Neutral Citation Number: [2007] IEHC 262

THE HIGH COURT

2007 No. 675 SS

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

AND

D. B.

DEFENDANT/RESPONDENT

Judgment of McCarthy J. delivered the 31st day of July, 2007.

1. This is a case stated by Judge Catherine Murphy, a Judge of the District Court assigned to the Dublin Metropolitan District, pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act, 1962 of a point of law for the opinion of this Court, and dated 16th May, 2007. The opinion is sought in respect of the following questions of law, namely -

> (1) Where a child is being prosecuted for a criminal offence by way of summons, can the proceedings be commenced by the use of a summons issued pursuant to the Courts (No. 3) Act, 1986, notwithstanding the provisions of S.I. 539 of 2004, pursuant to s. 64 of the Children Act, 2001 and form 37.1 appended thereto.
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> (2) Where the summons names the parents or guardian of the child but fails to specify the provisions of s. 91 of the Children Act, 2001 concerning non-attendance, without reasonable excuse, of a parent or guardian at the specified sitting of the court, is that fatal to the summons such that it amounts to a fundamental defect depriving the court of jurisdiction or is it a defect that is capable of being remedied?
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> (3) Where the parents or guardian of a child are not named on a summons directed to a child, is that fatal to the validity of the summons?

2. The defendant/respondent ("the accused") appeared before the Children's Court of the Dublin Metropolitan District on 13th December, 2006, charged with two offences, namely:-

> (1) That you on 21st May, 2006 at an address in Dublin 1, a public place in the Dublin Metropolitan District, did use or engage in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned, contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994.
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> (2) That you on 21st May, 2006 at an address in Dublin 1, a public place in the Dublin Metropolitan District, did, following a demand made by a member of An Garda Síochána exercising his powers under s. 24(2) of the Criminal Justice (Public Order) Act, 1994 fail to provide the said member with your name and address/provide a name and address that was false and misleading contrary to s. 24(3) and (4) of the Criminal Justice (Public Order) Act, 1994.

3. The summonses were issued pursuant to the Courts (No. 3) Act, 1986 ("the 1986 Act") and whilst they referred to the parent/guardian of the accused, they failed to specify the provisions of s. 91 of the Children's Act, 2001 ("the 2001 Act") concerning non-attendance, without reasonable excuse of a parent or guardian at the specified sitting of the court.

4. On 13th December, 2006 the summonses, with a number of summonses in other cases involving prosecutions against children, and raising similar or related issues were adjourned to 16th January, 2007 and it was then contended on behalf of the prosecutor/appellant that the summonses were "not valid" as not being in accordance with the requirements of the 2001 Act. The learned District Court Judge gave a decision on 26th January, 2007 whereupon judgment was given on what is described by the learned District Judge as "the general issue of the validity of the summonses" with a further adjournment to afford her an opportunity to consider each individual summons, in the light of her judgment on the "general issue", the matter being adjourned from time to time on 22nd March, 2007 whereupon further submissions were made on behalf of the parties. The case stated sets out *in extensor* the submissions made on behalf of the parties (including a summary thereof). The original decision of 26th January, 2007 was to the effect that the alleged defects in the form of the summonses, namely:-

> (a) the absence of judicial function from the summonses before the court (i.e. the user of the 1986 Act for the issue of the summonses as opposed to the user) and
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> (b) the absence of "the s. 91 notice from the summons before the court (i.e. that provision of the 2001 Act which specifies the consequences of non-attendance, without reasonable excuse, of a parent or guardian before the court

were fundamental and that the summonses were fundamentally defective; the judgment is set out in an appendix to the case stated.

5. I do not need to set out the submissions in relation to the matters in issue in the District Court since, in substance, same are similar to submissions made to this Court.

6. For the avoidance of doubt, my understanding of the matter, having regard to the submissions made in the District Court and in this Court, the judgment of the learned District Judge and the questions posed in the case stated pertain to whether or not the so-called administrative procedure under the 1986 Act for the issue of summonses may be used in respect of summonses issued pursuant to the 2001 Act or whether or not the capacity to issue summonses under that Act, and in particular s. 64 thereof, is limited to what I might describe as the procedure contemplated by ss. 10 and 11 of the Petty Sessions (Ireland) Act, 1851. The provisions of that Act were analysed by the Supreme Court in *The State (Clarke) v. Roche* [1986] 1 I.R. 619.

