

1/98; [1997] VSC 40

SUPREME COURT OF VICTORIA

**LONG v MAGISTRATES' COURT of VICTORIA**

Gillard J

29 August, 4 September 1997 — (1997) 96 A Crim R 149

**PRACTICE AND PROCEDURE – SEARCH WARRANT – PRE-CONDITIONS TO ISSUE OF – IF PRE-CONDITIONS SATISFIED WHETHER MAGISTRATE HAS DISCRETION TO ISSUE OR NOT – IF DECISION MADE TO ISSUE WHETHER MAGISTRATE BOUND TO ISSUE WARRANT IN PRESCRIBED FORM: *CRIMES ACT 1958*, s465; *CRIMES (FORM OF SEARCH WARRANT) REGULATIONS 1992*, R5; *MAGISTRATES' COURT ACT 1989*, ss57, 75, 77, 78.**

**HELD:** (1) Before a search warrant can be issued under s465(1) of the *Crimes Act 1958* ('Act'), the magistrate must be satisfied on the evidence of one or more of the matters set out in paras (a), (b) or (c) of the sub-section. If so satisfied, the magistrate has a discretion whether to issue the search warrant or not. However, the discretion must be exercised judicially and to give effect to the object of the section.

(2) If the magistrate decides to issue the search warrant, it must be issued in the form which is set out in the Regulations. The magistrate has no power to delete any part of the prescribed form of search warrant.

(3) Accordingly, where a magistrate issued a search warrant with the power to arrest deleted from the warrant, the warrant was void and of no effect. Further, where a magistrate was satisfied of the pre-conditions set out in s465(1) of the Act but declined to issue the warrant with a power to arrest, the magistrate was in error.

**GILLARD J:** [1] This is the return of a summons dated 25 July 1997 pursuant to an originating motion seeking relief in the form of mandamus and declaration pursuant to Order 56 of the Rules of Court. The plaintiff is a Detective Senior Sergeant of Police in the Major Fraud Group. The defendant is the Magistrates' Court of Victoria constituted by Magistrate, Mr Braun.

Under s465(1) of the *Crimes Act 1958* ("the Act") a magistrate is empowered to issue a search warrant. Section 465(4) provides:

"(4) The Governor in Council may make regulations prescribing the form of any warrant to be issued under this section and any such regulations shall be published in the Government Gazette and shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament is then sitting, and if not then within fourteen days after the next meeting of Parliament."

Regulations have been made pursuant to the sub-section. They are *Crimes (Form of Search Warrant) Regulations 1992* ("the regulations"). The form is set out in the schedule. In support of the summons the plaintiff swore an affidavit on 25 July 1997 and David Justin Foster, a legal practitioner attached to the Major Fraud Squad swore an affidavit on the same date. The documents were served on the Magistrate, Mr Braun, and by letter dated 11 August 1997 the Deputy Chief Magistrate indicated that the magistrate would enter an appearance and abide the court order.

Mr G Silbert of counsel appeared for the plaintiff. On 20 May 1997 the plaintiff applied to Mr Braun for a search warrant pursuant to s465 of the Act. He supported [2] the application by an affidavit which he had sworn on 20 May 1997. The proposed warrant was addressed to a bank. The plaintiff wished to access documents held by the bank as part of his inquiry into a loss, as the result of an offence, suffered by one Sydney Leslie Le Huray, a person incapable of controlling his own affairs. The proposed search warrant was in the form as prescribed in the regulations. The unsigned warrant and supporting affidavit were faxed to the defendant who was the Duty Magistrate at Prahran Magistrates' Court on 20 May 1997. This was in accordance with the usual procedure. The defendant dealt with the application in chambers without the necessity of any

appearance, signed the search warrant and returned it to the plaintiff. The defendant deleted parts of the search warrant. The defendant deleted the portion of the warrant which empowered the person authorized to arrest any person having possession, custody or control of the article, thing or material. It is contended that the deleted parts of the search warrant are necessary for the effective execution of it and the defendant, once he had decided to issue the search warrant pursuant to s465(1) of the Act, was bound to issue it in the form which is the form set out in the regulations. Regulation 2 provides –

"The objective of these Regulations is to prescribe a new form of search warrant issued under section 465 of the *Crimes Act 1958*".

Regulation 5 provides –

[3] "A warrant issued by a magistrate under section 465 of the *Crimes Act 1958* must be in the form in the Schedule" (My emphasis).

The schedule follows immediately under Regulation 5 and the form the plaintiff proffered to the defendant for signature was the prescribed form. The plaintiff's submission is simply put. Regulation 5 is expressed in mandatory terms. The form as prescribed must be used and the magistrate had no power to delete any part of the prescribed form of search warrant.

