STATE (DC)

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1986 No. 424 S

THE HIGH COURT
(STATE SIDE)

IN THE MATTER OF THE CONSTITUTION
AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
AND IN THE MATTER OF THE CHILDREN ACT 1908
AND IN THE MATTER OF E.C.

THE STATE (AT THE PROSECUTION OF D.C.)

PROSECUTOR

AND

THE MIDLAND HEALTH BOARD

RESPONDENT

Judgment of Mr. Justice Keane delivered the 31st day of July 1986.

THE FACTS

The Prosecutor is the father of a seven year old girl who is at present in the custody of the Respondent under a Warrant issued by District Justice Tormey pursuant to Section 24(1) of the Children Act 1908. On the 23rd June last a Conditional Order of Habeas Corpus was granted by MacKenzie J. directing the Respondents to certify in writing the grounds of the detention. The Respondents having relied upon the Warrant in question, the Prosecutor now seeks to have the Conditional Order made absolute.

The history of the matter is as follows. The little girl is the only child of the marriage of the Prosecutor and his wife, M. The couple are in poor circumstances and live in a two roomed house, without running water or heat. The Respondent, through its social workers, has been aware of the couple's circumstances for some time now and was concerned as to the conditions in which the child was living. There were frequent contacts between the social workers and the Prosecutor and his

wife.

On the 24th March last, one of the social workers formed the view that the child was seriously at risk in remaining in the Prosecutor's house, as she believed that she was showing marks consistent with a non-accidental injury. On that day, another social worker employed by the Respondent, swore an information to the effect that the child had been found that day, unfed and unclean and with visible signs of injury to her face. On foot of that information, District Justice Tormey issued the Warrant already referred to, which was directed to the Superintendent, Garda Síochána, L., and authorised him to remove the child to "a place of safety" and detain her until she could be brought before a court of summary jurisdiction. On the same day a Summons was issued in which the Respondent was named as the Complainant and the Prosecutor and his wife as the Defendants and in which an Order was claimed pursuant to Section 24 of the 1908 Act that the child be committed to the care of a relative or other fit person for such period as the Court might think fit. The Summons was served for the District Court sitting at B. on the 2nd May.

The Warrant was executed on the day of its issue by Sergeant M. The original carried an endorsement from Inspector H. (to whom, it was stated in the endorsement, the Superintendent had delegated his functions) and was addressed to Sergeant M. and Garda G. "jointly and severally" for execution. Sergeant M. arrived at the house accompanied in the car by one of the social workers and, having obtained admission from the Prosecutor's wife, informed her of the making of the Warrant, which he produced

to her, and asked that the child be handed over. The Prosecutor's wife handed her over to Sergeant M. who, in turn, handed her over to the custody of the Respondent. The Prosecutor's wife, who said that she was upset and distressed by the removal of the child from her care, went with her husband to a Solicitor, who ascertained from the Solicitor for the Respondent that the Summons would not be returnable until the 2nd May. The Prosecutor said that he and his wife were further distressed and upset on learning of this. Their Solicitor had asked that the Summons should be issued in time for the first Court hearing at B. on the 1st April, 1986. It was said in evidence, however, that the reason the Summons was made returnable for the 2nd May was that there was no Summons Server in the area, that accordingly it had to be served by registered post and that, under the relevant rule, it had to be so served at least 21 days before the Court hearing.

When the matter came on for hearing on that day, it was adjourned until the 4th July in order to enable the Respondent to consider a proposal (to which the Prosecutor and his wife did not object) that the child's maternal grandmother should be named as the "fit person" in whose custody she should be placed. The matter was further adjourned on the 4th July pending the determination of these proceedings.

The Warrant was in the following form (with full names where I have used initials):

"AN CHUIRT DUICHE - THE DISTRICT COURT

WARRANT TO TAKE TO PLACE OF SAFETY

In the matter of E.C., a child, and in the matter of the Children Acts 1908 - 1957

District Court Area of L. District No.9

WHEREAS on the 24th day of March 1986 an information on Oath has been sworn by M.G. of Midland Health Board who in my opinion is acting in the interests of E.C., a child, and I am satisfied there is reasonable cause to suspect that the said E.C. has been or is being assaulted, ill-treated or neglected at A.K.L., in the Court area and district aforesaid in a manner likely to cause the said child unnecessary suffering or injury to her health.