7. In that case, to put the matter shortly, a certain summons was issued on application to a District Court clerk who was invested with power to issue such summons, pursuant to the provisions of rule 30 of the Rules of the District Court, 1948; the matter precisely in issue in that case was whether or not a complaint had been validly made within the period of six months from the date of offence contemplated by the Petty Sessions Act, 1851 (being a complaint made to a District Court clerk) was valid and, of course, if it was not, a good defence to any summary offence (I speak generally) would arise. The matter was complicated in the instant case by virtue of the fact that the complaint was actually never made to the relevant District Court clerk but for the present purpose (and in terms of the larger issues at stake) it is appropriate to say that the Supreme Court (*per* Finlay C.J.) (at p. 641) concluded that

having regard to the terms of s. 10 of the 1851 Act –

> "It is an inescapable conclusion that the issue of a summons upon the making of a complaint is a judicial as distinct from an administrative act."

8. Finlay C.J. went on to say that -

> "Consideration, therefore, it seems to me, should be given to replacing sections 10 and 11 of the Act of 1851 with statutory provisions more suitable to the modern District Court which could include the procedure for the issuing of summonses, in criminal cases at least, as being an administrative procedure only and which could then, without any question of constitutional challenge, provide that the complaint should be made to the District Court and that the summons should be issued by the officers of that court upon the making of the complaint."

9. The 1986 Act provided for that administrative procedure and has since been amended but in a manner which does not give rise to controversy in the present case inasmuch as by the terms of s. 49 of the Civil Liability and Courts Act, 2004 a new section was substituted for that of s. 1 of the 1986 Act, (s. 1 being the relevant section pertaining to the issue of summonses) such that applications for issue of summonses may now be made by electronic means and, further, by s. 1(6) the form of summonses is prescribed, to the effect that it shall -

> (a) specify the name of the person who applied for the issue of the summons;
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> (b) specify the application date as respects the summons;
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> (c) state shortly and in ordinary language particulars of the alleged offence, the name of the person alleged to have committed the offence and the address (if known) at which he or she ordinarily resides;
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> (d) notify that person that he or she will be accused of that offence at a sitting of the District Court specified by reference to its date and location and, insofar as is practicable, its time; and
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> (e) specify the name of an appropriate District Court clerk.

10. Section 1(7) goes on to provide that –

> "For the avoidance of doubt, particulars of the penalty to which a person guilty of the offence concerned would be liable and not required to be stated in a summons."

11. Thus, accordingly, even where a person is accused of a criminal offence which might, in the ordinary course of events, give rise to the imposition of a term of imprisonment by way of sentence. What I might shortly term the consequences of conviction (and, by implication, of non-attendance) need not be stated. Whilst I shall come to the 2001 Act below, it is noteworthy, that non-attendance by a parent or guardian is not an offence and it seems to me that this is relevant to the proposition that explicit reference must be made to the latter section to render a summons issued under the 2001 Act, valid. I might say at this juncture that, having regard to the terms of the case stated, the issue of amendment of summonses and whether or not, the summons being a mere vehicle to secure the attendance of a person in court, any such defect might ultimately be relevant to any substantive issue under the Children's Act be before the court, once the parent or guardian or the child in question actually appear in court and with this counsel for the parties are agreed.

12. There is in existence, accordingly, since the 1986 Act, a dual procedure for commencement of proceedings by summons in the District Court and having regard to the history of the manner of exercise or invocation of the District Court or, its predecessor, Petty Sessions, as well as the provisions of the District Court Rules (including the forms annexed thereto) in force at the time of the issue of the summonses herein, no such dual procedure exists. I turn then to the relevant provisions of the 2001 Act. Section 64 thereof is as follows, namely:-

> "1. Where proceedings in respect of an offence alleged to have been committed by a child are to be commenced by the issue of a summons, the child's parents or guardian may be named in the summons and, if named, shall be required to appear at the sitting of the court specified in the summons.
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> 2. Where the summons names the child's parents or guardian it shall also specify the provisions of s. 91 concerning non-attendance, without reasonable excuse, of a parent or guardian at the specified sitting of the court."

Thus, a distinction arises between the form of the summons contemplated by the 1986 Act and the form contemplated by the Children's Act. In that connection the question of amendment might arise, I am not asked a question as to whether or not amendment might be made in such circumstances.

13. It has been submitted on behalf of the accused that after consideration of the Act one should then turn to the provisions of the applicable Rules of the District Court and in particular the District Court (Children) Rules, 2004 (S.I. 539/2004) (the 2004 Rules) and in particular Schedule B thereof. The form stated to be that to be used for s. 64 of the 2001 Act is headed "Summons to child or to parent or guardian or to both" and it contemplates the issue of a summons on the laying of an information before a judge (and indeed such form, on its face, makes provision for its signature only by a District Court Judge); it is further conceded that the type of form is not the type which has been ordinarily used (or otherwise exists) where the administrative procedure of the 1986 Act is invoked.

