

THE HIGH COURT

JUDICIAL REVIEW

No. 322/JR/~~322~~198-

BETWEEN

T.C. GERARD O'MAHONY

APPLICANT

AND

DISTRICT JUSTICE DANIEL SHIELDS, BRIAN PATRICK McARDLE,  
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Lardner delivered the 22nd day of  
February, 1988.

On the 29th of October, 1987 at 11 o'clock in the forenoon the Applicant's office and residence at 22, Merrion Square, Dublin was entered by Dr. Brian Patrick McArdle, an Executive Engineer in the Telecommunications and Radio Technology Division of the Department of Communications, with four other officers of this Department and four uniformed Gardai who proceeded to conduct a search for apparatus for wireless telegraphy and having done so seized and carried away certain items of such apparatus which they had discovered and which they have since retained. Their entry and search and seizure was made on foot of a warrant issued that morning by District Justice Shields under the provisions of Section 8 of the Wireless Telegraphy Act, 1926 as amended, which was produced to the Applicant. In his Affidavit the Applicant says that on the previous day he received a telephone call from a Mr. Brian Millane stating that he was an officer of the Department of Communications; alleging that the Applicant was broadcasting without a licence and that "they must close down the station". The Applicant replied that he was "officially authorised" for his

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actions and in effect that the matter should be tested in Court. At this point I note that there was no evidence nor was it contended before me that in fact the Applicant did have a licence.

When on the following day his premises were entered and searched and wireless apparatus was seized and carried away, the Applicant was outraged and subsequently commenced the present application by way of a Judicial Review seeking -

- (a) an Order for Certiorari to quash the search warrant
- (b) a Mandatory Injunction directing the return to the Applicant of the goods which were seized and
- (c) a Declaration that the warrant was bad in law on its face
- (d) a Declaration that Section 8 of the Wireless Telegraphy

Act, 1926 is repugnant to the provisions of the Constitution. Section 8 of the Wireless Telegraphy Act, 1926 is in the following terms:-

- "(1) A Justice of the District Court may, upon the information on oath of an officer of the Minister or of a member of the Garda Siochana that there is reasonable ground for believing that apparatus for wireless telegraphy is being kept or is being worked or used at any specified place or in any specified ship in contravention of any provision of this act or any regulation made or condition imposed under this Act, grant to such officer of the Minister or (with the consent of the Minister) to such member of the Garda Siochana (as the case may be) a search warrant which shall be expressed and shall operate to authorise the officer of the Minister or member of the Garda Siochana to whom the same is granted to enter, and if need be by force, the place or ship named in the

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said information and there to search for apparatus for wireless telegraphy and to examine all such apparatus there found and to seize and take away all or any part of such apparatus which appears to such officer or member to be kept, worked or used in contravention of any provision of this Act or any regulation made or condition imposed under this Act.

- (2) A search warrant granted under this section to an officer of the Minister may authorise or, if the Justice granting the same so thinks proper, require such officer to be accompanied by one or more members of the Garda Siochana when making the search under the warrant."

The first contention by Counsel for the Applicant was that a search warrant under Section 8 may only be applied for after a notice has been served under Section 7. Section 7 provides that the Minister when he thinks proper so to do may cause a special notice in writing to be served by registered post on any person requiring such person within 14 days to state on the form of Declaration such one or more matters therein mentioned. Viz such matters as whether the recipient of the notice does or does not keep or has or has not in his possession any apparatus for wireless telegraphy; the nature of such apparatus and the place in which he keeps it; whether he has or has not a licence granted under the act then in force etc. This contention does not seem to me to be well founded. Section 7 is not a precondition to application for a warrant under Section 8. The two sections are concerned with different matters and it seems to me that, in the present case, where the Department or officers of the Department had strong grounds for believing that the Applicant did possess

wireless telegraphy apparatus and was using it for broadcasting, to require them first to proceed under Section 7 would be altogether nonsensical.

The second contention by Counsel for the Applicant is that Section 8, in so far as it authorises the seizure and taking away of apparatus for wireless telegraphy discovered in the course of a search, purports to authorise a forfeiture of the Applicant's property; that it does not require that there should be a prosecution for an offence under the statute; that there is no provision for the return of the seized articles, upon the Applicant being acquitted of a prosecution, if a prosecution is brought or if he receives a licence under the Act; and that in so far as it purports to authorise a forfeiture it offends against the Applicant's property rights which are guaranteed by Article 40(3) of the Constitution. It is noteworthy that Section 8 is preceded by Section 3(1) which provides that subject to certain exceptions, which are not relevant here, no person shall keep or have in his possession ..... any apparatus for wireless telegraphy save so far as such keeping or possession is authorised by a licence granted under the Act and for the time being in force. Section 3 then provides that every person who keeps, has in his possession, works, or uses any apparatus for wireless telegraphy in contravention of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding £10, together with, in the case of a continuing offence, a further fine not exceeding £1 for every day during which the offence continues and also, in every case forfeiture of all the apparatus in respect of which the offence was committed. Section 5 provides for the grant of licences to keep and have possession of apparatus for wireless telegraphy.