THIS IS TO AUTHORISE YOU to whom this Warrant is addressed to search for said child and to remove her to a place of safety and retain her there until she can be brought before a Court of summary jurisdiction.
GIVEN under my hand this 24th day of March 1986.

W.A. Tormey.
Justice of the District Court.
To: The Superintendent, Garda Síochána, L."

The copy of the Warrant furnished by the Solicitors for the Respondent to the Solicitor for the Prosecutor did not contain the name of any person as having sworn the information required by the section. At the hearing before this Court, two Warrants were produced, both signed by the learned District Justice, in

one of which the name had been left blank. The Solicitor for the Respondent said it was a copy of the latter which had been furnished to the Solicitor for the Prosecutor. Sergeant M. said that the Warrant as executed by him contained the name of the person swearing the information.

THE LAW

Section 24(1) of the 1908 Act provides as follows:-

"If it appears to a justice on information on oath laid by any person who, in the opinion of the justice, is acting in the interests of a child or young person, that there is reasonable cause to suspect -

(a) that the child or young person has been or is being assaulted, ill-treated, or neglected in any place within the jurisdiction of the justice, in a manner likely to cause the child or young person unnecessary suffering, or to be injurious to his health; or

(b) that an offence under this Part of this Act, or any offence mentioned in the First Schedule to this Act, has been or is being committed in respect of the child or young person,

the justice may issue a warrant authorising any constable named therein to search for such child or young person, and, if it is found that he has been or is being assaulted, ill-treated, or neglected in manner aforesaid, or that any such offence as aforesaid has been or is being committed in respect of the child or young person, to take him to and detain him in a place of safety, until

he can be brought before a court of summary jurisdiction, or authorising any constable to remove the child or young person with or without search to a place of safety and detain him there until he can be brought before a court of summary jurisdiction; and the court before whom the child or young person is brought may commit him to the care of a relative or other fit person in like manner as if the person, in whose care he was, had been committed for trial for an offence under this Part of this Act."

Section 24(4) provides that:-

"Every warrant issued under this section shall be addressed to and executed by a constable....."

Section 129 of the 1908 Act provides that:-

"For the purposes of this Act unless the context otherwise requires -....

"The expression "place of safety" means any workhouse or police station, or any hospital, surgery, or any other suitable place, the occupier of which is willing temporarily to receive an infant, child, or young person."

Section 133(7) of the 1908 Act empowered the Lord Chancellor of Ireland to make rules regulating the procedure of courts of summary jurisdiction under the Act. Such rules were duly made in the form of the Summary Jurisdiction Rules 1909 (S.R.O. Number 952 of 1909) which will be found in O'Connor's <u>The Irish Justice of</u>

the Peace (volume 2 p 196). Rule 42 provides that:-

> "The person laying the information to lead to the issue of a warrant under Section 24 of the Act shall, as soon as possible after the warrant has been executed, and the child or young person taken to a place of safety, take out a summons asking that the child or young person be committed to the care of a relative or other fit person as provided in sub-section 1 of the said section, and shall name as defendant in said summons the person who had the custody, charge, or care of said child or young person, and said summons shall be served on the defendant two clear days before the return day thereof."

It would appear that this rule has never been repealed or amended.

Rule 47(1) of the District Court Rules 1948 (S.R.O. Number 431 of 1947) as substituted by Rule 5 of the District Court Rules (1) 1962 (S.R.O. Number 7 of 1962) requires that a Summons be served at least seven clear days before the date fixed for hearing and lodged with the District Court Clerk at least four days before the date fixed for hearing.

