

34/77

SUPREME COURT OF VICTORIA

R v CHIEF STIPENDIARY MAGISTRATE & ORS; ex parte WESTBURY

Jenkinson J

28 March 1977

PRACTICE AND PROCEDURE – ISSUE OF SEARCH WARRANT UNDER S465 CRIMES ACT IN RESPECT OF A COMMONWEALTH OFFENCE – REFERENCE IN WARRANT TO COMMON LAW CONSPIRACY – NO IDENTIFICATION OF THE OFFENCE CREATED BY THE COMMONWEALTH ACT – WHETHER MAGISTRATE IN ERROR IN ISSUING SEARCH WARRANT: CRIMES ACT (CTH), S86, PART III; CRIMES ACT 1958 (VIC), S465.

Information laid before C.S.M. that W. had conspired with N. to commit perjury in an application before the Family Law Court — that a file held in a solicitor's office containing documents as to the manager in question would afford evidence of such conspiracy. A search warrant was issued and executed. *Certiorari* was sought to quash the warrant on the grounds that there was no jurisdiction to issue that warrant couched in terms of s465 Victorian *Crimes Act*, because s86 Commonwealth *Crimes Act* created the offence of conspiracy to commit an offence under a law of the Commonwealth (the offence being against s35 Commonwealth *Crimes Act*) and the authority to issue a warrant for such offence would be under s10 of the Commonwealth *Crimes Act*.

HELD: Order nisi absolute. Application to quash granted. Warrant quashed.

1. The terms of the information and of the warrant left no room for doubt that the Magistrate was purporting, in issuing the warrant, to exercise the power conferred by s465 of the *Crimes Act* 1958. But the offence in relation to which the record – the information and warrant – showed the satisfaction required by s465 was not an offence. It was not possible to treat the words used in description of the offence as an informal description or identification of the offence created by s86 of the Commonwealth *Crimes Act*. Everything in the two documents indicated a reference to a common law conspiracy to commit common law perjury.

2. Satisfaction of the magistrate concerning an offence which was not in law an offence showed error vitiating jurisdiction.

JENKINSON J: ... If Part III and s86 of the Commonwealth *Crimes Act* had not been enacted, an agreement in Victoria between two or more persons, that one of them should do the acts which by the common law constituted the misdemeanour known as perjury before the Family Court of Australia, may have constituted the common law misdemeanour of conspiracy and, if it did, the parties would have been indictable in this State for that misdemeanour and punishable upon conviction by fine and imprisonment at the discretion of the court. If the conspiracy had been carried into execution and the acts done, he who had done them may have been indictable for the common law misdemeanour of perjury and liable to the punishment prescribed by s314(1) of the Victorian *Crimes Act*. (I put aside the possibility of considerations arising from s52 of the *Constitution*).

Part III and s86 of the Commonwealth *Crimes Act* having been enacted by the Commonwealth Parliament, such an agreement does not in my opinion constitute by force of any law of Victoria, statutory or common law, or by force of any other law in the Commonwealth but ss86 and 35 of the Commonwealth *Crimes Act*, the commission of the offence of conspiracy. Nor would the performance of such an agreement, after the enactment of Part III and s86 of the Commonwealth *Crimes Act*, constitute, by force of any law of Victoria, statutory or common law, or by force of any other law in Australia but s35 of that Act, the commission of an indictable offence. It is in my opinion, unnecessary for the purposes of this application for *certiorari* to determine whether those consequences of the enactment of Part III and s86 of the Commonwealth *Crimes Act* flow from the operation of s109 of the *Constitution* or, without recourse to that section, from the displacement of those provisions of the common law, in Victoria or in the whole of the Commonwealth, which before the enactment of Part III and s86 might have made the agreement and its performance criminal, or in part from the operation of s109 of the *Constitution* and in part from Commonwealth

statutory displacement of common law: (see Wynes: *Legislative Executive and Judicial Powers in Australia* (4th Edition), pp56-57; *R v Loewenthal; ex parte Blacklock* [1974] HCA 36; (1974) 131 CLR 338; (1974) 4 ALR 293; (1974) 48 ALJR 368; Lane: *The Australian Federal System*, p694 note 2).