On 22 May 1997 Mr Foster appeared before the defendant and submitted that what the magistrate had done was contrary to the law, and the warrant was void and of no effect. He produced and relied upon a copy of an order made by Beach J on 21 December 1995 in the matter of *Grima v Hender* in which His Honour had declared a search warrant with deletions similar to the deletions in the present matter void and of no effect. The hearing was adjourned to 29 May. On that day the defendant, following the order of Beach J, cancelled the search warrant he had signed in the amended form on 20 May. He was requested to issue a fresh warrant in an unamended form. He then gave reasons why he would not issue the search warrant in an unamended form and refused the application to issue the further warrant. The reasons are summarized in paragraphs 29 - 34 (inclusive) of the affidavit of Mr Foster. In essence the defendant stated he had a discretion whether to issue the warrant or not, and since there was [4] no evidence before him to warrant or justify a search warrant being issued with a power to arrest a person who has possession of documents, he declined to issue it. Mr Foster submitted that the police had to seek the issue of a warrant in the prescribed form. He stated it was expected to be a "friendly warrant" in the sense that it was not envisaged that any person would be arrested. The language used in the prescribed form is direct, strong and blunt. It authorizes members of the Police Force –

"to break, enter and search any place named or described in this warrant for any article, thing or material of any kind described in this warrant; and to arrest any person apparently having possession, custody or control of the article, thing or material".

Where the premises to be searched are occupied by a bank and it was expected that the entry and seizure would be as a result of prearrangement the language is singularly inapt and one can readily understand why a magistrate was reluctant to issue the warrant in that form. I have been informed that many search warrants have met the same fate as the one issued on 20 May, i.e. issued with deletions. On 29 May 1997 the magistrate stated that he was satisfied that all the preconditions for the issue of the warrant had been established and he would have issued the warrant but was not prepared to do so because the warrant gave the right to arrest.

At the outset it must be emphasized that there are two discrete functions, the first is the issue of the search warrant; the second is execution of the warrant by the person authorized to execute it. [5] The Common Law did not give the right to issue a search warrant except in cases where the search of premises was for the purpose of seizing stolen goods. The law did not permit a person to enter private property without the permission of the occupier – see *Entick v Carrington* [1765] EWHC J98 (KB); [1765] EWHC KB J98; [1765] EWHC J98; [1558-1774] All ER 41; 95 ER 807; (1765) 19 St Tr 1030. Legislation has created many exceptions to the Common Law position. In construing and applying the statutes account must be taken of the fact that the legislature is authorizing the invasion of common law rights. The words of the statute must expressly or necessarily produce the result before a court can countenance an interference with the rights. See *Black-Clawson Ltd v Papierwerke AG* [1975] UKHL 2; [1975] AC 591 at 650; [1975] 1 All ER 810; [1975] 2 WLR 513. Accordingly, strict compliance with the legislation as to the issue and

execution of search warrants is required. In *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52at p81; (1983) 49 ALR 385; (1983) 57 ALJR 749; 14 ATR 713 Mason J described the search warrant as follows:

"The search warrant has been described as 'part of the investigative pre-trial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known' (*Attorney-General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175;(1982) 132 DLR (3d) 385 at 397, per Dickson J). Its function is to authorize a search and seizure of materials which will implicate a person in the commission of the offence. The search and seizure which it authorizes is designed, among other things, to yield evidence which can be tendered by the prosecution in the subsequent trial of a person for the offence described in the warrant."

Section 465 of the Act was introduced in a form very similar to the present by s8 of the 1910 *Crimes Act* No. 2306. The history of the legislation is set out in the judgment of Brooking J in *Allitt v Sullivan* [1988] VicRp 65; (1988) VR 621 at 634 - 636. Section 465(1) provides –

"Any magistrate who is satisfied by the evidence on oath or by affidavit of any member of the police force of or above the rank of senior sergeant that there is reasonable ground for believing that there is in any building, receptacle or place—

- (a) anything upon or in respect of which any indictable offence has been or is suspected to have been committed; or
- (b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or
- (c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any indictable offence against the person for which the offender may be arrested without warrant—

may at any time issue a warrant authorizing some member of the police force or other person named therein to search such building receptacle or place for any such thing and to seize and carry it before the Magistrates' Court to be dealt with according to law."

Before the magistrate may issue the warrant he must be satisfied on the evidence of one or more of the matters set out in paragraphs (a), (b) or (c) of the sub-section. I accept, even though he is so satisfied, he does have a discretion whether he should issue the search warrant or not. However, the discretion must be exercised judicially and to give effect to the object of the section. It is difficult to conceive of any circumstance which would justify a refusal to issue once the preconditions had been satisfied. As I have already stated, the magistrate was satisfied of the pre-conditions. S465 of the Act is the legislative authority for the issue of the search warrant. The procedures involved in the issue are also dealt with by ss57 and 75 of the *Magistrates' Court Act* 1989.