Rules 46 and 47 of the 1948 Rules as substituted by Rule 5 of the 1962 (Number 1) Rules provides that where inter alia the District Justice is satisfied that service of Summonses cannot or will not be effected conveniently by a duly appointed Summons Server in a Court area or any part thereof comprised in his district, he may by order direct that service may be effected by registered post. Rule 47 of the 1948 Rules as substituted by Rule 5 of the 1962 (Number 1) Rules requires that every Summons

so served must be served at least 21 days before the date fixed for hearing and must be lodged with the Clerk at least four days before the date fixed for hearing.

Mr Geoghegan and Mr Edward Walsh, on behalf of the Prosecutor,advanced a number of submissions in support of their contention that the Conditional Order should be made absolute. These related to the form of the Warrant and the information on which it was grounded, the manner of its execution, the form of the Summons and the delay between the issuing of the Warrant and the hearing of the Summons. In addition and alternatively to these submissions, they urged that, to the extent that the combined effect of Section 24 of the Act of 1908 and the relevant rules was to authorise the delay that elapsed between the issuing of the Warrant and the hearing before the District Court, they were inconsistent with the provisions of the Constitution or (in the case of the rules) ultra vires the rule making authority, as authorising an impermissible violation of the constitutional rights of the Prosecutor and his wife as the parents of the child. The submissions can be summarised as follows:-

1. The information on which the Warrant was grounded was insufficient as being too vague and, in any event, based on hearsay

2. The Warrant was defective because no person was named in it as having sworn the information on oath required by Section 24.

3. The Warrant was defective,since it was addressed simply to "The Superintendent, Garda Síochána L." and not to a named person.

4. The authority given by the Warrant to remove the child to a place of safety was wholly inappropriate and an abuse of the powers conferred by Section 24: it should have been sufficient

to authorise the Garda Officer named in the Warrant to search for the child and ascertain whether she was being "assaulted, ill-treated or neglected" within the meaning of the section.

5. The Warrant was defective in simply authorising the removal of the child to "a place of safety" without specifying the place.

6. The Warrant was bad in failing to specify the ground upon which it was issued: it was not possible, it was said, to specify alternative grounds such as were cited in the Warrant.

7. There was an unwarranted delay in bringing the matter before the District Court which constituted a denial of natural justice. It was submitted that the section and the relevant rules plainly envisaged the matter being brought before the District Court as soon as possible - which in this case would have been within a few days of the issuing of the Warrant - and that, once a reasonable period had elapsed without the matter being brought before the Court, the Warrant was spent.

8. Section 24 and the relevant rules envisage that a person - as distinct from a body corporate such as the Respondent - swears the information leading to the issuing of the Warrant and acts as Complainant in the Summons. Since in this case, the information was sworn by M.G., she was the only person who could have acted as Complainant in the Summons. It followed that no valid Summons had as yet been issued and that, accordingly, the Warrant was again spent.

9. As no explanation was given to the Prosecutor's wife at the time the child was removed from her care as to why the Warrant had been issued or was being executed, the mode of its execution was not authorised by Section 24 or the relevant rules

and the further detention of the child was accordingly unlawful.

I shall consider these submissions in the order in which they have been set out above.

1. It is clear from the evidence that the information sworn by M.G. was based on information supplied by another person. The question, however, as to whether the information was sufficient to justify the issuing of a Warrant under Section 24 was entirely a matter for the learned District Justice. The issuing of the Warrant might, no doubt, be successfully challenged in a case where it could be shown that there was no evidence which justified its being issued. That, however, is not this case: there was evidence before the learned District Justice and it was a matter for him to determine whether, notwithstanding its secondary nature and what was also alleged to be its vagueness, it was sufficient, having regard to the terms of the section, to jusfify the issuing of the Warrant.

2. While the Warrant is not addressed to a named Garda, this does not, in my view, invalidate it. The section requires no more than that it be addressed to "a constable" and there is no reason why it should not be addressed to the holder of a particular office, such as the superintendent for a particular area, rather than a named person.

3. As I have already said, it transpired during the evidence that there were two Warrants signed by the learned District Justice in this case, one of which contained the name of the person who swore the information and which was the one produced by Sergeant M. at the time the child was being removed. The Warrant accordingly was not invalid in this respect.