Counsel for the prosecutor submits that the issue of the warrant is recognisable as a purported exercise of the power conferred by s465 of the *Crimes Act* 1958 of this State, that the offence specified in the information and the warrant is recognisable as the common law misdemeanour, known as conspiracy, and specifically conspiracy to commit the offence of perjury in the course of giving evidence in a proceeding before the Family Court of Australia; that there is no such offence, and that therefore lack of jurisdiction to issue the warrant is disclosed by the record of the proceeding in which the warrant was issued, for one of the conditions upon fulfilment of which s465 of the *Crimes Act* 1958 authorises the issue of a warrant is that the Stipendiary Magistrate or justice be satisfied that the things to be seized should be things which there is reasonable ground to believe will afford evidence as to the commission of an indictable offence and the offence stated in the record as the offence in relation to which that condition was fulfilled is not an offence at all.

Counsel for the respondents, other than the Chief Stipendiary Magistrate, seeks to answer those submissions by contending that s10 of the Commonwealth *Crimes Act* provided authority for the issue of the warrant and that all the conditions prescribed by that section were satisfied.

The words 'any indictable offence' in s465 of the *Crimes Act* 1958 do not as a matter of construction comprehend, in my opinion, an offence created by a law of the Commonwealth Parliament. If they did, the section would in my opinion, be inoperative in relation to such offences while s10 of the Commonwealth *Crimes Act* was in force, by virtue of s109 of the *Constitution*.

The warrant is in the form prescribed for warrants issued under s465 of the *Crimes Act* 1958 by the *Crimes (Form of Search Warrant) Regulations* 1972. The terms of the information and of the warrant in my opinion leave no room for doubt that the Chief Stipendiary Magistrate was purporting, in issuing the warrant, to exercise the power conferred by s465 of the *Crimes Act* 1958. But the offence in relation to which the record – the information and warrant – shows the satisfaction required by s465 was in my opinion not an offence. It is not in my opinion possible to treat the words used in description of the offence as an informal description or identification of the offence created by s86 of the Commonwealth *Crimes Act*. Everything in the two documents indicates a reference to a common law conspiracy to commit common law perjury, in my opinion.

And I have already stated my conclusion that, while Part III and s86 of the Commonwealth *Crimes Act* are in force, no such common law offence exists. Neither the condition expressed in s465 of the *Crimes Act* 1958, nor the condition expressed in s10 of the Commonwealth *Crimes Act* is, in my opinion, fulfilled merely by satisfaction of reasonable ground to believe that the things in respect of which the warrant is to issue will afford evidence of acts done of a particular description: what is required is satisfaction of reasonable ground to believe that those things will afford evidence as to the commission of a particular offence. (Cf. *Little v Commonwealth* [1947] HCA 24; (1947) 75 CLR 94 at 108; [1947] ALR 483, per Dixon J).

Even if, contrary to the view expressed by Fox J in *R v Tillett; ex parte Newton* (1969) 14 FLR 101 (as to which see the article by DC Pearce in 44 ALJ 467) a warrant which does not identify the offence may be sufficient in law, the warrant will, in my opinion, be quashed if the record discloses error of the kind here shown vitiating jurisdiction. And, in my opinion, satisfaction concerning an offence which is not in law an offence does show error vitiating jurisdiction. Nothing is intended in favour of jurisdiction: see *Yirrell v Yirrell* [1939] HCA 33; (1939) 62 CLR 287 at 298; [1939] ALR 457.

If it were assumed that a person may effectively exercise a power conferred by one statutory provision by acts done in the belief that those acts constitute the exercise of a power conferred by another statutory provision – an assumption as to the correctness of which I express no opinion – the record of the proceeding, the information and warrant, nevertheless discloses lack of jurisdiction to exercise the power conferred by s10 of the *Crimes Act* 1958. That section requires satisfaction of substantially the same kind as s465 of the *Crimes Act* 1958 in relation to an offence against

a law of the Commonwealth or of a Territory. And I have already expressed the conclusion that the record discloses that no such satisfaction was reached by the Chief Stipendiary Magistrate. There are other difficulties, deriving from terminological differences between the two sections, in treating the warrant as an exercise of the power conferred by s10.

If recourse were had to s98 of the *Magistrates' Court (Jurisdiction) Act* 1973, I would not be satisfied by the information or by the evidence before me that sufficient grounds were in proof before the Chief Stipendiary Magistrate to have authorised the drawing up of the warrant free from the defect under consideration. The bare assertion in the information of the informant's belief that the named documents will afford evidence as to the commission of the offence described in paragraph (a) of the information does not satisfy me that such grounds were in proof before the Chief Stipendiary Magistrate. In my opinion, it is unnecessary and perhaps undesirable to consider the other grounds upon which the order nisi was granted. The order nisi will be made absolute upon the ground numbered 2. There will be an order in the usual form for removal of the record into this court and for quashing the warrant "