14. A separate form of summons is also provided for in Schedule B headed "summons for the attendance of parent or guardian of a child" and this contemplates a signature either by a judge or a clerk; counsel for the prosecutor submits that such form may be utilised in the case of summonses issued by a judge pursuant to the provisions of s. 10 of the 1851 Act or a clerk pursuant to the 1986 Act (against a parent or guardian). There is no reference in the latter form to the necessity for any information to be laid thus giving that form the complexion that it is of an administrative nature but, contrary to the norm, may be signed by either the judge or the clerk. Such form, of course, contains the endorsement contemplated by s. 64(2) of the 2001 Act as to the consequences pursuant to s. 91 of the Act in the event of non-attendance. That section provides (so far as it is relevant) as follows, namely:

> "(1) The parents or guardian of a child, shall, subject to sub-section (5), be required to attend at all stages of any proceedings –

(a) against the child for an offence

(b) relating to a family conference in respect of the child, or

(c) relating to any failure by the child to comply with a community sanction or any condition to which the sanction is subject.

(2) Where the parents or guardian fail or neglect, without reasonable excuse, to attend any proceedings to which sub-section (1) applies, the court may adjourn the proceedings and issue a warrant for the arrest of the parents or guardian, and the warrant shall command the person to whom it is addressed to produce the parents or guardian before the court at the time appointed for resuming the proceedings.

(3) Failure by the parents or guardian, without reasonable excuse, to attend any such proceedings shall, subject to sub-section (5), be treated for all purposes as if it were a contempt in the face of the court.

(4) At the hearing of any proceedings in respect of the offence with which the child is charged, any parent or guardian who is required to attend the proceedings may be examined in respect of any relevant matters.

(5) (dispensation with attendance)

(6) (unknown parents or guardian)

(7) (non-application of section)

15. Counsel for the prosecutor has referred, also, to O. 12, r. 25 and r. 26 which provide as follows, namely:-

"25. Non-compliance with any of these rules shall not render any proceedings void, but in the case of such non-compliance, the judge may direct that the proceedings be treated as void, or that they be set aside in part as irregular, or that they be amended or otherwise dealt with in such manner or upon such terms as the judge thinks fit.

26. Where no form is provided by statute or by rules of court the parties to the court shall frame the form, using as guides the forms contained in the Schedule to these rules."

Counsel for the Director obviously contends on the basis of rule 25, that, even if there is only one form contemplated by the Rules, namely, one limited to user where the jurisdiction is invoked under s. 10 of the 1851 Act, its use for the administrative procedure under the 1986 Act does not, *per se*, render it void (that the proceedings be thereby treated as void in the discretion of the judge) or that they be set aside as irregular and, in any event, even if he is wrong in that contention, and I think he must be wrong having regard to the necessity for such order to be signed by the judge and the necessity for an information, reliance may be placed on a form framed under rule 26 when the administrative procedure is invoked, on the footing that the existence of the forms under the 2004 Rules, making no reference explicitly, as they do, to the user of the administrative procedure, means that this default provision may be utilised when such administrative procedure is invoked.

16. Most importantly, in the definition section (section 3) of the 2001 Act, a summons is defined as having "the meaning assigned to it by s. 1(1) of the Courts (No. 3) Act, 1986". This begs the question, of course, as to whether or not s. 10 of the 1851 Act may continue to be used, but no-one has suggested that this is the case and I would have thought that this definition could not be taken to oust the jurisdiction under the 1851 Act in such a dramatic way. In any event, I do not think it could be clearer that when a summons is referred to in s. 64 of the 2001 Act an administrative summons (whatever about a summons under the 1851 Act) may be used; to hold otherwise would be to fly in the face of the interpretation section. This is so, in my view, notwithstanding the fact that the 1986 Act refers to summonses in respect of "an offence"; obviously if summonses under the 1986 Act pertain only to offences that Act, without more, (i.e. in the absence of the definition section) would not apply to summonses issued so far as parents are concerned (where such summons is issued pursuant to s. 64 of the 2001 Act). Even if I'm wrong in this view, however, and it is a view irrelevant, ultimately, to the issue I have to decide (and it is accordingly with some trepidation that I express any view) it is arguable that a summons, being merely a mechanism to procure a party's attendance by the court, and having regard to the form for procurement of the attendance of parents or guardians alone (as distinct from the form contemplating the attendance of both the accused and such parents or guardian) is what I might call a summons no different from any other summons (being capable of user in respect of any witness whose attendance is required).