[7] The question here is – in the exercise of his discretion was the magistrate justified in refusing to issue the warrant in the form prescribed by the regulations? The magistrate refused because he was not prepared to invest the person who was to execute the warrant with the power to arrest a person. At this point it is important to note ss465 (2) and (3). They provide –

"(2) Subject to this section the rules to be observed with regard to search warrants mentioned in the *Magistrates' Court Act* 1989 shall extend and apply to warrants under this section.

(3) The provisions of this section shall be read and construed as in aid of and not in derogation of the provisions with regard to warrants to search contained in this or any other Act."

Sub-s(2) incorporates the provisions of the *Magistrates' Court Act* 1989. Division 3 of Part IV is concerned with warrants. Section 57(1)(c) authorizes the issue of a search warrant. Section 57(5) provides that a search warrant may only be issued by a magistrate. Subdivision (5) deals with search warrants. Section 75(1) provides –

"A search warrant may be issued as authorised by any Act other than this Act."

Section 77 provides in sub-ss(1) and (2) –

"(1) The person issuing a search warrant may endorse the warrant with a direction that any person arrested must be released on bail as specified in the endorsement.

(2) An endorsement under sub-section (1) must fix the amounts in which the principal and the sureties, if any, are to be bound and the amount of any money or the value of any security to be deposited."

This section presupposes there is a power to arrest on the execution of the warrant. Section 78 is an important **[8]** section because it spells out the authority given by the search warrant. Section 78(1)(b) provides –

"(1) A search warrant authorises the person to whom it is directed—

(b) if the warrant is to search for any thing—

(i) to break, enter and search any place named or described in the warrant for any article, thing or material of any kind named or described in the warrant; and

(ii) to bring the article, thing or material before the Court so that the matter may be dealt with according to law; and

(iii) to arrest any person apparently having possession, custody or control of the article, thing or material." (My emphasis.)

Section 78(2) provides –

"The person to whom a search warrant is directed must cause the person named or described in the warrant, or apparently having possession, custody or control of any article, thing or material named or described in the warrant, when arrested—

(a) to be brought before a bail justice or the Court within a reasonable time of being arrested to be dealt with according to law; or

(b) to be released on bail in accordance with the endorsement on the warrant." (My emphasis.)

It is noted that the Legislature authorizes the arrest of any person apparently being in possession, custody or control of the article, thing or material. It is s78(1)(b) which expressly states the ambit of the authority given to the person authorized to execute the warrant. His authority extends to arresting a person "apparently having possession, custody or control of the article, thing or material". This is the authority given by law and the legislation does not empower any person to exclude or diminish that authority. **[9]** Section 78(2) provides for what is to happen when the person is arrested. These provisions apply to the issue of a search warrant under s465(1) of the Act. The magistrate has no authority to exclude the power of arrest which is given by the *Magistrates' Court Act* 1989.

The form in the regulations merely gives effect to that legislative expression of the authority and the defendant had no power or authority to exclude it. The defendant was wrong in issuing the warrant on 20 May with the deletions and had no lawful basis for refusing to issue the search warrant on 29 May once he was satisfied the other pre-conditions were established. The wording of Regulation 5 reinforces that conclusion. The verbiage is mandatory and makes it clear that the form in the schedule must be used. Compare s53 of the *Interpretation of Legislation Act* 1984. The form itself provides for insertion of information but it does not, on its face, permit deletion. The form provides for the power of arrest.

A consideration of the purpose of a search warrant also confirms my opinion. The officer executing the warrant is expected to act reasonably in the execution. What is reasonable depends on all the circumstances. When it is expected there will be no difficulty in obtaining co-operation on execution of the warrant, and there is no concern the article, thing or material will be destroyed or disappear, the executing officer would be expected to make suitable arrangements for its execution. In those circumstances execution at an inconvenient hour to the occupier, forced entry and/or arrest would not arise. Officers executing the search warrant must act **[10]** responsibly, with care and avoid inconvenience, but the exigencies of the moment may require speed, forced entry, surprise visit and/or arrest. It is essential that any article, thing or material is not destroyed, lost, misplaced or removed by a mischievous person, and the executing officer must have all the powers given by the Legislature to prevent it happening. To curtail the authority to arrest because

it is expected to be a friendly execution of the warrant is to emasculate the object of the search warrant. By deleting the power of arrest the defendant was removing an important weapon in the armoury of the executing officer, who would use the power when the circumstances demanded it. Finally, the history of the legislation supports my conclusion. Section 465 of the Act was introduced in 1910 and has remained in much the same form ever since. However, the regulations and form have changed.