In the present case the Applicant on the day following the search and seizure complained to the Department of Communications and signified that he intended to institute proceedings to have the search warrant quashed. I am informed by Counsel that in the month of November the Respondent procured the issue of two Summonses alleging offences by the Applicant under the 1926 Act and that these have not yet been served, pending the determination of the present proceedings. Having considered these sections of the 1926 Act, I am unable to accept the contention that Section 8 purports to authorise the forfeiture of wireless telegraphy apparatus without a prosecution. Rather I find it authorises a step preliminary to the hearing of a prosecution for an offence under the Act, namely, entering and search of the premises for the purpose of obtaining and preserving evidence which will be relevant to such a hearing. This seems confirmed by the provisions in Section 3, subsection (3) providing for a forfeiture following upon a conviction. Although the statute does not expressly so provide I am satisfied that where a person who is charged with an offence under the section secures an acquittal and there is nothing else, he would be entitled as a matter of law to the return of any seized apparatus. I therefore reject the submission that Section 8 of the act constitutes or purports to permit any unjust attack on the Applicant's property rights under Article 40(3) of the Constitution or offends against Article 43.

I turn now to consider the warrant. It is indisputable that any unauthorised entry of the Applicant's dwelling-house would be unlawful under Article 40(5) of the Constitution and at Common Law and any unauthorised entry of his offices or other of his premises would be unlawful at Common Law, as would any unauthorised searching of such premises or the seizure and taking away of any of his chattels. Such an unauthorised entry would constitute trespass

and such a seizure and taking away would also constitute a form of trespass to chattels for which damages would be recoverable. Where then, a statute gives a power to enter and search private premises or to take and carry away chattels, the authority to do so is no wider than is expressly or by necessary implication contained in the provisions of the statute. Here it is the extent of the authority contained in Section 8 which is in issue. The sequence of events leading to the entry and search and seizure is established by evidence to have been as follows -

On the 29th of October, 1987 Dr. McArdle applied to District Justice Shields with a complete but unsigned form of information in the following terms

The District Court

Dublin Metropolitan District Court Area District Number 11

The information of Dr. Brian Patrick McArdle of the Department of Communications, Findlater House, in the City of Dublin who being duly sworn upon oath, at Dublin Metropolitan District Court, District Number 11 in the said District before me one of the Justices in and for the said District deposeth and saith as follows

I am an Engineer of the Department of Communications, Dublin and an officer of the Minister for Communications. I state that I have reasonable grounds for believing that apparatus for wireless telegraphy is being kept at 22 Merrion Square Dublin 2 situate in Dublin Metropolitan District Court Area District Number 11 in the said district in contravention of the provisions of the Wireless Telegraphy Act, 1926 as amended.

I pray for a warrant under Section 8 of the Wireless Telegraphy Act 1926 authorising me to enter the said premises

and if need be by force and to be accompanied by other officers of the Department of Communications nominated by me and by members of the Garda Siochana and there to search for apparatus for wireless telegraphy and to seize and take away all or any part of such apparatus which appears to be kept worked or used in contravention of any provision of the Wireless Telegraphy Act 1926 as amended or any regulation made or any condition imposed under the said Act.

Brian P. McArdle

Sworn before me this 29th day of October 1987

District Justice Shields

One of the Justices of the District Court assigned to the said District.

In evidence Dr. McArdle says that he cannot remember whether on the particular occasion he was sworn or not but that he normally in such cases is sworn. Having presented the written information to the District Justice, Dr. McArdle signed it in his presence and he then presented the form of search warrant in the following terms

" The District Court  
Dublin Metropolitan District Court Area District Number 11  
Search Warrant Wireless Telegraphy Act 1926

Whereas I, the undersigned Justice, having received information from the oath of Dr. Brian Patrick McArdle, credible witness that he has reasonable grounds for believing that apparatus for wireless telegraphy is being kept or is being worked or used at 22 Merrion Square Dublin 2 situated in the Dublin Metropolitan District Court Area, District Number 11 in the said district, in contravention of any provision of the Wireless Telegraphy Act or any regulation

made or condition imposed under the said act.

