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SUPREME COURT OF VICTORIA

R v SING & ANOR; ex parte HARRISON

Southwell J

15 June 1979 — (1979) 36 FLR 322; noted 54 ALJ 427

CRIMINAL LAW – PROCEDURE – SEARCH WARRANT – FORMAL VALIDITY – NECESSITY FOR ISSUING JUSTICE TO READ AND COMPREHEND MATERIAL IN SUPPORT OF APPLICATION FOR ISSUE OF WARRANT – WARRANT PURPORTING TO AUTHORIZE SEIZURE OF ALL BOOKS AND DOCUMENTS OF NAMED COMPANIES TOO WIDE – WARRANT FAILING TO DISCLOSE ON ITS FACE IDENTITY OF PERSONS SUSPECTED OR IDENTITY OF DOCUMENTS SOUGHT BAD – DISPOSITION OF DOCUMENTS SEIZED UNDER INVALID WARRANT – NOTICE OF ACTION – TORT – TRESPASS – DETINUE – CONVERSION – ABUSE OF PUBLIC OFFICE – ACTS OF COMMONWEALTH POLICE IN PURPORTED PURSUANCE OF INVALID WARRANT – NOTICE REQUIRED TO BE GIVEN BEFORE ACTION – PREROGATIVE WRITS – *CERTIORARI*: *CRIMES ACT* 1914 (CTH); *COMMONWEALTH POLICE REGULATIONS* (CTH), RR56, 59.

Mr Sing, a member of the Commonwealth Police Force, swore an information before a justice of the peace in support of an application for the issue of a search warrant pursuant to the *Crimes Act* 1914 (Cth) s10. The justice referred to the sworn information as "a load of garbage which (the justice) didn't have to read" and issued the warrant. The warrant purported to authorize Mr Sing to enter certain premises and seize "company books, documents, records, banking documents, bank records and other documents or other instruments as to which there are reasonable grounds for believing that the same will afford evidence as to the commission of offences against" six specified regulations under the *Banking (Foreign Exchange) Regulations* (Cth). The persons suspected of offences were not named. Mr Sing entered premises in purported pursuance of the warrant. An action was commenced for trespass, detinue, conversion and abuse of public office and interlocutory injunctions were sought in the action. The action was commenced without the notice required by reg 59 of the *Commonwealth Police Regulations* having been given. An order nisi for a writ of *certiorari* to quash the warrant was also obtained. During the course of the hearing Mr Sing obtained a further warrant ("the second warrant") to enable him to obtain possession of some of the documents seized from his (Mr Sing's) superior officer in the Commonwealth Police Force, to whom he had handed over the documents. Upon the hearing of the applications for interlocutory injunctions and on order absolute for *certiorari*—

HELD:

1. No interlocutory injunction should be granted because, by reason of the failure to give the notice required by r59 of the *Commonwealth Police Regulations* the plaintiffs could not be said to have a fair probability of success in the action.

2. The order nisi for a writ of *certiorari* should be made absolute because the warrant was bad for the following reasons:

(i) the issuing justice of the peace failed to read and comprehend the information.

***Electronic Rentals Pty Ltd v Anderson* [1971] HCA 13; (1971) 124 CLR 27; [1971] ALR 513; 45 ALJR 302, applied.**

(ii) the warrant was too general in that it did not identify the persons suspected of offences or sufficiently state the particulars or limit documents sought.

***R v Tillett; Ex parte Newton* (1969) 14 FLR 101, discussed.**

3. The respondent was entitled to retain possession of the documents obtained by execution of the second warrant. Accordingly no order should be made for return of the documents.

SOUTHWELL J: *[after stating the facts, His Honour continued]* … Mr Liddell QC, who appeared for Mr Sing took a preliminary objection based upon regs 58 and 59 of the *Commonwealth Police Regulations* made pursuant to the *Commonwealth Police Act* 1957-1966.

Mr Ormiston QC, who appeared with Mr Myers for the plaintiffs and prosecutor (whom I shall hereafter call the plaintiffs) submitted firstly that the regulations were *ultra vires* on the basis that the regulations were so wide that having regard to he nature and purpose of the Act as a whole, they could not be said to be either necessary or convenient within the meaning of those words in s13.

