IN THE SUPREME COURT OF QUEENSLAND OSC No. 17 of 1984

FULL COURT

BEFORE:

Mr. Justice Andrews, SPJ

Mr. Justice Kelly

Mr. Justice Shepherdson

BRISBANE, 21 DECEMBER 1984

DONALD DALE

v

MAVIS CAROLYN SCOTT

Ex parte: DONALD DALE (Applicant)

JUDGMENT

MR. JUSTICE KELLY: In this matter the court was constituted by the Senior Puisne Judge, my brother Shepherdson and myself.

I am authorised by the Senior Puisne Judge to say that in his opinion the order to review should be discharged with costs, and that he agreed with the reasons which I have prepared. In my opinion the order to review should be discharged with costs. I publish my reasons.

MR. JUSTICE SHEPHERDSON: I agree that the order to review should be discharged with costs. I publish my reasons.

MR. JUSTICE KELLY: The order of the Court will be: order to review is discharged with costs.

IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 17 of 1984

BETWEEN:

DONALD DALE

AND:

MAVIS CAROLYN SCOTT

Ex parte: DONALD DALE (Applicant)

_____

ANDREWS S.P.J.

KELLY J.

SHEPHERDSON J.

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Judgment of Kelly J. and Shepherdson J. delivered on 21st December, 1984. Andrews S.P.J. concurring

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"ORDER TO REVIEW. DISCHARGED WITH COSTS."

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IN THE SUPREME COURT OF QUEENSLAND O.S.C. No. 17 of 1984

DONALD DALE

v.

MAVIS CAROLYN SCOTT

Ex parte: DONALD DALE Applicant

JUDGMENT - KELLY J.

Delivered the Twenty First day of December 1984.

This is an appeal by way of order to review from an order of the Children's Court at Brisbane whereby it was ordered that Michilli Yvette Dale and Ricky Donald George Dale, the children of the appellant, be admitted to the care and protection of the Director of the Department of Children's Services. Michilli Dale was born on 18th October, 1972 and Ricky Dale was born on 11th March, 1975.

The proceedings before the Children's Court were commenced by applications under s. 49 of the Children's Services Act 1965-1982 (“the Act”) for an order for admission to the care and protection of the Director made by the respondent, a police officer. The applications were heard together over a period of eight days between 8th November, 1983 and 29th May, 1984. The appellant was represented by counsel. A sergeant of police appeared for the applicant (the respondent before this Court) and there was legal representation on behalf of the Director and also on behalf of the children.

The ground of each application was set out in the respective applications in these terms:—

> “He (or she) is a person in relation to whom any of the offences mentioned in Part VIII of this Act has been committed.”

On the first day of the hearing Mr. Warnick, counsel for the appellant, applied for particulars and referred the Court to Rule 8 of The Children's Courts Rules, 1966, the relevant provision of which reads:—

"(4) An application in any proceeding shall -

(a) Be in writing and state the order applied for and sufficient particulars to show the grounds on which the applicant claims to be entitled to the order, and, if made on notice, the names and addresses of the persons intended to be served, and the applicant's address for service."

Sergeant Fischer for the applicant refused to supply particulars and the stipendiary magistrate did not order that they be given, stating that he was not satisfied that he had power to do so in such an application.

Mr. Warnick then referred the Court to Rule 6 which is in these terms:—

> " 6. Non-compliance with any of these Rules shall not render void the proceedings in which the non-compliance has occurred, unless it is expressly so provided in these Rules, out the proceedings may be set aside, either wholly or in part, as irregular or amended or otherwise dealt with on such terms as to costs and otherwise as a Court thinks fit."

Mr. Warnick asked the Court not to order particulars but to rule that the application was bad on its face and in fact to set it aside unless particulars were provided. This application also was refused by the stipendiary magistrate. After further argument Mr. Warnick asked that both applications be struck out as being bad on their face. In refusing that application the stipendiary magistrate said:—

> "... it's an application under the Children's Services Act. It's for the welfare of the child as of course we all know is paramount. The wording of the application, I think is secondary. The primary import is the application is before the court. I intend to proceed with the application, to hear evidence. If the application is not supported then I have the remedy to refuse the application and unless there's another application, I intend to proceed now."

The hearing then proceeded.

Section 46(1) which is contained in Part VI of the Act sets out various circumstances in which for the purposes of the Act the child shall be deemed to be in need of care and protection. For present purposes the only circumstances to which reference is necessary are:—

"...

(b) he is in the custody of a person who is unfit by reason of his conduct and habits to have custody of the child;

(c) he is a person in relation to whom any of the offences mentioned in Part VIII of this Act has been committed;

...

