49/87

SUPREME COURT OF VICTORIA — FULL COURT

ALLITT v SULLIVAN

Murphy, Brooking and Hampel JJ

20 May, 26 June 1987 — [1988] VicRp 65; [1988] VR 621

PROCEDURE – SEARCH WARRANT – SOLICITOR'S OFFICE – LEGAL PROFESSIONAL PRIVILEGE – WARRANT NOT INDORSED BY ISSUING JUSTICE – WHETHER WARRANT INVALID – DUTY OF SEIZING CONSTABLE WHEN WARRANT EXECUTED – DUTY OF ISSUING OR OTHER JUSTICE BEFORE WHOM SEIZED DOCUMENTS ARE BROUGHT – PROCEDURE TO BE FOLLOWED WHERE PRIVILEGE CLAIMED: *CRIMES ACT* 1958, S465.

The *Crimes (Form of Search Warrant) Regulations*, SR 292/72 prescribe the form of warrant which may issued by a magistrate or justice under the provisions of s465 of the *Crimes Act* 1958 (Vic). The form concludes:

> "These are therefore ... to authorise and require you ... to search for such things therein and if any such things be found to seize and carry then before me or some other Justice to be dealt with according to law."

During the execution of a search warrant issued under s465 of the *Crimes Act* 1958, S, a solicitor, claimed legal professional privilege. However, the police officer insisted on executing the warrant whereupon S made an attempt to prevent the seizure of documents and was arrested and charged with hindering police. At the hearing of the charge, the court agreed with S's submission that there was no case to answer on the ground that the warrant was invalid in that it had no indorsement on it as to legal professional privilege. Upon order nisi to review the dismissal of the charge—

HELD: (1) Per Murphy and Brooking JJ, Hampel J, dissenting: Order nisi absolute. Matter remitted to the magistrate for further hearing. Where a magistrate or justice issues a search warrant under the provisions of s465 of the *Crimes Act* 1958, there is no requirement for any indorsement to be made on the warrant relating to legal professional privilege.

***Arno v Forsyth* [1986] FCA; (1986) 9 FCR 576; (1986) 65 ALR 125, distinguished.**

(2) Per the Court: If on the execution of a search warrant issued under s465 of the *Crimes Act* 1958, a claim for legal professional privilege is made, the documents or things seized should be secured in some appropriate manner and taken to the issuing or some other magistrate or justice. The person before whom the documents or things are brought may then rule on the claim of privilege or allow the parties to obtain declaratory relief in the Supreme Court.

(3) Per Brooking J: If no question of privilege or other complication arises, the person before whom the seized things are brought may order their release into the custody of the investigating police officers and indorse on the warrant a note to that effect.

MURPHY J: *[After setting out the relevant legislative provisions, the facts, and cases concerning legal professional privilege, His Honour continued]*: ... **[18]** In *Arno v Forsyth* [1986] FCA; (1986) 9 FCR 576; 65 ALR 125 the warrant in question was issued under s10 of the *Crimes Act* 1914 (Cwlth.). The matter came on appeal to the Federal Court from a decision of Sweeney J ((1985) 63 ALR 130) declaring the warrant to be bad on its face and therefore void. Two things should he said immediately. Most of the documents mentioned in the warrant were the very type of documents (e.g. opinions) to which legal professional privilege would be expected to attach. Next, they were not identified, but the description simply encompassed all such documents prepared by Mr Forsyth, a barrister, between 1976 and 1982. Nor were the alleged offences precisely identified, save by reference to a large number of sections of the *Crimes Act* 1914 and the *Income Tax Assessment Act* 1936. Fox J thought that the question of privilege arose for consideration at the time that it was sought to execute the warrant, and not at the time of issue of the warrant, when any attempted characterization by the issuing justice would be futile. As to the procedure to be adopted to meet with the problem at the time of execution, His Honour thought that the whole matter may have to be the subject of legislation. Accordingly His Honour did not see that the warrant was invalid on the around that it authorized search and seizure of documents which may prove to be the subject

of legal professional privilege. **[19]** However, he did think it invalid because it was, "hopelessly wide and obscure" so that it "approximates a general warrant". With respect, I agree. Lockhart J grappled with the practical problem presented if the issue of legal professional privilege was thought to arise (as Fox J thought) only at the time of execution of the warrant, and attempted to suggest guidelines but not "hard and fast rules". (65 ALR at 136 *et seq*.)

