

54/94

## SUPREME COURT OF VICTORIA

***FREEMAN v BATESON***

Beach J

10, 15 November 1994

**SEARCH WARRANT – FORM OF WARRANT – OFFENCE/THING SOUGHT MUST BE IDENTIFIED – MEDICAL PRACTITIONER – SUSPECTED OF OBTAINING PROPERTY BY DECEPTION – MEDICARE RECORDS SOUGHT – WHETHER WARRANT SUFFICIENT: *CRIMES ACT 1958*, s456(1).**

**1. When issuing a search warrant under s456(1) of the *Crimes Act 1958*, a Magistrate should be satisfied that the warrant sufficiently particularises the suspected offence and sets out the description of the article, thing or material sought to be seized.**

**2. Where a search warrant specified the suspected offence as obtaining property by deception by a medical practitioner and sought Medicare records, the warrant was not worded in unjustifiably wide terms.**

**BEACH J:** *[After setting out the relevant provisions of s456(1) of the Crimes Act 1958, the evidence given in support of the warrant and the grounds of injunctive relief sought, His Honour continued] ... [5] Where a search warrant has been issued by a Magistrate, in the absence of evidence to the contrary, I think this Court is justified in assuming that before the Magistrate issued the warrant he was satisfied of one or more of the matters specified in subs(1) of s465. The form of each search warrant is that prescribed in the schedule to the Crimes (Form Search Warrant) Regulations 1992 (SR 141 of 1992).*

The form contains a number of boxes to be filled in by the applicant for the warrant. The first box is under the heading "name and description of article, thing or material". In the case of the warrants issued on 28 October 1994 the words inserted in each box are "medical records and other documents". In the case of the warrants issued on 3 November the words are simply "medical records".

In *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246, the High Court considered the question as to what description should appear in a search warrant concerning the article thing covered or material the [6] warrant. At CLR p117 the court said:

"A thing must be identified either as an object or as an object which answers a particular description. It is by reference to the means of identification of the object of the search that the sufficiency of both reasonable grounds for suspecting and reasonable grounds for believing must be judged. Where a specific object is identified, the question whether there are reasonable grounds for believing that, if it exists and is found, it will afford evidence as to the commission of an offence, is a discrete question to be answered according to the facts set out in the complaint. Where the object is identified by the description, the broader and less specific the description the more difficult it is likely to be to satisfy the requirement of reasonable grounds for believing that a thing answering the description will afford evidence of the commission of an offence. Conversely the narrower and more specific the description the more difficult it may be to satisfy the requirement of reasonable grounds for suspecting that the designated object is in the particular location:"

Later at p118 the court said:

"It may be suggested that the emphasis upon description of the object of the search proposed to be conducted pursuant to a search warrant constitutes little more than a play on words. But that is not the case. The warrant, if issued, authorises entry to search for the described object and authorises the seizure of any object which comes within the particular description. In other words, the description of the object of the search is a reference point for delimiting the scope of the warrant. The wider and less specific the description of the object, the wider will be the powers of seizure which the warrant confers. On the other hand, as has been seen, the wider and less specific the

description of the designated object the more difficult will be the task of persuading the justice that there are reasonable grounds for belief that the object so described will, if found, afford evidence of the commission of the particular offence. Thus, the requirement of reasonable grounds for believing in para (b) performs the important function of preventing the authority to search and seize which a warrant confers from being worded in unjustifiably wide terms".

The point was considered by the Full Court of this court in *Allitt v Sullivan* [1988] VicRp 65; (1988) VR 621. At p647 Brooking J said:

"What does the description of thing or things require in the present context. It must be [7] emphasised that we are not concerned with whether the material placed before the issuing Magistrate enabled him to be satisfied as recited in the warrant. That material was not before the Magistrates' Court and is not before us. The question is one of sufficiency of description. Read literally a description may be extremely wide without being vague. Some of the descriptions in this warrant are very wide, for example, 'all check butts commencing 1/5/82 until 16/7/85' but the Magistrate was satisfied as mentioned in the recital and read literally the description is ambiguous if the dates are intended to be the dates borne by the butts. The category is very wide but the description is clear enough to permit the identification of the executing officer.

The same may be said of the item 'all receipts commencing 1/5/82 until 16/7/85'. But, unless item 17, is by reason of its context, to be limited to bank deposit books, it contains a description too imprecise: 'All deposit books commencing 1/5/82 until 16/7/85'. I think it may fairly be read as limited to bank deposits books.

Items 27 and 28 are of doubtful meaning as a result of the words 'purporting to be', but as no argument was founded on this I say no more about it".

