RE W AND D (SECURE ACCOMMODATION)

Family Division

Thorpe J

3 April 1995

Secure accommodation – Children charged with criminal offences – Bail refused – Children remanded to local authority accommodation – Local authority seeking secure accommodation order – Whether criteria for making secure accommodation order where child remanded to local authority accommodation satisfied – Whether secure accommodation order should be made in principle where bail refused

W, aged 15, and D, aged 13, were taken into voluntary local authority care in December 1994 and March 1995 respectively. Later in March 1995, R, also in local authority care, was subjected to an assault, in respect of which criminal charges were brought against W and D amongst others. W and D appeared before the Croydon justices the following day, when bail was refused and both children were remanded to local authority accommodation under s 23(1) of the Children and Young Persons Act 1969. The local authority applied for a secure accommodation order under s 25 of the Children Act 1989. Such accommodation, however, was not immediately available, and was situated in Peterborough. The bench declined to make a secure accommodation order, and imposed conditions upon the remand to local authority accommodation in accordance with a submission made in the alternative by counsel for the local authority. Those conditions were that W should not leave the relevant children's home unless accompanied by a worker, not go to the children's home where R resided, and not contact prosecution witnesses or co-defendants. The local authority appealed. On the hearing of the appeal, fresh evidence was admitted in the form of an affidavit from the chairman of the bench, statements from the local authority, and statements from W and D themselves, which emphasised the children's reasons for not wishing to be remanded into secure accommodation.

Held – dismissing the appeal – the appellant local authority had argued on appeal that if bail was inappropriate, then a secure accommodation order ought to have been made as a matter of principle. Regulation 6(2) of the Children (Secure Accommodation) Regulations 1991, however, provided that a secure accommodation order could not be made in respect of children remanded under s 23 of the 1969 Act unless the court was satisfied that the child was either likely to abscond from local authority accommodation, or was likely to injure himself or others if kept in local authority accommodation. In the present case, there was ample evidence on which the court could properly have concluded that the criteria laid down in reg 6(2) were not made out. In those circumstances, it was open to the court to impose conditions on a remand under s 23 of the 1969 Act, which it had done on the alternative application of the local authority. Although the fresh evidence before the appellate court entitled it to substitute its own discretion for that of the court below, the court did not find, on that evidence, that the criteria in reg 6(2) were met. The appeal would be dismissed accordingly.

Statutory provisions considered

Children and Young Persons Act 1969, s 23(7), (8)
Bail Act 1976, s 3(6)
Children Act 1989, s 25
Children (Secure Accommodation) Regulations 1991 (SI 1991/1505), reg 6(2)

Case referred to in judgment
M (Secure Accommodation Order), Re [1995] Fam 108, [1995] 1 FLR 418, [1995] 2 WLR 302, [1995] 3 All ER 407, CA

Jennifer Driscoll for the children
Jane De Zonie for the local authority

THORPE J:
This is an appeal from a decision of the Croydon justices, who made an order remanding two children to accommodation provided by the local authority pursuant to s 23(1) of the Children and Young Persons Act 1969 in preference to a secure accommodation order made under s 25 of the Children Act 1989. The appellant local authority contend that the justices should have made the stronger order.

The history is as follows. On 15 December 1994 W was accommodated at her mother's request whilst her mother underwent an operation. On 14 March 1995 D was also accommodated at his mother's request for what was intended to be a period of 28 days. On 19 March 1995 a boy called R, who was also in local authority care, was subjected to vicious injuries. Fortunately, the police were on the scene in time to prevent worse and at a time when all alleged perpetrators were still upon the scene of crime. On 20 March 1995 charges were brought against W and D under s 18 of the Offences Against the Person Act. All eight defendants were before the Croydon magistrates on the following day. The adult accused was committed to an adult prison, a remand in custody. The five juveniles, who were male and over 15 years of age, were all remanded in custody and dispatched to remand centres under s 60 of the Criminal Justice Act 1991. W and D did not meet those conditions. W is over 15 but she is female. D is male but is only 13. The justices concluded that, having regard to the seriousness of the charges and the fact that both W and D knew the victim, it was not a case for bail. They refused bail and remanded both children to accommodation to be provided by the local authority under s 23(1) of the Children and Young Persons Act 1969.