It may be that on the facts of the case which was there being considered and having regard to the absence of any procedural provisions in s10, the issuing justice may be wise or perhaps required to give consideration to the steps contemplated by Lockhart J. But I see no requirement in the Act or Regulations going to validity of the warrant which lead to such a conclusion; and in my opinion it would place an almost intolerable burden upon the issuing justice in any particular case. Moreover, it would also put the constable executing the warrant in the unenviable position of having a duty to perform, and of not knowing in any particular case whether perhaps his warrant of authority was invalid, thus leaving him open to action for trespass. I do not see judicial legislation of the sort apparently envisaged to be necessary in order to reconcile the provisions of s10 of the Commonwealth *Crimes Act* 1914 with the fundamental common law principle of legal professional privilege, as being appropriate in any way to the provisions of s465 of the *Crimes Act* (Vic.).

I find myself, in any event, unable with respect to agree with Lockhart J that a warrant is bad, because it **[20]** fails somewhere to state the matters relating to legal professional privilege to which he referred. I do not accept that such a warrant fails to disclose jurisdiction on the face of the warrant. In the same case, Jackson J did not think it was open to say, at that stage of proceedings when issues of professional privilege had yet to be determined, that the warrant was bad on its face, because it referred to documents which might ultimately be held to he the subject of legal professional privilege. (65 ALR at 145-6)

In the New Zealand case, *Rosenberg v Jaine* [1983] NZHC 6; [1983] NZLR 1; (1983) 1 CRNZ the warrant in question was held to be too wide and general in its terms. As such it did not enable the solicitor to form a view whether the information sought from his appointments book was or was not the subject of legal professional privilege. However, Davison CJ went on to discuss the matter of "privilege" in some detail, and offered advice, "for the assistance of those who may have cause to consider the issue of warrants for search of solicitors' offices". This advice would accord with what I have set out above concerning a s465 warrant.

I would only point out that it may not always be a solicitor's office that is being searched, so as to cause a plea of legal professional privilege to arise. It may be his home or hotel room, and I would expect that the direction contained in the Victorian Statute, if followed, would enable either the executing officer or the solicitor to have the issue of the client's privilege ruled upon, before any breach of any such privilege occurred.

[21] Unless the document or thing is carried without intermediate interference by way of inspection for identification, and without copying or the like, I would, as I have said, understand that the terms of the warrant have not been followed, and the executing officer would expose himself to action. It would seem therefore appropriate that a solicitor who *bona fide* and reasonably claimed that the documents were entitled to legal professional privilege, upon making such a claim upon the execution of a s465 warrant under the Victorian *Crimes Act* 1958, would be entitled to place such documents in an envelope or box, and to accompany the same with the executing officer to the issuing justice or to any other justice, there to argue the issue or to have the documents detained until a definitive ruling can with due expedition be obtained. If such a course was taken, I doubt that it could be argued that the executing officer was hindered in the execution of his duty. In summary then in the present case, there was in my opinion nothing in the Appendix of documents annexed to the warrant to suggest to the issuing magistrate that they might be the subject of legal professional privilege (assuming of course that the Magistrate was *au fait* with the most recent of the High Court's pronouncements on this vexed matter). We do not know what the issuing magistrate thought. There is nothing in the Victorian Act or Statutory Rule *Crimes (Form of Search Warrant) Regulations* 1972 SR 242 which suggests that any indorsement should be made on a warrant relating to legal professional privilege.

The submission made that such an indorsement is required on **[22]** every search warrant

that is issued in relation to any solicitor's premises cannot in my opinion be accepted. The warrant is as required, in the prescribed form. It "shall be as follows:". There is no evidence that has been advanced in support of the claim for legal professional privilege, and it seems highly unlikely that any of the documents qualify as being so privileged.

