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SUPREME COURT OF NEW SOUTH WALES

TRIMBOLI v ONLEY (No. 2)

Moffitt P, Hope and Hutley JJ A

2 November 1981

37 ALR 354; 56 FLR 317; (1985) 2 NSWLR 466; 18 A Crim R 19

PRACTICE AND PROCEDURE – SEARCH WARRANT – CONSTRUCTION OF – PERSON OR PERSONS SUSPECTED OF COMMITTING OFFENCE NOT NAMED IN WARRANT – WHETHER WARRANT VOID: *CRIMES ACT* 1914 (CTH) S10.

A warrant which does not name the person suspected of committing the offence is not therefore void. *R v Sing: Ex parte Harrison* (1979) 36 FLR 322, not followed (see MC 62/1980).

MOFFITT P: This matter comes before us as an application of the appellant, Mr Trimboli, for an expedited hearing of the appeal and a stay of proceedings in the meantime.

On 24 September last, MA Polkinghorne Esq JP issued a search warrant which is the subject of these proceedings. Its execution at the premises of the appellant was commenced at 8.30 a.m. on 25 September, but its completion was stayed by the operation of an *ex parte* injunction granted by Powell J later in the morning. Some documents had been taken into the possession of the respondent, a member of the Commonwealth Police Force, but it may be these documents had not been examined to any degree before notice of the injunction was given. Search of a safe then still remained to be done. Pursuant to orders later made, all of these documents and the contents of the safe came into the custody and control of the Registrar of the Equity Division.

Eventually the proceedings came on to be heard on the merits and a decision was given by Powell J on 19 October last (*Trimboli v Onley (No 3)* (1981) 37 ALR 38; (1981) 56 FLR 304). A number of legal and jurisdictional questions were raised on behalf of the defendant, but Powell J cut through these by going to the merits of the appellant's claim which attacked the validity of the warrant. The submission was, as the judgment states that "on its face the warrant is excessive in ambit" and hence void. After making short reference to some of the relevant authorities, Powell J then set about construing the warrant on the assumption that the authorities in favour of the most stringent construction of warrants should be applied.

The second part of the warrant authorized the police to seize "the said fraudulently obtained Australian passports, documentation to support thereof, papers and other things". The argument presented to his Honour was that this provision, strictly construed, authorized the police to seize any papers and things without limitation. He rejected this submission on several bases, but primarily on the basis that the word "said" related all the subject matter which followed it back to the earlier part of the warrant, which related the documents to specific offences, under the *Passports Act* 1938 and the Commonwealth *Crimes Act*. This part of the warrant is in the following terms:-

> "WHEREAS, I, Maurice Arthur Polkinghorne, a Justice of the Peace within the meaning of that expression in s10 of the *Crimes Act* 1914, being satisfied by information on oath placed before me this day that there is reasonable ground for suspecting that there is in a place, being 7 Huntingdale Avenue, Cabramatta in the State of New South Wales, things being fraudulently obtained Australian passports, documentation in support thereof, papers, and other things, as to which there are reasonable grounds for believing that the same will afford evidence as to the commission of offences against s10 of the *Passports Act* 1938 and s67(b) of the *Crimes Act* 1914, laws of the Commonwealth, namely, offences of making false statements in support of a passport application and forgery and uttering."

Powell J then concluded that the warrant was valid and dismissed the proceedings. He made various orders, including the following:-

> "3. ORDER that the Registrar in Equity do deliver into the possession of the defendant or into the possession of such person or persons as the defendant shall, in writing, delivered to the said Registrar, appoint all such documents and other things and all such copies thereof as were delivered by the defendant into the custody of the said Registrar pursuant to the Order of this Court made herein the 25th September 1981"

Other ancillary orders were made. Orders were also made in aid of the present applicant exercising a right of appeal to this court if he wished to do so. In the result the original injunction was continued until 26 October. We are told it has not been continued beyond that date. Further, a stay of proceedings on the Order 3 which I have above set out was made, and that has continued up to the present time. It is in respect of that order that continuation of the stay of proceedings is sought pending the hearing of the appeal.

The notice of appeal filed in effect stated his Honour erred in law in holding the warrant was valid and in not holding it was void. It did not specify the errors, as is required by the relevant rule Pt 5, r8(1)(b). This court has been concerned in the past that the appellate processes be not used, by delays inherent in any appellate process, to postpone the operation of the process of the criminal law where the circumstances do not justify that course, and has been prepared to deal with matters promptly or immediately to that end. Consequently the court considered it appropriate to examine the merits of the original application and the merits of the appeal.

Having heard argument on the construction of the warrant, it is clear that his Honour's judgment is right. An attempt was made to raise other matters not raised at first instance as a basis for an attack on the validity of the warrant. A question arises whether it would be appropriate to permit them to provide the basis for a further stay of proceedings and whether, at this stage, they should be allowed to be raised. However, the court decided to hear argument upon them without ruling on these questions. It is sufficient to say that there is no substance in the submissions.

Specific reference should be made to one matter. It was argued that the warrant was invalid because it did not name the person or persons suspected of committing the offence or offences referred to. There is nothing in s10 of the Commonwealth *Crimes Act* and there is no basis otherwise to conclude that, on this basis, the warrant is void. On this question, insofar as it decides or expresses an opinion to the contrary, the Victorian decision in *R v Sing; Ex parte Harrison* (1979) 36 FLR 322 at 326 should not be followed here. For the reasons which have already been given, in my view the appeal should be dismissed with costs, and I so propose.

[Hope and Hutley JJ agreed.]
