

21/02; [2002] VSC 267

SUPREME COURT OF VICTORIA

**FERNANDES v BUTLER & ORS**

Smith J

14 June, 1 July 2002 — (2002) 131 A Crim R 403

**SEARCH WARRANT – EXECUTED AND PROPERTY SEIZED – PROPERTY TAKEN BEFORE MAGISTRATE – ORDER *EX PARTE* BY MAGISTRATE THAT PROPERTY BE RETAINED IN POSSESSION OF POLICE – SUBSEQUENT APPLICATION BY PERSON FOR RETURN OF PROPERTY – APPLICATION REFUSED ON GROUND THAT THE COURT WAS *FUNCTUS OFFICIO* – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT 1958, S465; MAGISTRATES’ COURT ACT 1989, S78(6)*.**

Section 78(6) of the *Magistrates’ Court Act 1989* (‘Act’) provides:

(6) The Court may direct that any article, thing or material seized under a search warrant be returned to its owner, subject to any condition that the Court thinks fit, if in the opinion of the Court it can be returned consistently with the interests of justice.

As a result of the execution of a search warrant, property was seized and taken before a magistrate who ordered that the relevant property be retained in possession of police pending production in court if required and to be conveyed to the Forensic Science laboratory for analysis. Subsequently, F. applied to the Magistrates’ Court for an order as to who owned the property seized and to further order that the property be returned to the owner F. On the hearing of the application, the magistrate determined that F. was the owner of the property but declined to order the return of the property on the ground that when the directions were given *ex parte* as to the goods seized pursuant to the warrant, the court was thereafter *functus officio* in relation to any issues about the retention, disposal or use of the property. Upon appeal—

**HELD: Appeal allowed. Matter remitted to the court for hearing and determination according to law. A person is not *functus officio* after making a determination affecting the rights of people, including the question of the right to possession of chattels, when the determination has been given *ex parte*. The Magistrates’ Court has a continuing supervisory role to employ. The fact that the Magistrates’ Court is making decisions affecting the right to possession of property, there would need to be express provision in the legislation removing the right to be heard for such a result to follow. Accordingly, the Court was not *functus officio* and the magistrate was in error in deciding otherwise.**

**SMITH J:**

**The present appeal**

1. On 7 March 2002 the Magistrates’ Court dismissed an application of Anthony Marshall Fernandes. The application purported to be made pursuant to s78(6) of the *Magistrates’ Court Act 1989* (the Act) for an order directing that a Statesman motor vehicle owned by Mr Fernandes be returned to him. The Court also ordered that Mr Fernandes pay the respondent’s costs of \$2,000.
2. This present proceeding is an appeal under s109 of the Act from those orders.
3. By order made 5 April 2002, the Master identified the following questions as raised by the appeal

"(a) whether upon a proper construction of Section 78(6) of the Act, his Worship was right in ruling that the Court was without power to determine according to law an application made by the appellant for return of the appellant’s vehicle in the circumstance that, following execution of the warrant and the seizure of the vehicle and upon the return of the warrant and the sighting of the vehicle by the Court constituted by her Worship Ms M. Popovic, the Court had directed *ex parte* that the vehicle be retained in the possession of the police pending production at Court if required and further that the vehicle be conveyed to the forensic laboratory for analysis?

(b) whether his Worship was right in finding that the determination made *ex parte* by her Worship M. Popovic exhausted the power of the Court to determine any further application in relation to the vehicle according to law"?

**The original proceedings**

4. The proceedings before the learned Magistrate the subject of this appeal were commenced by an Application dated 8 January 2002. The matter came on for hearing before His Worship on 27 February 2002. On that day His Worship identified and was asked to answer two questions

(a) whether the appellant owned the vehicle, and if so,

(b) whether pursuant to the terms of s78(6) of the Act, it was in the "interest of justice" for His Worship to order the return of the vehicle to the applicant.

5. The relevant search warrant was received into evidence before His Worship. It purported to be issued pursuant to s465 *Crimes Act* 1958 and authorised Detective Senior Sergeant Butler

"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 this warrant; and to bring the article, thing or material before the Court so that the matter may be dealt with according to law: ... "

The "reasons for search/ suspected offence" were described as

"recovery of stolen property and evidence of theft and other secondary offences . T.O.M.C\stolen goods."