In any event under s465 of the Victorian Act, the constable executing the warrant is required, on seizing the relevant documents, "to carry them before me or some other justice to be dealt with according to law". If a claim for legal professional privilege is made, on execution of the warrant, then it would appear appropriate that the justice to whom the documents are "carried", if any doubt as to the law, should give the claimant to privilege or the solicitor (for it is the client's privilege and not that of the solicitor), or the executing constable (as the case may be) the opportunity to obtain a court ruling, before disposing of the documents in any way at all.

If the parties do not have faith in one another, (as may well be the case) then upon a solicitor, on execution, taking the objection, the documents could he secured in some way (say in a box or in an envelope) and both parties could go to the justice, to whom the situation could be explained, and he could then rule upon the matter, if this was possible, and give the parties the opportunity to obtain a court ruling, before he dealt with the documents carried to him according to law.

A similar procedure was adopted in the factual situation that arose in *Descoteaux v Mierzwinski* 141 DLR **[23]** (3d) 590 at 595, 620. That case was a decision of the Supreme Court of Canada comprising seven justices, the judgment being delivered by Lamer J. There, the provisions of the *Criminal Code* (as referred to above) were almost identical with s465 of the Victorian *Crimes Act* 1958, but the Act spelt out the way in which the justice, to whom the document after seizure was carried, should deal with the document "according to law". Lamer J did outline what he said an issuing justice should do, in the Canadian environment, before issuing a warrant. A study of the case reveals that the provision for an independent person to be present was important. He thought that the justice should be "particularly demanding" (above reference at 617), bearing in mind that it was a solicitor's office to be searched, and the confidentiality of communications made to a lawyer by his client should be considered.

It would seem that in Canada, legal professional privilege is more extensive than in Australia. Lamer J mentioned that "some have expressed the view that Parliament rather than the courts should set guidelines for searching lawyer's offices". (at p618) I agree, with respect, with those who have expressed this view, and have only condescended to the detail set out above because it appears to be entirely consistent with the statute, and to accommodate and perhaps satisfy in the Victorian clime some of the practical difficulties which some of the cases have shown to exist, particularly in the operation of the Commonwealth *Crimes Act* s10.

Bearing all these considerations in mind it is my opinion that, the warrant in the present case was not "bad on **[24]** its face" simply because it did not bear an "indication on the warrant as to legal professional privilege", and the Magistrate in so finding was, in my opinion, in error. It was also submitted that once the solicitor made a general claim for professional privilege attaching to all documents, the authority of the warrant ceased, and the executing officer should have called "a stand off", until the issue could be resolved.

Something may depend upon just what is meant by a "stand off", for it is the duty of the executing officer to execute the warrant reasonably. But I fail to see why, if the solicitor simply claims professional privilege for all documents, the authority of the warrant ceases, so that the executing officer thereafter has no warrant to proceed.

I would be inclined to accept that, if the executing officer took any step in connexion with the documents seized, other than to carry them directly to the justice, he would he acting in excess of his authority. Then, before the justice, it would be his duty to explain to the justice even if the solicitor was not present, that a claim for legal professional privilege had been made in respect of the document. Here, once again, if he did act in any manner which was found to infringe the protection, in fact attaching to the document because it was the subject of legal professional privilege, he would also be acting in a manner rendering him liable to action. No doubt, the justice, if in any doubt about the document would fix some reasonable time in the circumstances within

which the relevant party could commence proceedings in the Supreme **[25]** Court to determine the disputed issue, and in the meantime secure the material.