17. Ms. Ring has sought to argue that by virtue of the section of the 1908 Act, analogous to s. 64 of the 2001 Act (i.e. pertaining to the procurement of attendance of parents or guardians), and the discretion invested in the court as to whether or not a summons should be issued against such parent or guardian, the procedure under the 1861 Act is that applicable, being an argument, as indicated above, supported by the proposition that the forms (and in particular the form which must be signed by a judge and based on an information) reflect the true interpretation of the 2001 Act, as opposed, in the latter case, to a faulty interpretation or inadequate provision in the Rules where the administrative procedure is invoked. Schedule A of the 1908 Act contains statutory forms of summonses addressed to children or young persons, or to parents or guardians, or to both, and also for summonses to secure the attendance of parents or guardians. These forms are very largely in the forms provided for in the 2004 Rules and it appears no large assumption that the 2004 Rule forms were based thereon. These forms, of course, were prescribed by statute before the 1986 Act, and there are no statutory forms under the 2001 Act but merely those prescribed by secondary legislation. The Act of 1908 is, accordingly, of little assistance in this regard. Ms. Ring's point, so far as the 1908 Act is concerned is, firstly, that it is relevant to the legislative history of this class of case and the section is as follows, namely:-

"30. Where a child or young person is charged in a summons with any offence, his parent or guardian may in any case be named as a defendant, and shall, if he can be found, and resides within a reasonable distance, and the person so charged or brought before the court is a child, being named as a child along with the child or young person, and the summons shall be served on the defendants two clear days before the return day thereof."

18. It will be noted this power contemplates the naming of a parent or guardian as a defendant rather than, merely, a notice party for whom adverse consequences may flow, under s. 91 of the 2001 Act, in the event of non-attendance. The point advanced primarily on the basis of such legislative history, by Ms. Ring, is that there is a discretion here as to whether or not a parent or a guardian "may" in any case be named and that, in certain circumstances he or she must ("shall") be named (or rather, that that was the position before the relevant section of the 2001 Act was brought into force). Ms. Ring initially suggested that this section and, indeed, s 64

had to be read as making it mandatory to name the parent or guardian in a summons also charging the child or, by separate summons (in the forms to which I have referred) but ultimately she took the view (and this of course supports the proposition that the issue of a summons was a judicial decision because it requires the exercise of a discretion as to whether or not the parents might be engaged in the matter at all); this thesis, of course, would support her proposition that the administrative procedure could not be invoked. These arguments might or might not be of substance but, as I have said, the definition of a summons in the 2001 Act seems conclusive: against that proposition can be advanced only the legislative history, the supposed discretionary nature of the power and the forms; it seems that these are undoubtedly inadequate and have been replaced by the District Court (Children Summonses) Rules, 2007 (S.I. 152 of 2007). Ms. Ring conceded, of course, that the logic of her position was that insofar as those Rules provided for user of the administrative procedure they were void in the absence of power to use such procedure.

19. With respect to reference in a summons to s. 91 of the 2001 Act, as contemplated by s. 64(2) of such Act, it appears that s. 64(2) is applicable to cases "where the summons names the child's parents or guardian" and it is accordingly capable of argument that since a reference is made to "a summons" in s. 64(1), in terms of charging a child, and, in particular, the naming of the parents or guardian in such summons, it is only in respect of summonses charging a child, where the parents or guardian are joined that reference must be made to s. 91. I am of the view that this proposition is correct and that, thus, there is no statutory requirement under the 2001 Act for reference to s. 91 in summonses merely issued for the procurement of attendance of parents (such as a summons under form 37.2). Any difficulty in this respect, of course, falls to be dealt with under the law pertaining to defects in summonses.

20. As to whether or not the want of reference to s. 91 in the instant summons is fatal to such summons, such that it amounts to a fundamental defect depriving the court of jurisdiction or whether or not, on the other hand, it is a defect capable of being remedied. I think that the starting point for consideration of this issue must be the provisions of the District Court Rules 1997, Os. 38(1) and 12(2). I do not propose to set out these Rules *in extenso* here, but merely to summarise them as they are relevant, firstly so far as O. 38(1) is concerned (inasmuch as this is the Rule principally dealing with defects) and, secondly, O. 12(2) (which explicitly deals with amendments), as follows namely:-