4. Under the section, the Justice may issue the Warrant in alternative forms. He may authorise the Guard to search for the child and, if he or she is found to have been assaulted, ill-treated or neglected or that a specified offence has been committed, to remove him or her to a place of safety until he or she can be brought before the Court. Or he may authorise the Guard, with or without search, to remove the child to a place of safety and detain him or her until he can be brought before the Court. It is for the learned District Justice to determine which form of order is appropriate in the particular circumstances of any case and I have no doubt that it was within his jurisdiction in the present case to make the form of order that he did.

5. The section empowers the Justice to issue a Warrant authorising the Garda to remove the child to "a place of safety". It does not require the place of safety to be specified in the Warrant and I see no reason for reading such a requirement into the section. If, for example, the Warrant authorised the removal of the child to a specified hospital and, it transpired upon arrival that he or she required specialised treatment which was not available in that hospital, it would be necessary, if the submission on behalf of the Prosecutor was correct, for the Garda to return to the Justice and obtain a fresh Warrant. There is no reason for ascribing such an intention to the legislature.

6. The Warrant under Section 24 is not a Summons alleging a criminal offence. It is a form of machinery enabling a child who may be at risk for a wide variety of reasons to be removed to a place of safety until his or her future custody is

determined by the Court. It is, accordingly, unneccesary for the Warrant to specify the grounds on which it is being issued with the same precision that would be required if it were a Summons initiating a criminal prosecution.

7. The seventh ground relied on - that there was an unwarranted delay in bringing the matter before the Court - can, I think, be conveniently considered in conjunction with the submission as to the constitutionality of the section.

8. Under Rule 12 of the Summary Jurisdiction Rules, 1909 the person laying the information under Section 24 is the person who is required to take out a Summons asking that the child be committed to the care of a relative or other fit person. Section 24, however, does not expressly require that the Complainant in the Summons should be the person laying the information, although it was no doubt envisaged that this would be the normal procedure. It is clear that rules cannot be used as a guide to the proper construction of the statute under which they have been made. But it is unnecessary to consider whether, applying the converse, i.e. reading the rules in the light of the parent statute, they authorise the taking out of the Summons in the name of a body corporate on whose behalf the information was sworn. Nor is it necessary to consider whether, as was further argued on behalf of the Prosecutor, the effect of Section 6(2)(g) of the Health Act, 1970 is that the Respondent does not have any functions in relation to Section 24 of the 1908 Act and, accordingly, cannot take out a Summons under Rule 42. Nor, indeed, is it necessary further to consider whether, in the event of any of these submissions being well founded, any defect in the proceedings now before the District Court could be cured by adding the person

who swore the information as a Complainant in the Summons. The reason is that none of these submissions, if well founded, could result in the Warrant, as distinct from the Summons, being invalid. The Warrant was grounded on an information sworn by a "person" as required by s.24 and, accordingly, its validity is unaffected by any defect in the Summons resulting from the substitution of the Respondent for the person swearing the information. It is not necessary for this Court to express any opinion on the validity of the Summons issued or whether any alleged defects can be cured during the hearing, nor indeed would it be proper to do so: these are matters entirely within the jurisidcition of the learned District Justice who has still to complete his adjudication on the application under s.24. This ground accordingly fails.

9. As to the submission that the manner in which the Warrant was executed did not have sufficient regard to the rights of the Prosecutor and his wife, I accept the evidence of the Social Workers that they had made clear on a number of occasions their concern for the safety of the child and that they endeavoured without success to get in touch with the Prosecutor's wife before applying for the Warrant under s.24. In these circumstances, I do not think it was an essential ingredient in the proper execution of the Warrant that the Garda concerned should have explained in detail the circumstances surrounding the obtaining of the Warrant and the nature of the procedure being put into effect.

10. Section 24(4) provides, as has been seen, that the Warrant "shall be addressed to and executed by a (Garda)....." It does not state that the Warrant must be executed by the Garda

to whom it is addressed and it would be a singularly impractical requirement if it did so. Provided the Warrant is both addressed to an officer of the Garda and executed by either that officer or another officer to whom he has properly delegated his functions in the matter, the section is complied with. Accordingly, this ground also fails.