The "description of article, thing or material" was

"stolen parts of Holden GTS HSV Registration QDT 352, associated paper work and keys. Stolen white Holden VR Senator unregistered bearing registration "ALLHOT" and associated paper work and keys".

The warrant was issued on 1 August 2000.

There was also evidence that on 9 August 2000 her Worship Ms Popovic gave the following directions:

"The above items have been brought before me to be dealt with according to law. I direct that items numbered 1 - 16, 19 - 24 be retained in possession of police pending production in Court if required. I direct that items numbered 17 - 18 be returned to Apollon Venimin 112 Glengala Road Sunshine. I direct that items numbered 23 and 24 ... be conveyed to the Forensic Science laboratory for analysis. I understand that these items may be altered from the original state as a result of analysis".

The vehicle in question was item 23.

The first day of the hearing was devoted to the determination of the first question. It was resolved in favour of the appellant. The matter was then adjourned to 7 March 2002. On that day His Worship confirmed his findings as to the appellant's ownership of the car. Counsel for the respondent to the application then submitted that the principle of *res judicata* applied to preclude His Worship from proceeding further to determine the application. He also submitted that s78 of the Act did not confer a right upon anyone to make an application under that section and the appellant had no right of audience under that section. The *res judicata* argument was supported by further submissions that the determination under the section was complete because there had been a determination made by the Magistrate pursuant to s78(6) on the return of the matter before the Magistrate when dealing with it "according to law" pursuant to s78(1)(b)(ii).

6. The material before me includes the transcript of argument and the reasons given by His Worship for his decision. The essence of his reasons was that upon the making of the directions, *ex parte*, as to the goods seized pursuant to the warrant, the Magistrates' Court was thereafter *functus officio* in relation to any issues about the retention, disposal or use of the vehicle.

**The relevant legislation**

7. Reference should first be made to s465 of the *Crimes Act* 1958:

**"Search Warrants for and Seizure of Things**

**465. Issue of search warrant by magistrate**

(1) 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, or will be within the next 72 hours, 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 is being or is likely to be committed within the next 72 hours,
- (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 authorising 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. (1A)....

(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. (4) ...."

8. It will be noted that s465 refers to the *Magistrates' Court Act* provisions dealing with search warrants and makes warrants issued under s465 subject to those sections. The section of that Act of particular relevance in these proceedings is s78 which provides as follows:

**"78. Authority conferred by search warrant**

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

(a) ...

(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. (2) ... (b) ... (3) ... (4) ...

(5) For the purposes of sub-section (1)(b)(iii) an article, thing or material that is bulky or cumbersome may be brought before the Court by giving evidence on oath to the Court as to the present whereabouts of the article, thing or material and by producing a photograph of it.

(6) The Court may direct that any article, thing or material seized under a search warrant be returned to its owner, subject to any condition that the Court thinks fit, if in the opinion of the Court it can be returned consistently with the interests of justice."

9. The particular sub-section in question is s78(6). That sub-section was inserted into the legislation by Act number 71 of 1993. In the second reading speech, the Attorney General said that it was inserted

"to clarify that a Magistrate may order the return of the property seized under a search warrant if the Court believes it can be returned consistently with the interests of justice notwithstanding the criminal proceedings not having concluded"<sup>[1]</sup>.

10. It implemented a recommendation of the Legal and Constitutional Committee contained in its 45<sup>th</sup> report to Parliament entitled "Law relating to stolen goods". From that report, it appears that the police stated in their submissions that, while the Magistrates' Court had the power to direct the return of stolen property to an owner, it was not normally done and such a provision would assist. It should be noted that the provision in the Act was not confined to stolen property but was expressed to include "any article, thing or material seized under a search warrant".

**Appellant's submissions**

11. Counsel submitted that, absent sub-section (6), the Magistrates' Court did have the power to direct the return of items seized under a warrant and the provision was included to make that abundantly clear. Counsel further submitted that the search warrant legislation should be construed having regard to the legal background against which that legislation is enacted. He referred, in particular, to the discussion in *Allitt v Sullivan*<sup>[2]</sup>.

12. Counsel referred first to the reasons for judgement of Murphy J. In particular he referred

to his Honour's reference to s465 Crimes Act 1958 and the requirement in that section that the authorised constable on seizing the "thing" should

"carry it before the Magistrate or justice issuing the warrant or some other justice to be dealt according to law"<sup>[3]</sup>.