I believe there is much force in the plaintiffs' submission in relation to r58. But it is

not necessary for me to decide the point, because I am not satisfied that r59 is *ultra vires*. Inappropriate though it may be thought to use subordinate legislation to impose such restrictions and requirements as exist in r59, when examined carefully the regulation does no more than require notice before action to be given; and even if the question of the time limit of six months were relevant to this case, which it is not, the court has wide powers to extend the time. The regulation does not prohibit action, nor does it purport to deprive a citizen of a right to sue. It merely provides for notice to be given prior to action, although the regulation may also have the effect of limiting the period in which actions may be brought.

I note the strength of Mr Ormiston's comment that a reading of the case of *R v Tillett; Ex parte Newton* (1969) 14 FLR 101, which dealt with a somewhat similar search warrant issued pursuant to s10 of the *Crimes Act*, indicates that the Commonwealth. Solicitor-General Mr RJ Ellicott QC, did not take the same point. Perhaps he felt embarrassed about taking what might be regarded as an unmeritorious defence.

Mr Liddell's instructors apparently are not similarly embarrassed. In any event, the fact that a point is not taken in one case, for unexplained reasons, cannot affect the proper interpretation of the Act and the regulations. Suffice it to say that I am not satisfied that r59 is *ultra vires*. It is common ground that no notice within the meaning of that regulation was given. Although I cannot in these proceedings finally determine the action, it follows from what I have said that I cannot find that the plaintiff has a fair probability of success in the action, and I must therefore refuse to grant the relief sought, that is, an interlocutory injunction, and must therefore dismiss that summons.

So far as the *certiorari* proceeding is concerned, I am satisfied that it constitutes an action within the meaning of r59. But I am persuaded by Mr Ormiston's submission that the *certiorari* proceedings are neither in respect of an act done by Mr Sing in the execution of a warrant under r58 or an action in respect of an act done in pursuance of his duties under r59. The regulation cannot in any event be availed of by Miss Halpin. I therefore turn to consider the main issue, and that is the validity of the warrant. There is conflicting evidence as to what occurred at the time of the issue of the warrant. In that regard I am of opinion that the absence of any affidavit from Miss Halpin is highly significant. Part of the headnote in the case of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395) reads:

> "Any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence".

Menzies J said:

> "Evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence".

In my view the evidence relating to Miss Halpin's reference to "a load of garbage which she didn't have to read" is the type of allegation which is unlikely to have been invented, mistaken or misunderstood and it involves, in my view, a clear admission that she did not do what the law requires her to do, that is, read the whole of, and comprehend the material upon which, the application for the issue of a warrant was based: see *Electronic Rentals Pty Ltd v Anderson* [1971] HCA 13; (1971) 124 CLR 27; [1971] ALR 513; 45 ALJR 302.

It follows, in my opinion, that the warrant was not issued in accordance with the law, is void and ought to be quashed. Even if I am wrong in that finding, I am satisfied that another ground exists for quashing it, that is, it is too wide. I do not think it necessary to expand upon the remarks I made during discussion with counsel. On its face, the warrant authorizes a seizure of all books and documents relating to the companies. Even if the qualification imposed by reference to the regulation is considered, it is still, in my opinion, too wide. In that regard I refer to the case of *R v Tillett; Ex parte Newton* especially where Fox J says this:

> "If the operative part of the warrant were treated as qualified or limited by reference to the recital, so that the books, etc. referred to were those which might afford evidence as to the commission of an offence against the Commonwealth *Crimes Act*, the scope of the warrant would still be very wide".

And in particular I refer to the following words:

> "It would be almost as general as a search warrant relating to particular premises could be, and for reasons I will elaborate later, could in my opinion be wider than the section authorizes".

His Honour continues:

> "In my view, therefore, the authority given by the warrant had reference to all books, documents, etc. in the premises, without limitation. If this view is incorrect, it would at best relate to books, documents, etc. in the premises, as to which there were reasonable grounds for believing that they would afford evidence of an unspecified offence against the *Crimes Act*".

True it is, in the case before me, the offences are specified, but there is no hint, as I have said, of any identity as to persons, as to companies or as to the type of document which the search warrant relates to. Counsel could not advance any argument which persuades me why, in the circumstances of this case, there could not, or should not, have been some attempt at precision: great precision would rarely be possible and is not required by law and I do not purport to hold that under no circumstances might it be possible to uphold the validity of a warrant in this form. Here, reasonable precision in describing the document was possible and should have been attained. For those reasons I am of the opinion the warrant was too wide and for that reason alone ought to be quashed.
