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THE HIGH COURT  
(JUDICIAL REVIEW)



BETWEEN

MICHAEL RYAN

APPLICANT

AND

SEAN O'CALLAGHAN, PEACE COMMISSIONER

RESPONDENT

Judgment of Mr. Justice Barr delivered the 22nd day of July, 1987.

The facts of this case are not in dispute and are as follows:-

On 10th August, 1986 D/Garda John Frewen swore an information before the respondent, a Peace Commissioner, in which he deposed that he was then making enquiries into a case of larceny of cash and cigarettes value £7.50, property of Dermot Mulhearn, from premises 69 Rosemount Avenue, Artane and

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that he had reasonable cause for suspecting from information which he had received and which he believed to be reliable that all or some of the stolen property would be found at premises situate at 2 Moatview Gardens in the Dublin Metropolitan District and he asked for a warrant to enter and search such premises, to look for, and seize if found such property with a view to producing the same as evidence in support of a charge of larceny. This application was made pursuant to Section 42 (1) of the Larceny Act, 1916 (the 1916 Act) which is in the following terms:-

"If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any property whatsoever, with respect to which any offence against this Act has been committed, the justice may grant a warrant to search for and seize the same."

The power to issue such a warrant is now exercisable by a Peace Commissioner whose authority in that regard derives from the Courts of Justice Act, 1924 Section 88, sub-section (3).

The respondent received the information sworn by Garda Frewen and issued to him a warrant to search the premises in question. Garda Frewen and other police-officers acting on the authority of the warrant soon afterwards entered the dwelling-house at No. 2 Moatview Gardens where the applicant resides and arrested him there. He was subsequently charged with assault and larceny. He is presently awaiting trial on these and other offences.

Search warrants are often required by the police as a matter of urgency in connection with the investigation

of larceny and related crimes. It is frequently necessary for investigating Garda officers to make applications under Section 42 of the 1916 Act at times when courts are not normally sitting. Accordingly, a practice has grown up and has existed for many years whereby, outside normal court hours, such applications are more frequently made to Peace Commissioners than to District Justices. There is good reason for this in that the former are much more numerous than the latter and are readily available at short notice in almost every part of the country. It is obviously desirable to have available to the police a simple and expeditious procedure for obtaining search warrants from an independent source to assist them in the investigation of larceny and other related crimes.

The only issue raised and argued on this application is whether a Peace Commissioner in purporting to exercise the power granted to him by Section 42 of the 1916 Act by issuing a warrant authorising the entry and search of the dwelling-house of a citizen is thereby exercising judicial power in a criminal matter which is a function lawfully exercisable only by judges appointed under the Constitution.

Counsel for the applicant has submitted that the power vested in a Peace Commissioner to issue in a criminal matter a warrant to search the dwelling-house of a citizen pursuant to an application under Section 42 of the 1916 Act is ultra vires the Constitution for two reasons. First, it necessarily involves the invasion of the constitutional right of every citizen to the privacy of his home and, therefore, such a power is exercisable only by a judicial authority appointed under the Constitution. Secondly, it is argued that the issuing of a search warrant is part of the process of prosecuting crime and,

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therefore, is a function exercisable only by judges appointed under the Constitution.

Article 40, Section 5 of the Constitution provides that "the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law". Article 40 section 4(1) is in similar terms and provides that "no citizen shall be deprived of his personal liberty save in accordance with law". If Mr. Carney is correct in his first submission then it follows that the phrase "save in accordance with law" means save in accordance with the order of a court established under the Constitution. This is a far narrower interpretation than the words themselves warrant and no authority has been cited to me which specifically supports that proposition.

A review of the judicial authorities on the interpretation of the phrase "save in accordance with law" in Article 40 Section 4(1) of the Constitution (I am not aware of any reported authority on the interpretation of the same phrase contained in Article 40 Section 5) reveals that there has been a movement away from the positivist concept that the phrase means "in accordance with the law as it exists at the time when the particular Article is invoked and sought to be

applied..... subject always to the qualification that such provisions are not repugnant to the Constitution or to any provision thereof" as postulated by Sullivan C.J. in re.