In my opinion in the context of this case the description of the article thing or Medicare fraud offences, were such as to require an examination of the whole of material, namely Medicare records whilst extremely wide is not vague. The nature of the offences the police believed Dr Freeman had committed, in particular his medical records. It was Dr Freeman's medical records which the police believed would afford evidence as to the commission of those offences.

In my view it was unnecessary for the police to identify those records with any greater degree of particularity than they did. As to the words "and other documents" appearing in the three warrants issued on 28 October 1994, in my opinion they do not sufficiently particularise the documents sought or limit the documents sought. If that was the sole description of the articles, [8] things or material sought by those warrants I consider that the warrants would have been invalid. However, if those warrants were otherwise valid I do not consider that the inclusion of those words in them is sufficient to render them invalid. The question as to the identification of the suspect offence in a warrant was also considered by the Full Court in *Allitt's* case. At p624 Murphy J said:

"It was argued that the warrant failed to give sufficient particulars of the "indictable offence to wit" but the form itself states at its base "Insert indictable offence" and the words "Blackmail - Traffic Drug of Dependence" then appear in the warrant as issued. I do not think that there is anything in this criticism of the warrant's form".

At p646 Brooking J said:

"In my opinion a warrant under s465 need state only the legal nature of the offence and in this regard the present warrant is sufficient."

The present warrant stated in the box headed "Reasons for search/suspected offence - "Obtained property by deception". "Trafficking in a Drug of Addiction". In my opinion they sufficiently state the nature of the suspected offences and in that regard I consider the warrants are sufficient.

Finally it is said that an unauthorised person took part in the search of the premises at Toorak on 31 October. In that situation it is said that there was an illegal seizure of the documentation from those premises and the documentation should be returned to the plaintiffs. This suggestion is based upon material set out in the affidavit of Detective Senior Constable Robert Pama, sworn 10 November 1994. The relevant paragraphs of which read: [9]

"(13) The study was in an untidy state with documents strewn over the desk and various tables and cupboards. I assigned Senior Constable Sheridan to keep a log of items seized. I assigned Constable Pett to look through the desk that was located in the centre of the room. Mr Vidler and I then commenced to search the cupboards located on a wall immediately behind the desk. Mrs Freeman had with her a pad of paper. She took a seat immediately in front of the desk and asked for our names which we gave.

(14) During the course of our search we placed certain items in plastic bags and they were duly logged by constable Sheridan. Mr Vidler assisted specifically with advice in respect of items that related to Medicare.

(15) Mrs Freeman remained seated in the centre of the room during the entire search and was taking notes. As the seized items were placed in plastic bags they were shown to Mrs Freeman. Mrs Freeman at no time asked for a list.

(16) During the search I observed a number of boxes containing a very large quantity of S4 drugs. I contacted Mr Thirlwall (who was a member of the team attending the North Melbourne premises on that date) by mobile phone. Mr Thirlwall told me that it was not necessary to seize those drugs but that a photograph of those drugs would be sufficient. In addition, Mr Vidler informed me that photographs of certain Medicare items would be sufficient rather than seizure of items. Accordingly, I took a number of polaroid photographs of the drugs and of other items located in the study. Mrs Freeman at no time objected to the taking of those photographs and she was quite well aware that they were being taken".

Mr Vidler is an investigator employed by the Health Insurance Commission. It is clear from Detective Pama's evidence that he was present at the premises at Toorak with a view to identifying documentation relevant to the Medicare fraud in which the police believed Dr Freeman had been involved. I can find no justification for the contention that his presence invalidated the warrant or rendered the seizure of the documentation in question illegal.

**[10]** The findings I have made thus far are sufficient to dispose of this application. However, I wish to make one final observation. In my opinion it is only in exceptional circumstances that this court will step in and in the exercise of its Civil Jurisdiction impede the process of a criminal investigation. If there has been an illegal seizure of documentation and I am satisfied there has not, there are adequate processes of the criminal law itself to provide protection for the plaintiffs. Even if I had been satisfied that it was seriously arguable that search warrants or some of them were invalid in the exercise of my discretion I would not have granted the injunctive relief sought.

The reality of the situation is that immediately following the delivery of a judgment to that effect the police could obtain fresh warrants and re seize the documents presently in the custody of this court and the Magistrates' Court.

The plaintiffs' application is refused. Paragraph one of my order of 4 November 1994 is vacated. I order that the defendants' costs of the present application be taxed and when taxed paid by the plaintiffs.

**APPEARANCES:** For the plaintiff Freeman: Mr PG Nash, QC with Mr I Miller, counsel. HS Wise Gershaw & Co, solicitors. For the defendant Bateson: Mr M Phipps QC with Mr P Sest, counsel. Victorian Government Solicitor.