His Honour then compared the situation under the Canada Criminal Code where more detailed provisions existed, including a provision that the thing seized was to be returned to the person from whose possession it was taken where the justice was satisfied that it was not to be used in any further investigation or proceedings or, if the person from whom it was seized was in unlawful possession of it, that it be returned to the lawful owner or person entitled to possession, or that it be forfeited if the lawful owner or person entitled was not known. His Honour commented that a Magistrate applying s465 of the *Crimes Act* would consider the same sorts of matters as were spelt out in the Canada Criminal Code.

13. His Honour went on to discuss the obligations of the executing officer<sup>[4]</sup>. In particular he expressed the view that:

"if the executing officer took any step in connection with the documents seized, other than to carry them directly to the justice, he would be acting in excess of authority".

In addition his view was that that such an officer would be obliged to:

"explain to the justice even if the solicitor was not present, that a claim of legal professional privilege had been made in respect of the document."

He also commented that if the executing officer failed to do so, he or she would be acting in a manner rendering him liable to action. He then referred to the possibility of the Justice fixing a reasonable time within which the relevant party could commence proceedings in the Supreme Court to determine the disputed issue of privilege. As to the obligation of the Magistrate to deal with the goods seized "according to law", Murphy J commented

"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".

14. In the same matter Brooking J considered the history of search warrants.<sup>[5]</sup> In discussing the operation of warrants to seize under s465 his Honour stated that:<sup>[6]</sup>

"Once a thing has been found, identified and seized, then neither the warrant nor the section pursuant to which it was issued says anything in terms by way of authorising the executing officer to retain or use the thing seized; his power and his duty is to carry it before a Justice to be dealt with according to law. If the section and the prescribed form of warrant did no more than authorise search for and seizure of the things described in the warrant, then it might be argued with some force that the seizing officer was entitled to retain what he had seized, either by virtue of the warrant (which would on this view be treated as authorising by implication retention) or by virtue of principles that have been developed by the Courts concerning the circumstances in which the police may retain seized articles until the conclusion of criminal proceedings. But I do not see how it can be said that the warrant itself, or s465, authorises retention or use of what has been seized. For such retention or use is inconsistent with the duty imposed by the warrant on the executing officer to carry what has been seized before a justice to be by him dealt with according to law".

His Honour continued

"I should have thought that the effect of a warrant under s465 is that things seized are to be taken before a Justice without delay although what is delay for this purpose will depend very much on the circumstances of the case. Moreover, having regard to the terms of the warrant and the section, while the principles developed by the Courts concerning the circumstances in which the police may retain seized articles pending the conclusion of criminal proceedings will bear, and bear heavily, on what "dealing" by the Justice will be "according to law", the express provisions of the warrant and the statute shows that the "rights" given to the police by the common law are, so to speak, to be enforced, not directly, but by means of an order or disposition giving affect to them which is made by the Justice before whom the seized property is brought".

15. A little later His Honour went on to say<sup>[7]</sup>

"The power and the duty of the police officer executing a warrant is to take what he has seized before a Justice to be dealt with by him according to law; once he has seized the goods, that is his only power in relation to them. He is not entitled, for example, to retain what he has seized for the purpose of facilitating his investigations instead of taking the seized property before a Justice; ... If the things the subject of the warrant are documents, the warrant gives the officer no power to read them except for the purpose of identifying what he has seized. Once he has identified and seized the documents, his task is to take them before a Justice. How is the Justice to deal according to law with what has been seized? I see no difficulty here. If goods have been seized as suspected stolen property, and it appears that they were not stolen, then they will be restored by the Justice to the possessor, but if it appears that they were stolen, then they will be deposited by the Justice in the hands of the police... Where criminal proceedings have been commenced or are in contemplation the Justice should give affect to the common law right of the police to retain possession of property required for the prosecution, the right of the police being, of course, not limited to cases of theft... The cases show that it would be proper to allow the police to retain possession of things seized not only for the purpose of using them as evidence but also for the purpose of using them in the course of investigation. If a document was clothed with legal professional privilege then the Justice would deal with it according to law if he directed that it be returned to the person from whose premises it was seized."