In the circumstances of this case, I do not agree that the executing officer was acting under an invalid warrant, simply because the respondent said that he claimed professional privilege for all documents. Mr Thomson sought to uphold the Magistrate's decision that the warrant was invalid on the ground that it was too wide and uncertain. I do not accept his submission that the statement of the indictable offence was defective. It conformed with the Statutory Rule in form, and was sufficiently clear. As to the Appendix, I accept the warning expressed by Lockhart J in *Arno v Forsyth* [1986] FCA; (1986) 9 FCR 576; 65 ALR 125 at 139, namely –

> "When investigations are proceeding ... it may be impossible to define documents in search warrants other than in rather general terms. If the terms are so general or vague as to suffer from the vice of a general warrant then plainly it is bad; but it must be remembered that at the tine the warrant is issued the matter is obviously in an investigatory stage and there will not be sufficient evidence in a form admissible at a criminal trial to prove the alleged offences". (65 ALR at 139)

I would only substitute "may be" for "is obviously" and "may" for "will" after "is issued" in that last sentence. I do not think that the warrant here bears any comparison with the warrant being considered in *Forsyth's Case*.

Finally, it was put that the solicitor here was acting reasonably and, by consent, the transcript of what transpired between the executing officer and the solicitor/respondent was produced to the court. It was **[26]** submitted that pursuant to s93 of the *Magistrates' Courts Act* 1971 (Vic.), it was appropriate to do so, for this material was before the Magistrate in the court below.

Having read this transcript, it becomes apparent that the executing officer acted most reasonably, repeatedly asking for co-operation. The solicitor was given the opportunity, which he took, to consult the Law Institute and two other legal advisers. He refrained from going to court, although threatening to do so. Eventually, after a long period, the solicitor simply said, "You are not taking any documents, it's as simple as that". A little later, he said -

> "I don't know the documents here ... what I have ... other documents, I don't think they are of any significance, so I don't think that as far as he is concerned it makes much difference ..." and "I am just wondering whether it's worth the hassle because there is really nothing in these documents".

After some further coming and going, the executing officer insisted on executing the warrant and the solicitor said – "You are not, I am going to stop you". He was told that he would be arrested if he did and said, "Look you are not going to execute that warrant". There was evidence in the affidavit material that the respondent put his right arm around the neck of Sergeant Vickers as he was about to put his hand on a file and further that he lunged at Sergeant Vickers, pulling him back. In these circumstances, it is not possible to sustain a submission that the executing officers acted unreasonably, and the transcript of the tape supports the **[27]** evidence, *aliunde*, that the respondent hindered the said Vickers in the execution of his duty.

In my opinion, the circumstances of this case suggest that the procedure required by s465 in connexion with search warrants may not in all cases be carried out to the letter. In fact it has been murmured, although there is no evidence to this effect, that police executing s465 search warrants rarely carry the things seized to the issuing justice or any other justice as the Act and warrant order, before appropriating the things seized. Should this he so, it is illegal, and would probably expose the police to action for trespass, for failure to follow the simple and clear terms of the warrant requiring the executing constable to carry the things seized to the issuing justice or any other justice to be dealt with according to law.

This was not made the subject of attack in this case, but in the light of what has been suggested, and having regard also to the view that I have formed of s465 and of the warrant issued pursuant to it, it would be as well that any warrant issued under s465 is followed to the letter of its instruction. Otherwise, it would seem that action would lie. Similarly, it is the duty of the issuing justice or the justice to whom the things seized are carried, to deal with them according to law. This is not a duty which can be treated as a formality particularly in the light of the matters

discussed in these reasons for judgment. I would order that the Order Nisi be made absolute, the order below set aside and the matter be **[28]** remitted to the Magistrate to be dealt with according to law.

BROOKING J: ... **[35]** It is asserted that the police have for years ignored the command in a warrant under s465 that the things seized be carried before a justice. Perhaps they have: I do not know. The indorsement of a return on the warrant as to the manner of its execution is no substitute for the **[36]** carrying required by the warrant. And the command of the warrant is categorical: an officer may not ignore that command and simply retain in his possession what he has seized (*R v Container Materials Ltd* (1941) 3 DLR 145 at pp174-6). Whether the property may be notionally carried before the justice need not now be considered. Whether or not notional carriage is sufficient, what is necessary is that the matter be brought before a justice. In what I will call the ordinary case, where no question of privilege or other complication arises, it would be appropriate for the justice before whom things seized were brought to release them for the time being into the custody of the investigating police officers, and desirable that he indorse on the warrant a note that he has so dealt with them.

I agree that the order proposed by the learned presiding Judge should be made.