I turn now to the submissions based on what was claimed to be an unwarrantable delay between the issuing of the Warrant and the hearing of the Summons before the learned District Justice. In the context of the submission that the provisions of s.24 were inconsistent with the provisions of the Constitution to the extent that they authorised such delay, reference was made to Order 60, Rule 1, of the Rules of the Superior Courts which provides that:-

> "If any question as to the validity of any law, having regard to the provisions of the Constitution, shall arise in any action or matter the party having carriage of the proceedings shall forthwith serve notice upon the Attorney General, if not already a party."

I was satisfied that, having regard to the decision of the Supreme Court in The State (Sheerin) .v. Kennedy (1966) I.R. 379 this rule does not apply where the statute under attack was enacted prior to the coming into force of the Constitution.

Under Article 42 of the Constitution, the State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

Article 42.5 provides that:-

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means, shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

Mr. Geoghegan, while conceding that a statutory scheme, such as that prescribed by Section 24, was permissible, having regard to the terms of Article 42.5, submitted that it was in no sense essential to such a scheme that there should be a delay, such as occurred in this case, between the issuing of the Warrant and the adjudication by a court of competent jurisdiction on the future custody of the child.

In my opinion, this submission is well founded: the power conferred by Section 24, while clearly essential in the interests of children who are at risk for a variety of reasons, is a serious abridgement of the rights of parents and any statutory scheme which did not keep to a minimum the interval of time which may necessarily elapse between the removal of the child from his or her parents and the determination of its future custody by the Court would constitute, in my view, an impermissible violation of those rights.

It also appears to me, however, that s.24 and Rule 42 is not such a scheme. On the contrary, in providing that the Warrant is merely to authorise the detention of the child until his custody has been determined by a court of competent jurisdiction and that the Summons is to be taken out "as soon as

possible", and in providing for a two day period of service only on the Defendants, it seems to me to envisage a procedure which is as expeditious as is possible, having regard to the other requirements of justice, including the welfare of the child, which necessarily arise in proceedings of this nature.

The delay in this case arose, not because of any frailty in the 1908 Act and the rules made thereunder, but because there was no Summons Server in the relevant area and it was accordingly necessary to serve the Summons by registered post under the District Court Rules 1948, necessitating a 21 day period of service. It would, however, have been possible for the Respondent to have brought the matter before the District Justice at a substantially earlier date and applied to the learned District Justice to abridge the time for service of the Summons under Rule 13 of the District Court Rules 1948. Had that course been adopted, I have little doubt but that the present proceedings would never have come before this Court. It also follows that, had the present application been heard before the Summons came on for hearing in the District Court, the Prosecutor might well have been entitled to have the Conditional Order made absolute on the gound that the child was at that stage being detained in a manner which violated the constitutional rights of the parents. For the reasons I have indicated, however, the provisions of Section 24 of the 1908 Act and Rule 12 of the Summary Jurisdiction Rules, 1909 are not, in this context, inconsistent with the provisions of the Constitution. The case has, of course, illustrated that a lacuna exists in the District Court Rules 1948, since it is clearly undesirable that the operation of s.24 in a constitutional manner should depend

in a significant number of cases on the abridgement of the time for service of the Summons by the District Court. While this is doubtless a matter to which the attention of the Rule Making Authority should be directed, it does not affect the matters in issue in these proceedings.

I am satisfied that, whatever might have been the position had this applicaiton been made before the hearing of the Summons by the District Court, it would be wrong at this stage to make the Conditional Order absolute. The legitimate complaint of the Prosecutor and his wife that the hearing of the Summons had been unnecessarily delayed is no longer a relevant factor, since the only matter now holding up the adjudication by the District Court is the existence of the present proceedings. The making absolute of the Conditional Order in the present circumstances is not necessary, accordingly, to vindicate or protect any constitutional right of the Prosecutor and his wife. On the other hand, there remains the possibility that making it absolute before the District Court has completed its adjudication on the matter might affect the welfare of the child whose natural and imprescriptible rights are also guaranteed by Article 42.5

It follows that the application to make absolute the Conditional Order must be refused.

Ronan Keane