16. Counsel also submitted that in construing the relevant sections the High Court statement in *George v Rockett*<sup>[8]</sup> should be borne in mind. The High Court commented

"... in construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which through the writ of trespass it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation".

17. Counsel for the appellant submitted that the learned Magistrate interpreted the provisions so that they had the effect that upon the making of directions *ex parte*, in respect of the goods seized pursuant to the warrant, the Court was thereafter *functus officio*. He submitted that this is contrary to authority and not open on the evidence as it stood.

18. Counsel submitted that the sections give the Magistrate responsibility to deal with the chattels seized according to law and that such a power must be a continuing one. He submitted that, in particular, s78(6) is a continuing source of power, exercisable according to law and as required from time to time in the interest of justice, to order the return of goods seized under the warrant. Counsel submitted that there was nothing in the expressed intention of Parliament limiting the provisions so that they could only be applied the once. Counsel submitted that the supervisory jurisdiction of the Magistrates' Court is one which needs to be exercised from time to time. He argued that on the first return to the Court with the property seized, it will often be impossible to identify the owners of items seized so that the occasion for an order for the return of the goods to their owner is likely to arise later.

19. Counsel also submitted that s40, *Interpretation of Legislation Act* 1984, must be applied. It provides:

**"Exercise of powers and performance of duties**

40. Unless the contrary intention appears, where an Act or subordinate instrument confers a power or imposes a duty, the power may be exercised and the duty shall be performed—

(a) from time to time as occasion requires; and

(b) if conferred or imposed on the holder of an office or position as such, by the person for the time being holding, acting in or performing the duties of the office or position;"

20. Counsel submitted that to interpret the provision otherwise would result in arbitrary application of the Act. Counsel also submitted that the reasoning accepted by his Worship would render s78 (6) a dead letter in all circumstances except those in which the owners of seized goods could be identified at the time of their first return to Court or those in respect of which the final



disposition of the goods seized could be resolved as a matter of certainty so as to permit the *ex parte* entry of final orders. He submitted that s78(6) is permissive and facultative – precisely the opposite in effect to that contended for by the respondents and upheld by the learned Magistrate.

21. Counsel submitted that the power in s78(6) is to be exercised from time to time and the Act should be interpreted in the manner he suggests if the common law's traditional protection of the rights of individuals in property is to be recognised and appropriately protected and a proper balance to be struck.

22. Finally, counsel also submitted that the general principle of "*functus officio*" does not apply to any orders made *ex parte* which may be set aside or varied on the application of any party effected by them<sup>[9]</sup>.

### Respondents' Submissions

23. Counsel for the respondents maintained the position argued below that the learned Magistrate was *functus officio* having given directions under s78(6) of the Act.

24. He submitted further, however, that the appellant had no right of audience under the sub-section in any event. This argument was put below but not dealt with by His Worship because he determined the issue on the *functus officio* basis. The argument can be raised in these proceedings on several bases. It is open to the respondent to seek to support the decision on any other basis that was open at the time and, if there was no right to be heard, then that would justify the original decision. Secondly, it may go to the question of whether any order should be made if the appellant otherwise is successful. Counsel drew attention, for example, to s28 *Summary Offences Act* which expressly gives the applicant the power to take steps in Court and contrasted this with the lack of any such provision in s78. He asserted that s78 deals with the authority conferred by the search warrant once issued to the police. Once issued, the Court has no more to do with the warrant until it is executed and then s78 comes into play. He submitted that when it is brought back to Court it is plainly intended that the matter should be dealt with *ex parte* and that the Magistrate must deal with it on that basis.

25. Counsel further submitted that the appellant is not without other remedies. He argued that proceedings could be brought in conversion to recover the vehicle. He also drew attention to the fact that s443A of the *Crimes Act* 1958 could now be used, there having been a committal and the relevant accused having been committed for trial. He submitted that the section gives power to Magistrates not to applicants. He identified s42 of the Act as operating in the same way.

### Analysis

26. The learned Magistrate did not have the benefit of the extensive discussion concerning the legislation and law which has been presented to me. In light of that material, I am satisfied that the Court was not *functus officio*.

27. First, I accept that a person is not *functus officio* after making a determination affecting the rights of people, including question of the right to possession of chattels, when the determination has been given *ex parte*. Further, I am satisfied that the Magistrates' Court has a continuing supervisory role to employ. I have come to that conclusion on the basis of the proper interpretation of the provisions and their objectives. I reach that conclusion without relying upon s40 of the *Interpretation of Legislation Act* 1984. That section, however, removes any argument, there being no contrary intention.