The local authority immediately applied for a secure accommodation order under s 25. Evidence was not called, but detailed submissions were made and in the case of each child a social worker addressed the court. It is notable that counsel making the application on behalf of the local authority stated in relation to each child that if the bench was not satisfied that the criteria contained in s 25 had been satisfied, then conditions should be attached to the remand in local authority accommodation, namely that the child was:

(1) not to leave the relevant children's home unless accompanied by a worker;
(2) not to go to the children's home where the victim resided; and
(3) not to contact prosecution witnesses or co-defendants.

It was that alternative disposal for which the bench opted.

The conditions were expressed in relation to W thus:

(1) not to leave the relevant children's home unless accompanied by a worker, and not to leave the building without permission save on

school days when she will be accompanied to school and picked up from school;
(2) not to go to the children's home where R resided;
(3) not to contact any prosecution witness or have any association with co-defendants.

It may be that in reaching that decision the justices were in part influenced by realities, namely that if they had made a secure accommodation order under s 25 in relation to W:

(a) such accommodation was not available until 25 March 1995;
(b) the accommodation was in Peterborough;
(c) such a disposal would have necessitated weekly court appearances in Croydon, for each of which W herself would have to make the return journey.

The local authority was dissatisfied with this outcome and filed a notice of appeal pursuant to s 94 of the Children Act 1989 on 24 March 1995. Four days later on 28 March 1995, Lady Berry, who had acted as chairman of the court, filed an affidavit explaining the proceedings and the outcome from the bench's viewpoint. On the following day, 29 March 1995, the parties appeared before Wilson J, who gave a direction pursuant to a consensus that evidence should be admitted for the purposes of this appeal. He said that the local authority, the appellant, should file statements of evidence by two witnesses swiftly, and he said that any evidence in answer should be filed by the respondents thereafter.

Statements by two witnesses for the appellant appear in the bundle. Statements by the two children are separately available. W made a long statement on 30 March 1995 exhibiting a letter which she had written to her family. D swore a substantial statement on 31 March 1995.

Crudely summarised, the statements for the local authority emphasise the practical difficulties of managing the children within any framework less controlling than a secure accommodation order. The statements of the children underline their anxiety at the prospect of committal to secure accommodation and emphasise that their determination to abide by the conditions of remand is fortified by the fear of finding themselves in secure accommodation. W emphasises the importance to her of being in close proximity to her family. D stresses the importance to him of being able to attend school.

Thus I have to decide the case on the basis of the fresh evidence which it is agreed should be before the court and direct myself in relation to the complicated statutory framework. Where a child has been remanded to a local authority under s 23 of the Children and Young Persons Act 1969, and where an application is made for a secure accommodation order under s 25 of the Children Act 1989, the application is to be heard by the bench within the criminal justice system. That is plain from s 60 of the Criminal Justice Act 1991 and the Children (Secure Accommodation) Regulations 1991. In the special case of a secure accommodation order in respect of children remanded under s 23 of the Children and Young Persons Act 1969, the criteria in s 25(1) of the Children Act 1989 are modified by reg 6(2) of the Children (Secure Accommodation) Regulations 1991. The statutory test

imported by reg 6(2) reads thus:

> 'A child may not be placed in secure accommodation unless it appears that any other accommodation is inappropriate because –
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> (a) the child is likely to abscond from such accommodation, or
> (b) the child is likely to injure himself or other people if he is kept in any such accommodation.'

Section 25(3) imposes a duty on the court hearing the application for a secure accommodation order to determine whether those criteria are satisfied in the case. Section 25(4) makes plain that, if any of the criteria are satisfied, the court shall make an order that the child be kept in secure accommodation and specify the maximum period for which he should be so kept.

The attaching of conditions to a remand under s 23 of the Children and Young Persons Act 1969 is achieved by s 23(7):

> 'A court remanding a person to local authority accommodation . . . may, after consultation with the designated authority, require that person to comply with any such conditions as could be imposed under section 3(6) of the Bail Act 1976.'