> 1. By O. 38(1) (2) (and subject to the provisions of 1(2) (3)) no objection may be taken or allowed on the ground as a defect in substance or form or any omission in a summons but the court may amend any such summons or proceed with the matter as though no such defect or omission had existed.
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> 2. The foregoing, is subject to the qualification that if in the opinion of the court the defect is one which misled or prejudiced the accused (or in the present context, the notice parties) of which might affect the merits of the case, it might refuse to make an amendment and might dismiss the complaint either without prejudice or on the merits or, if it made an amendment, upon such terms as it thought fit adjourned the proceedings. Thus three courses of action are open to the District Court in such circumstances.
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> 3. By O. 12(2) the general power of amendment is conferred *inter alia* in respect of such defects or errors in a summons as might be necessary for determining the real question at issue between the parties, but if in the opinion of the judge the amendment was one which might prejudice a party in the merits of the case he or she might make the amendment and, if necessary, adjourn the case or, might refuse it and, if necessary, dismiss the proceedings.

21. Accordingly, *prima facie*, no objection may be taken or allowed on the ground of the defect or of any omission (presumably constituting a defect) and the court may thereupon amend; the limitation here, of course, is one which might have misled or prejudiced a party or which might have affected the merits and aside from the power to dismiss or strike out a complaint, the court may adjourn after amendment. In the event of an amendment made under O. 12(2) such adjournment may also be granted. The latter, of course, is a protection always available for accused persons or notice parties. Walsh on criminal procedure has been relied upon on behalf of the prosecutor and he points out (at 13-15) that:-

> "The summons is merely a device to secure the attendance of the defendant (and by extension, in the present circumstances the parents or guardians of a child) in court to answer the complaint, citing as authority for this proposition *Director of Public Prosecutions v Kline* [1983] I.L.R.M. 76 and *Attorney General (McDonnell) v. Higgins* [1964] I.R. 374, being a well known rule of law. As to the discretion to amend the relevant authority would appear to be *The State (Duggan) v. Evans* [1978] 112 I.L.T.R. 61. Assuming for a moment that the frailty in the document (i.e. the omission) misled or prejudiced the defendant, Finlay P. pointed out that the rule contained no express guidance as to the grounds on which the choice between the alternative courses referred to above might be made and pointed out that it was not possible to define with particularity such grounds:
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> > 'Save that the decision must presumably rest on the extent and nature of the misleading prejudice, or possible effect on the merits of the case set against the requirements of justice between the prosecution and the defendant.'"

He further stated that:

> "It would appear to me that a dismissal on the merits would not be justified unless the opinion of the justice was that there was a possibility that the defect would affect the merits in a manner not certain to be cured by adjournment or that an adjournment was necessary but would be an injustice."

22. Applying these principles it seems to me that the interest of justice would not favour a refusal to make an amendment by the insertion of an appropriate form of words to conform with the requirements of s. 64(2), that is to say, a form of words appropriate to deal with s. 91 of the 2001 Act. The alternative would be that it might be necessity to contemplate a dismissal of the proceedings or their striking out on the merits or otherwise when the welfare of a child was at stake and the parents or guardian are not accused persons or subject to any criminal penalty, properly so called. They are in no different a position to any witness who is a recipient of a summons i.e a warrant may be issued for arrest to compel attendance, save that non-attendance now constitutes or is deemed to be contempt in the face of the court. The purpose of the reference to s. 91 is to put the parents or guardian on notice of the potential consequences for them in the event that they failed to attend pursuant to the summons. A benefit is conferred upon them by this degree of specificity as to such consequences and the insertion of the endorsement (if I might call it that) in the relevant form could certainly be made without injustice if they attend, having regard to the nature of summonses and, if they do not attend an amendment is made, there is no reason why the matter could not be adjourned and the summons be re-served. I think it is fair to say that a summons of this type might be regarded as a hybrid, inasmuch it merely commands the attendance of the parents other than for a criminal offence (being no more than a witness summons, in substance).

23. I therefore answer the questions posed as follows, namely:-

> 1. Where a child is being prosecuted for a criminal offence by way of summons the proceedings can be commenced by the use of a summons issued pursuant to the Courts (No. 3) Act, 1986, notwithstanding the provisions of S.I. 539 of 2004, pursuant to s. 64 of the Children's Act, 2001 and Form 37.1 appended thereto.
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> 2. Failure to specify the provisions of s. 91 of the Children's Act, 2001 is not fatal to a summons, does not amount to a fundamental defect depriving the court of jurisdiction and is a defect capable of being remedied.
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> 3. It is not fatal to the validity of a summons directed to a child that the parents or guardian of a child are not named therein."