Article 26 and Offences Against the State (Amendment) Bill 1940

I.R. 470. The contemporary view of the Supreme Court is stated by Henchy J. in King .v. Attorney General 1981 I.R. 233 at page 257. The learned Judge struck down as unconstitutional an offence created by Section 4 of the Vagrancy Act, 1824 for

several stated reasons, one of which was

"that it violates the guarantee in Article 40, s. 4 sub-s. 1, that no citizen shall be deprived of personal liberty save in accordance with law - which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution....."

In the light of Mr. Justice Henchy's definition of "save in accordance with law" in the context of Article 40, Section 4 sub-section (1), does it follow that the procedure for obtaining a search warrant from a Peace Commissioner which is laid down in Section 42 of the 1916 Act is a method which ignores the fundamental norms of the legal order postulated by the Constitution? In my view it does no such thing. I am satisfied that it is in the interest of the common good that there should be a simple procedure readily available to the police whereby in appropriate cases they may obtain search warrants relating to premises, including the dwellings of citizens, so as to facilitate them in the investigation of larceny and other allied offences. The procedure laid down in Section 42 (1) of the 1916 Act contains important elements for the protection of the public, including all those who might be found on the premises to be searched. The investigating police-officer must swear an information that he has reasonable cause for suspecting that stolen property is to be found at the premises to be searched and he must satisfy a Peace Commissioner, who is an independent person unconnected with criminal investigation per se, that it is right and proper to issue the warrant. I am satisfied that such warrants bona fide sought and obtained from a Peace Commissioner pursuant to the

procedure laid down in Section 42 of the 1916 Act are not tainted with any constitutional illegality and provide lawful authority for the search of the premises to which they relate.

The second point argued on behalf of the applicant was that the issuing of a search warrant pursuant to Section 42 of the 1916 Act is part of the process of prosecuting crime and, therefore, is a function exercisable only by a judge appointed under the Constitution.

The powers of a Peace Commissioner are set out in Section 88 (3) of the Courts of Justice Act, 1924 and Section 26 of the Criminal Justice Act, 1984. These include powers to issue summonses and to remand an arrested person either in custody or on such bail as the Commissioner thinks fit. Such powers might will be regarded as judicial in nature. However, they are irrelevant to the present proceedings and I make no finding thereon. I am concerned only with the power granted to a Peace Commissioner to issue a search warrant pursuant to an application made by a Garda officer under Section 42 of the 1916 Act. This raises the question as to whether the issuing of such a warrant is a procedural matter concerning the investigation of crime or a judicial function relating to the prosecution of crime.

The purpose of a search warrant issued under Section 42 is to enable a police-officer who is investigating the larceny of property to search premises where he bona fide believes such goods may be found. It is not uncommon that when such a search takes place it has negative results or, where stolen property is in fact discovered, the person in possession of it may have a bona fide explanation (such as innocent purchase for full value in ordinary course of business) which when checked out

satisfies the police that the possessor of the goods is not guilty of any offence in relation to them. In short, the search of premises by the police under the authority of a search warrant is no more than part of the investigative process which may or may not lead to the arrest and charging of a person in connection with the crime under investigation or any other crime. In my view the prosecution of an offence commences when a decision is made to issue a summons or prefer a charge against a person in respect of the particular crime alleged. It follows, therefore, that the issue of a search warrant prior to the commencement of a prosecution is part of the process of criminal investigation and is executive rather than judicial in nature. This interpretation of when a criminal prosecution is deemed to commence follows the finding of the Court of Appeal in England in Provincial Cinematographic Theatres Limited .v. Newcastle-upon-tyne Profiteering Committee 90 LJKB 1064 where it was held that the direction to prosecute was the first step in proceedings which might result in a fine or imprisonment or both and that, accordingly, it was the first step in a criminal cause or matter. The judgment therein was cited by O'Byrne J. with apparent approval in the State (Gettings) .v. Judge Fawsitt 1945 IR 183 at page 204.

I am satisfied that the second ground advanced on behalf of the applicant also fails and that the issuing of a search warrant by a Peace Commissioner pursuant to the provisions of Section 42 of the 1916 Act is not contrary to the Constitution. It follows, therefore, that this application fails.

Approved  