The Bail Act 1976, by s 3(6), states:

> '[A person granted bail] may be required . . . to comply . . . with such requirements as appear to the court to be necessary to secure that –
>
> (a) he surrenders to custody,
> (b) he does not commit an offence while on bail,
> (c) he does not interfere with witnesses or otherwise obstruct the course of justice . . .,
> (d) he makes himself available for the purpose of enabling inquiries or a report to be made . . .'

Reverting to the present case, it seems to me plain that the three conditions applied by the justices were conditions that they were entitled to apply, having regard to the terms of s 23(7) of the Children and Young Persons Act 1969 and s 3(6) of the Bail Act 1976.

There is a technical argument that the terms of the following subsection of the Children and Young Persons Act, namely s 23(8), were not here complied with. That subsection requires a court imposing conditions to explain in open court and in ordinary language why it is imposing them. As Lady Berry has explained in her affidavit, after 2½ hours of court time devoted to these bail applications, that obligation was overlooked. However, the reasons were apparent to all and the conditions were conditions that had been formulated by the local authority itself. Accordingly, I would not be minded to interfere in any way with the order under attack on the bare ground of that technicality.

The real point which is urged by the appellant is that if the justices had reached the conclusion that the seriousness of the charges and the surrounding circumstances were such as to make bail inappropriate, then they should have made a secure accommodation order. The device of a

remand subject to conditions is, say the appellants, no more than a bail subject to conditions, and it is therefore wrong in principle. Furthermore the appellants allege that, in considering an application for a secure accommodation order, the bench is not entitled to exercise a broad Children Act discretion. It has a simple duty to ask the question whether or not either of the two statutory criteria were satisfied. If the answer to that question is yes, then the bench has no discretion but to impose the secure accommodation order. Here the appellants argue that it is manifest that the bench was satisfied that one or both of the statutory criteria was satisfied: so much is to be collected from their reasons for refusing bail. Ergo, as a matter of principle, they should have granted the subsidiary application under s 25.

The statutory provisions have been recently considered by the Court of Appeal in the case of *Re M (Secure Accommodation Order)* [1995] Fam 108, [1995] 1 FLR 418. That authority makes it plain that welfare is not a paramount consideration in the determination of a s 25 application. Section 25, falling within Part III of the Act, is subject to a general duty of a local authority to safeguard and promote welfare. Welfare, although a matter of great importance, is only an ingredient within the relevant criteria.

Against the guidance to be extracted from that authority, it seems to me that the local authority's criticism of this decision is unfounded. Whilst s 25(4) excludes a judicial discretion, the court must still exercise a judicial discretion in determining whether or not the criteria are satisfied under s 25 as modified by reg 6(2). It seems to me that it is difficult for the local authority to criticise this decision of this bench when they themselves, in advancing their application, had effectively offered the court a choice between the stronger order, which was the subject of their first submission, and the alternative, namely conditions attached to remand.

There was no evidence, other than the general story, to be collected from the workings of the criminal justice system and the family justice system upon the lives of these two children over the preceding months. There were statements from the relevant social workers and they had the assistance of counsel both for the local authority and for the children. It seems to me that the decision at which they arrived was well within the generous ambit of their discretion.

But, beyond that, the parties agreed on 29 March 1995 that fresh evidence should be admitted. I have read the evidence which has been filed pursuant to the direction of Wilson J and it seems to me that in the light of that fresh evidence I have a considerable discretion in determining whether or not either of the criteria contained in reg 6(2) has been made out. Is either child likely to abscond? Is either child likely to injure himself or other people? I have their statements in which they express their fear of secure accommodation and their determination to avoid that disposal by strict compliance with the conditions imposed by the bench. I have the reality that the management course for which the bench opted on 21 March 1995 has now been under trial for about 2 weeks. It seems to me, bearing in mind the emphasis within the judgment of Butler-Sloss LJ in *Re M* that the restriction upon the liberty of a child is a serious step which must be taken only when there is no genuine alternative, that it would be a wrongful exercise of discretion on my part to declare either of the criteria satisfied on the basis of the fresh evidence submitted by the parties. Accordingly, I dismiss this appeal.

Appeal dismissed.

Solicitors: *McMillan Williams* for the children
Stoneham Langton & Passmore for the local authority

CHRISTOPHER WAGSTAFFE
Barrister