(o) he is for any other reason in need of care and such care cannot be adequately provided by the giving of assistance under Part V of this Act."

Section 52(1) provides as follows:—

" (1) A Children's Court shall not order that a child be admitted to the care and protection of the Director unless such court -

(a) is satisfied that such child is in need of care and protection; and

(b) is not satisfied that such care and protection can be secured to such child by any other order it may make."

The offences mentioned in Part VIII of the Act are set out in s. 69(1) and (1A) and in s. 69A. Section 69(1) so far as is here relevant provides:—

"(1) A person having a child in his charge shall not ill-treat, neglect, abandon or expose him in a manner likely to cause him unnecessary suffering or to injure his physical or mental health nor suffer him to be so ill-treated, neglected, abandoned or exposed.

Penalty: Four hundred dollars or imprisonment for twelve months or both such fine and imprisonment."

Section 69(1A) is in these terms:—

" (1A) A person having a child in his charge shall not leave the child for a time that is unreasonable having regard to all the circumstances of the case unless he makes reasonable provision for the supervision and care of the child during that time.

Penalty: Two hundred dollars or imprisonment for three months or both such fine and imprisonment."

Section 69A prohibits the tattooing of children.

In all 22 witnesses including the appellant gave evidence. In the event there was no finding by the stipendiary magistrate that an offence under Part VIII had been committed. The stipendiary magistrate found that each child was in need of care and protection and, after stating that he was not satisfied that such care and protection can be secured to each child by any other order that he might make other than that each child be admitted to the care and protection of the Director, he ordered accordingly.

Grounds (i) and (ii) of the order to review are as follows:—

(i) That the Children's Court erred in law in proceeding to hear the said Application pursuant to Part VI of the Children's Services Act 1965 - 1980 without:—

(a) There first being evidence that a charge had been laid against DONALD DALE in respect of any alleged offence pursuant to Part VIII of the Children's Services Act 1965-1980, or

(b) There first being evidence that DONALD DALE had been convicted of an offence pursuant to Part VIII of the said Children's Services Act 1965-1980.

(ii) That the said Children's Court erred in law in making the aforesaid Order pursuant to Part VI of the Children's Services Act 1965-1980, it not having:—

(a) Made a finding that an offence had been committed pursuant to Part VIII of the said Act;

(b) Applied the standard of proof appropriate to the criminal nature of proceedings pursuant to Part VIII of the said Act.”

In my view it is not necessary that there should have been a charge laid in respect of an offence under Part VIII or a conviction of such an offence prior to the making of an application under s. 49 on the ground that the child to whom the application relates is a person in relation to whom any of the offences mentioned in Part VIII has been committed. It could be that the applicant would seek to establish the commission of such an offence in the proceedings then before the Court so that it would not be precluded from proceeding to hear the application notwithstanding that there was no evidence of the laying of a charge or of a conviction of an offence. The Court did not make a finding that an offence had been committed and it was not necessary that it should do so before it could make an order. Having regard to s. 52(1), I consider that, notwithstanding that an application is made upon the ground that an offence has been committed, if on the evidence before the Court it is satisfied that even though that ground has not been established nevertheless the child is in need of care and protection and it is not satisfied that such care and protection can be secured to the child by any other order it may make, it may then order that the child be admitted to the care and protection of the Director. Consequently in my opinion neither of these grounds is made out.

Ground (iii) then is in these terms:—

"(iii) That the said Children's Court erred in law in failing to dismiss the said Application in that it did not comply with Rule VIII of the Children's Court Rules 1966."

It was submitted on behalf of the appellant that the proceedings were a nullity because of a denial of natural justice, that there was a failure to properly hear the appellant as he had not been informed of the case which he had to meet and that the failure to particularise the grounds was so fundamental that the law assumes that an injustice has been done. Reliance was placed on cases such as Annamunthodo v. Oilfields Workers' Trade Union (1961) A.C. 945, Ridge v. Baldwin (1964) A.C. 40 and Calvin v. Carr (1980) A.C. 574.

Whatever may have been the position if, following the refusal of particulars, the matter had been determined on 8th November, 1983, this, of course, was not the case. The hearing continued for a number of days spread over a period of some six months, the nature of the case which it was sought to make for the purpose of obtaining the orders sought became clear and there was ample opportunity for cross-examination of the witnesses called in support of the applications and for the appellant to give evidence, which he did. In the event it could not be said that the appellant was not informed of the case which he had to meet (and despite the form of the proceedings, which, as I later point out, differ from the ordinary lis between parties, he was in fact being called upon to do this) nor could it be said that he did not have an opportunity of being heard.

In the result he had a "fair deal" (see Calvin v. Carr (supra), at p. 594). In my view when the hearing is thus looked at as a whole there has not been a breach of the rules of natural justice.