Regulation 2 of the 1967 regulations (SR 194 of 1967) provides –

"The form of any warrant issued by a stipendiary magistrate or justice under section 465 of the *Crimes Act* 1958 shall be as follows:–"

The regulations of 1972 which repeal the 1967 regulations are in the same form and prescribed the same form as the 1967 regulations. The form provided for insertion and also deletion of details. The regulations and the prescribed form did not include any reference to arrest and they required execution during the day only. That was the position on the eve of the passage of the 1992 regulations. Prior to the passage of the *Magistrates' Court Act* 1989 the reference in the *Crimes [11] Act* 1958 in s465(2) was to the *Magistrates (Summary Proceedings) Act* 1975. S13(1) (c) of that Act provided –

"13.(1) The following rules shall except where otherwise expressly enacted be observed with regard to warrants:—

(a) ... (b) ...

(c) A warrant to search for any thing shall authorize the persons to whom it is directed to break enter and search by day (or by night if the issue of the search warrant for execution at night is authorized by law) any dwelling-house tenement ship vehicle or place named or described in the warrant for any instrument article thing or material of any kind named or described in the warrant and to bring it together with any person apparently having the possession, custody, or control thereof before the justice issuing the warrant or before some other justice or before some Magistrates' Court to be dealt with or disposed of according to law;"

The sub-section authorized "the bringing" of any person apparently having possession of the "article thing or material" before a justice or a Magistrates' Court. However, this power was not included in the form of warrant prescribed by the 1972 regulations. This Act was repealed and s78 of the *Magistrates' Court Act* 1989 authorized the arrest of any person apparently having possession etc. of the article, thing or material. In *Allitt v Sullivan (supra)* the court considered the state of the legislation in 1987 i.e. s465 of the Act, s13(1) the *Magistrates (Summary Proceedings) Act* 1975 and the 1972 regulations. At page 637 Brooking J stated –

"Sub-section (2) of s465 provides that, subject to the section itself, the rules to be observed with regard to search warrants mentioned in the [12] *Magistrates (Summary Proceedings) Act* 1975 shall extend and apply to warrants under the section. By s13(1) of the latter Act rules are laid down which shall, except where otherwise expressly enacted, be observed with regard to warrants. Rules are then set out in five paragraphs, each relating to a different kind of warrant. By para (c), a warrant to search for any thing shall authorise the persons to whom it is directed to break enter and search and to bring what is seized 'together with any person apparently having possession, custody, or control thereof before the justice issuing the warrant or before some other justice or before some Magistrates' Court to be dealt with or disposed of according to law'. Whether this provision is concerned with the terms of a warrant or its effect is perhaps not clear. Be that as it may, nothing turns in the present case on whether the warrant authorised the taking of a person who apparently had possession, custody or control of the things seized." (My emphasis.)

In my opinion the new Act of 1989 and the regulations of 1992 were designed to put beyond doubt what the authority was of an executing officer. Any doubts about the right to take into custody any person in possession of the article were removed. The Legislature intended the executing officer should have the power of arrest and used language which made it clear it was mandatory to issue the warrant in the form set out in the regulations. It follows, in my opinion, the defendant was wrong in issuing the search warrant in the amended form on 20 May 1997 and I will make a declaration and give effect to that conclusion. He was also wrong in refusing to issue the search warrant when requested on 29 May 1997 and I will make an order in the nature of mandamus to compel him to issue the warrant.



The summons also sought relief in the nature of mandamus in respect of all future applications to the defendant for the issue of similar search warrants. I am not prepared to make an order in respect of future **[13]** applications. The court is concerned with the resolution of disputes between parties and will not make an order in respect to future matters which at this stage are purely hypothetical. I expect, however, that magistrates will issue search warrants in accordance with the legislation and these reasons.

In accordance with these reasons I am prepared to make the following orders:

- (1) That the plaintiff have leave to commence this proceeding by originating motion in accordance with Form 5C.
- (2) That the requirements of Rules 5.03(1) and 8.02 of the Rules of Court be dispensed with.
- (3) That there be a declaration that the search warrant issued by the defendant on 20 May 1977 on the application of the plaintiff and which was amended by the defendant is void and of no effect.
- (4) That there be a declaration that the defendant erred in law in refusing to issue a search warrant on the application by the plaintiff on 29 May 1997.
- (5) That the defendant issue the search warrant being Exhibit TPL-2 to the affidavit of Tony Peter Long sworn 25 July 1997.

**APPEARANCES:** For the Plaintiff: Mr G Silbert, counsel. Victorian Government Solicitor.

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