28. As to the right to be heard, in view of the fact that the Magistrates' Court is making decisions affecting the right to possession of property, there would need to be express provision in the legislation removing the right to be heard for such a result to follow. It cannot have been contemplated by Parliament that the right to be heard would simply disappear in the absence of any express statement to the contrary.

29. Accordingly, I am satisfied that the errors alleged have been made out and that the decision cannot be supported on other grounds.

**Procedural Issues**

30. Towards the conclusion of the hearing of this appeal an issue emerged as to the validity of the procedure adopted to bring the matter before the learned Magistrate – and consequently the appeal to this Court under s109 of the Act.

31. On the face of it, the matters in question were ancillary to criminal proceedings and yet an application was brought in the civil jurisdiction of the Magistrates' Court. Counsel for the respondent submitted that this creates a disadvantage for the prosecution because it is unable to rely upon the evidence obtained by telephone taps, the proceedings being civil and, therefore, not exempt under the relevant legislation. The issue was not canvassed below and only emerged as a possible issue at the conclusion of this hearing.

32. Counsel for the appellant submitted that the procedure that was followed was appropriate. He relied firstly on the *Magistrates' Court Act* 1989 and in particular s3 and the definition of proceeding — "any matter in the Court ...". He noted that the word "matter" in that definition is not defined. Turning to Part 5 which deals with civil proceedings, he drew attention to the fact that s100(1) confers jurisdiction to hear and determine "any other cause of action if the Court is given jurisdiction " by or under any Act other than this Act". The phrase "cause of action" is not defined. He submitted that a cause of action may be said to arise under s465. It is subject to the provisions of the *Magistrates' Court Act*, s78. Nonetheless, it may properly be said, he submitted, that there is a civil jurisdiction because the cause of action may be said to be given "by or under the *Crimes Act*" provision – another Act. Alternatively, he submitted that the matter was in the nature of an application for a declaration and that is within the equitable jurisdiction of the Magistrates' Court. He referred also to s31 *Supreme Court Act* 1958 in this context. As to the latter, he pointed to the fact that in the proceedings, two questions were identified and declarations could have been obtained in respect of them. Counsel also submitted that Order 2 of the *Magistrates' Court Civil Proceedings Rules* provides that where the wrong process has been used it does not invalidate proceedings. Counsel submitted that having regard to these matters, and the fact that the parties had proceeded all along on the basis that the proceedings were valid until near the conclusion of this appeal, the proper conclusion to reach is that the proceedings were valid.

33. This is an issue that may well warrant further argument and closer scrutiny. I am not persuaded, however, on the limited discussion before me that the procedure used was not available. If it was not a valid procedure, the goods subject to the search warrant, nonetheless, remained under the supervision of the Magistrates' Court pursuant to the warrant. The Application was a way of giving notice within that proceeding to the respondents that the person claiming to be interested in the goods wished to have the matter raised in Court and, in particular, was seeking a return of certain chattels held under the warrant. Proceeding on that basis, another way in which the decision might have been challenged in this Court was by Originating Motion under Order 56. The appellant was given the opportunity to consider filing an Originating Motion but chose to rely on the existing proceedings.

**Conclusion**

34. The appeal should be allowed and the matter remitted to the Magistrates' Court for hearing and determination according to law.

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[1] Second reading speech, Legislative Assembly, 1 August 1993, *Hansard* page 247

[2] [1988] VicRp 65; [1988] VR 621.

[3] at 625.

[4] at 632.

[5] It should be noted that Section 465 of the *Crimes Act* then incorporated the rules relating to search warrants mentioned in the *Magistrates (Summary Proceedings) Act* 1975.

[6] at 638.

[7] at 639.

[8] [1990] HCA 26; (1990) 170 CLR 104 at 110; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.

[9] *Jovanovic v R* [1999] FCA 1008; (1999) 92 FCR 580; 165 ALR 6; (1999) 106 A Crim R 548.

**APPEARANCES:** For the Appellant Fernandes: Mr H Carmichael, counsel. Riordan & Partners, solicitors. For the Respondent Butler: Mr M Grinberg, counsel. Victorian Government Solicitor.