Regard must then be had to Rule 6 of the Children's Court Rules. There has undoubtedly been non-compliance with Rule 8(4)(a) by the failure to give particulars but this does not thereby render the proceedings void. There was

clearly an irregularity but in the events which happened, to which I have already referred, in my view no basis exists for setting the proceedings aside. It may well be that they could have been significantly shortened had the appellant been clearly informed at the outset of the case which it was sought to make in support of the applications, but that is another matter. In my opinion there is no substance in this ground.

Ground (iv) is as follows:—

"(iv) That the said Children's Court erred in law in receiving evidence tending to show that a criminal offence had been committed by DONALD DALE on the child Terri Ann Dale in proceedings in which the said Children's Court had:—

(a) Failed to apply the rules of evidence;

(b) Failed to apply the standard of proof applicable to charges of a criminal nature;

(c) Failed to apply a standard of proof appropriate to the seriousness of the allegations."

This ground was argued in conjunction with ground (xiv) which is in these terms:—

"(xiv) That the manner in which the Children's Court proceeded to determine the said Application constituted:—

(a) A denial of the principles of natural justice;

(b) A failure to determine the matter in a manner in the best interests of the said children."

Section 52(2) of the Act is relevant in this regard. That subsection is as follows:—

" (2) Upon every application made to a Children's Court under this Part the court shall determine the matter in

> the manner which appears to the court to be in the best interests of the child or child in care concerned."

In essence, evidence in support of the applications was directed to showing that the circumstances for the care of the children offered by the appellant were unsuitable and constituted a risk to the children primarily because of the risk of sexual abuse of them by the appellant. It was alleged that there had been sexual abuse by him of an elder sister, Terri Dale, who in 1981 had made a complaint to the police following which the appellant had been charged with the offence of carnal knowledge. That charge was not proceeded with and in July 1981 the matter was struck out following an arrangement under which the child was taken to New Zealand by her mother. Evidence in the proceedings before the Children's Court was given by Terri Dale whom the stipendiary magistrate considered to be a very impressive witness and whose evidence in relation to sexual misbehaviour by the appellant he accepted.

It was submitted on behalf of the appellant that in considering the question of the alleged sexual abuse of Terri Dale the stipendiary magistrate did not direct himself to the seriousness of the allegations made and to the degree of persuasion necessary. However, nothing appears in his reasons for judgment which would indicate that this was so and it is not to be assumed that he did not direct himself correctly.

The question of the application of the rules of evidence was the subject of a submission to the stipendiary magistrate by counsel for the appellant at an early stage of the proceedings when an objection was taken to hearsay. The stipendiary magistrate then said that the rules he would apply would be under s. 52(2) and he referred to Official Receiver v. Kay (1963) 3 All E.R. 191 (reported in the Law Reports under the name of In Re K. (Infants) (1965) A.C. 201) and MacGillivray v. MacGillivray (1967) S.A.S.R. 408.

In Re K. (Infants) (supra) concerned an application that the infants be made wards of Court for custody, care and control, and access and the matter on which it came before the House of Lords was a preliminary point as to whether the mother was entitled as of right to see the whole of the reports of the Official Solicitor, including confidential reports and medical reports. The House of Lords held that the disclosure of confidential reports was a matter of discretion for the Judge, and that the mother was not entitled as of right to disclosure of the reports. It also held that the paramount consideration of the Chancery Division in exercising its jurisdiction over wards of court was the welfare of the infants; that this jurisdiction was of its nature a paternal jurisdiction, and that, therefore, a ward of court case partook of an administrative character and was not a mere conflict between parties.

Lord Devlin, at p. 240, referred with approval to a passage in the judgment at first instance which included the following:—

> " In the ordinary lis between parties, the paramount purpose is that the parties should have their rights according to law, and in such cases the procedure, including the rules of evidence, is framed to serve that purpose. However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose. Over a very large field in infant cases, the procedure and rules of evidence applicable to a lis between parties serve that purpose admirably and are habitually applied, but they should never be so rigidly applied as of inflexible right as to endanger or prejudice the very purpose which they should serve."

Lord Devlin then continued, at pp. 240-241:—

> "Where the judge sits as an arbiter between two parties, he need consider only what they put before him. If one or other omits something material and suffers from the omission, he must blame himself and not the judge. Where the judge sits purely as an arbiter and relies on the

parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing. Where the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail."