These are, therefore, strictly to charge and command you and other officers of the Department of Communications nominated by you and members of the Garda Siochana to enter and, if need be by force, the premises at 22 Merrion Square, Dublin 2

And there to search for apparatus for wireless telegraphy and to examine all such apparatus there found and to seize and take away all or any of such apparatus which appears to such officers to be kept worked or used in contravention of any provisions of this Act or any regulation made or condition imposed under this Act.

And for so doing this shall be your warrant.

Given under my hand this 29th of October 1987

To Dr. Brian Patrick McArdle of as above

Daniel Shields

Justice of the District Court assigned to the said District."

After the information and draft warrant had been presented to and read by the District Justice he signed both without hearing any further evidence. In regard to the written information I note that it records above the District Justice's signature that it had been sworn before him. In my view there is sufficient evidence to conclude that this information was duly sworn by Dr. McArdle before the District Justice.

A number of complaints are made by the Applicant about the warrant. Firstly it is said that the only evidence before the District Justice, as recited in the warrant, is that he had "received information from the oath of Dr. Brian Patrick McArdle credible witness that he" (Dr. McArdle) "has reasonable grounds for believing that apparatus for wireless telegraphy is being kept or is being worked or used at 22 Merrion Square Dublin 2...." etc.

whereas Section 8(1), it is submitted, requires the District Justice himself to hear and have evidence before him upon which he can judicially decide that there are reasonable grounds for such belief. The Applicant's Counsel sought to support this submission by relying on I.R.C. .v. Rossminster Limited 1980 1 All England Reports page 81. The relevant part of that case concerned the correct interpretation of the wording of Section 20(c) (1) (3) of the Taxes Management Act, 1970 which is significantly different from the wording of Section 8 of the 1926 Act which I have to consider and I do not find this decision helpful in deciding the present issue.

I accept that the decision which the District Justice makes in deciding to grant or refuse a warrant under that section is a judicial decision. It is clearly essential that before permitting entry on private premises, which would otherwise be unlawful, there should be a consideration of the information, which should be sworn, and a determination by a District Justice to ensure that a warrant should not issue lightly or without reasonable cause. It is for the Oireachtas however to prescribe what the District Justice is to have before him for consideration. In this regard Section 8(1) prescribes

"A Justice of the District Court may, upon the information on oath of an officer of the Minister or of a member of the Garda Siochana that there is reasonable ground for believing that apparatus for wireless telegraphy is being kept or is being worked or used at any specified place ..... grant to such officer a search warrant."

It appears to me that the plain meaning of these words is that what a District Justice is required to have before him and to consider is the sworn information that the informant has reasonable grounds etc. The section does not appear to me to require the District Justice to have put in evidence before him and to consider the facts which constitute or form the basis of the reasonable grounds for

belief. The wording so construed undoubtedly affords a very limited field upon which the judgment of the District Justice may operate and correspondingly cuts down the safeguard of citizens' rights afforded by the requirement of a decision on the matter by a District Justice before a warrant authorising what would otherwise be a trespass may issue.

Having regard to the Constitutional guarantee in Article 40(5) that the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law, the desirability of amending Section 8 so as to require more substantive evidence to be laid before and considered by a District Justice ought to be considered. On this aspect I should say that the evidence satisfies me that nothing was seized from the Applicant's private dwelling and that the officers withdrew immediately from the part of the building which was a private dwelling as soon as they discovered this.

A further complaint made by the Applicant in regard to the warrant is that in so far as it charged and commanded, in addition to Dr. McArdle, "other officers of the Department of Communications" nominated by him and "members of the Garda Siochana" to enter the premises it exceeded the power conferred by Section 8. It seems to me that there is some substance in this complaint having regard to the plain words of the section. In my view when a section gives a power by search warrant to do what might otherwise be an act of trespass or in the case of a private dwelling might also involve a violation of a citizen's private dwelling, namely, to enter and search premises, the limits of the power given must be respected and strictly adhered to. In so far as the warrant purports to authorise entry by "other officers of the Department nominated by"

Dr. McArdle, it exceeds the power given either expressly or by necessary implication by Section 8.

Despite this finding the evidence satisfies me that the District Justice acted on evidence as prescribed in Section 8 and evidence before me on affidavit and orally given by the deponents on cross-examination establishes that reasonable grounds existed for believing that apparatus for wireless telegraphy was being kept and worked and used at the Applicant's premises at 22 Merrion Square. I am satisfied that the search warrant in so far as it authorised entry and search by Dr. McArdle and members of the Gardai was intra vires and valid. In these circumstances in the exercise of my discretion I refuse to grant the Applicant an Order of Certiorari or any other of the relief claimed.

*Approved*  
*G. Gardner*  
*26 Feb '88*

*Approved in Absence*  
*G. Gardner*