In dealing with an objection on the ground of hearsay Lord Devlin said, at pp. 242-243:—

"Here the test of convenience is the right one. It is agreed that the practice always has been to admit hearsay. None of the Lords Justices in the Court of Appeal disapproved of this practice nor were they invited to do so. Reports on such matters as the conditions prevailing at the school to which it is proposed to send an infant or of a house in which he is to reside may often be of great assistance and I think that it might often adversely affect the interests of the infant if a judge were to be debarred from acting upon them. A judge in chambers is, of course, quite capable of giving hearsay no more than its proper weight. An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it.

I agree that the liberty to tender hearsay evidence could be abused. I cannot imagine that any judge would allow a grave allegation against a parent to be proved solely by hearsay, at any rate in a case in which direct evidence could be produced. I agree that in such a case if a lot of hearsay material was produced a party might be embarrassed by not knowing what steps he ought to take to meet it. But I think that it is well within the inherent powers of a judge exercising this sort of jurisdiction to deal with such a situation. He can, in a proper case, indicate in advance that he will pay no attention whatever to grave allegations that are based only on hearsay. I do not think that the possibility of abuse should be allowed to outweigh the benefits of continuing the existing practice."

In Re T (an infant) (1982) Qd. R. 475, which dealt with a welfare report which had been requested by a Judge of this Court hearing an application for the custody of an illegitimate child, in the course of a judgment with which the other members of the Court agreed, I said at p. 476:—

> "I may say, however, that I would think that this is a step which may properly be taken by a judge exercising the inherent jurisdiction of the Court in relation to illegitimate children, which differs from the ordinary lis between parties and in which the Court is primarily concerned with the welfare of the child, so that it should be able to inform itself of facts which are relevant to the matter. This was the view taken by Dunn J. in Re L. Infants [1976] Qd. R. 5. It is consistent with the practice followed in the Court of Chancery referred to in the course of the judgments in In re K. (Infants) [1965] A.C. 201, and whilst the decision in that case relates to a report of a somewhat different character from that under consideration here, I would think that the same principle is applicable."

In my view in proceedings upon an application for an order for admission to the care and protection of the Director the Children's Court is primarily concerned with the welfare of the child and the proceedings differ from the ordinary lis between parties so that the principle referred to in the passages from In re K. (infants) (supra) which I have set out are applicable when the Court is exercising its powers under s. 52(2).

It is sufficient to say that it has not been shown that, in departing from the rules of evidence to the extent to which he did and in particular by admitting certain hearsay evidence, the stipendiary magistrate misapplied the principle to which I have referred or that he failed to exercise properly the discretion conferred on him by s. 52(2). Consequently grounds (iv) and (xiv) fail. For similar reasons grounds (v), (vi) and (vii) which deal with the admission of evidence and the failure to call certain witnesses also fail.

The remaining grounds of the order to review may be shortly disposed of. Ground (x) is that the findings of the Court are against the evidence and the weight of evidence and the other grounds are particular expressions of that general ground. The submission on behalf of the appellant is that the body of evidence referred to in those grounds outweighs the contrary evidence.

In dealing with the review by this Court on a magistrate's findings of fact Townley J. in delivering the judgment of the Court in Smith v. Smith, Ex parte Smith (1950) S.R. Qd. 113 at p. 120, cited with approval Mooney v. James (1948) 2 A.L.R. 369, at p. 377, where Barry J. said:—

> "As the magistrate has had the advantage of seeing and hearing the witnesses, and as the reality of a proceeding can seldom be gathered from the printed record, this court is very reluctant to interfere with the findings of a magistrate upon a question of fact where there is some evidence to support them and hence rarely does so."

In this case there is evidence to support the findings of the stipendiary magistrate who had the advantage of seeing and hearing the witnesses and in my view no basis has been shown for interfering with those findings. These remaining grounds therefore also fail.

In my opinion the order to review should be discharged with costs.

IN THE SUPREME COURT OF QUEENSLAND O.S.C. 17 of 1984

DONALD DALE

v.

MAVIS CAROLYN SCOTT

Ex parte: DONALD DALE Applicant

JUDGMENT - SHEPHERDSON J. - FULL COURT

Delivered the twenty first day of December 1984.

I have had the benefit of reading the reasons for judgment prepared by my brother Kelly. I agree that the order to review should be discharged with costs and for the reasons which he has stated.

I would however add the following views in respect of ground (ii) of the notice of appeal.

A child in need of care and protection is not defined in the Act. Section 46(1) which enumerates circumstances in which a child shall be deemed to be in need of care and protection is not in my view to be treated as an exhaustive definition of a child in need of care and protection.

That this is so, I think, is made clear from a consideration of s. 52(1)(a) where the phrase “in need of care and protection” is not expressly restricted and from s. 52(2) which obliges the Children's Court on the hearing of every application under Part VI to determine the matter in the manner which appears to the Court to be in the best interests of the child concerned.

Section 52(2) in my view places the Children's Court in