SUPREME COURT OF QUEENSLAND

CITATION:	*Wright & Anor v Queensland Police Service & Ors* [2002] QSC 046
PARTIES:	**WENDY ANN WRIGHT** (first applicant) **REBECCA EMMA LOUISE WRIGHT** (second applicant) **v** **QUEENSLAND POLICE SERVICE** (first respondent) **SENIOR CONSTABLE MARK ELLIS** (second respondent) **ANN THACKER SM** (third respondent)
FILE NO/S:	S 745 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	5 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2002
JUDGE:	Holmes J
ORDER:	**1. I declare that the warrant issued by the third respondent on 27 December 2001 is invalid.** **2. I declare that the seizure of documents from 23 Goble Street, Hendra on 28 December 2001 was unlawful.** **3. I dismiss the application for an injunction requiring the first and second respondents to deliver up all documents seized and all copies of them.** **4. I adjourn for further consideration the question as to whether an order should be made for the return of any documents or the videotape.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – WARRANTS – SEARCH WARRANTS – ISSURE AND VALIDITY - GENERALLY Where second respondent applied over the telephone to the

third respondent for permission to execute a warrant on the applicants – whether there existed urgent or special circumstances justifying the application for the warrant by telephone – whether the details prescribed by s452(2)(b) should appear on the face of the warrant – whether there was a failure to provide "brief particulars" of the offence – whether the "prescribed authority" came into existence in the absence of any actual document endorsed by the magistrate - whether non-compliance with sections 73 and 451 of the *Police Powers and Responsibilities Act* 2000 affected the validity of the warrant – whether items seized pursuant to an invalid warrant should be returned or retained – whether, where criminal proceedings had commenced against the applicant, the application should be stayed.

Crimes Act 1914 (Cth), s 10
Criminal Code, s 123 – Perjury
Police Powers and Responsibilities Act 2000
ss 4, 68, 73, 78, 451, 452

Australian Broadcasting Corporation v Cloran (1984) 4 FCR 151
Beneficial Finance Corporation Ltd v Australian Federal Police Commissioner (1991) 103 ALR 167
Brewer v Castles & Ors (No. 2) (1984) 52 ALR 577
Cassaniti v Croucher (1997) 37 ATR 269
Challenge Plastics Pty Ltd v Collector of Customs (1993) 42 FCR 397
Commissioner of Police v Atkinson (1991) 23 NSWLR 495
Commissioner of Police v Barbaro (2001) 51 NSWLR 419
Ex Parte Bradrose Pty Ltd and Albezia Pty Ltd (1989) 41 A Crim R 274.
George v Rockett (1990) 170 CLR 104.
Ghani v Jones [1970] QB 693
GH Photography Pty Ltd v McGarrigle (1974) 2 NSWLR 635
Gollan v Nugent (1988) 166 CLR 18
Harts v Commissioner of Australian Federal Police (1997) 75 FCR 145
Hatton v Beaumont (1977) 2 NSWLR 211
Hedges v Grundmann; Ex parte Grundmann [1985] 2 Qd R 263
Inland Revenue Commission v Rossminster Ltd [1980] AC 952
Island Way Pty Ltd v Redmond [1990] 1 Qd R 431
Johnson & Anor v Whitehouse & Anor OS 4293 of 1996.
Malone v Metropolitan Police Commissioner [1980] QB 49
Ousley v R (1997) 192 CLR 69
Ozzie Discount Software (Aust) Pty Ltd v Muling (1996) 86 A Crim R 387
Ozzy Tyre & Tube Pty Ltd v CEO Of Customs [2000] FCA

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Parker v Churchill (1986) 9 FCR 334
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355
Puglisi & Anor v AFM Authority & Ors (1997) 148 ALR 393
R v Fraser-Adams (2001) 161 FLR 120
R v Tillett; Ex parte Newman (1969) 14 FLR 101
Rowell v Larter (1986) 6 NSWLR 21
Tye v The Commissioner of Police (1995) 84 A Crim R 147

COUNSEL: Mr Glynn SC for the applicants
Mr Kimmins for the first and second respondents

SOLICITORS: Nyst Lawyers for the applicants
Queensland Police Service Solicitor for the first and second respondents
Crown Law for the third respondent

The application

[1] The applicants seek declarations that a search warrant issued by the third respondent, a magistrate, on 27 December 2001 and executed on premises at Hendra on 28 December 2001 is invalid, and that the seizure of documents under it was unlawful. They also seek orders requiring the delivery up of documents seized, and all copies of them, together with the original and any copies of the police video tape of the execution of the warrant. Those orders are resisted by the first respondent, the Queensland Police Service, and the second respondent, an officer of the Queensland Police who obtained and executed the warrant. An appearance was entered for the third respondent solely to indicate that she would abide by the order of the court.

The obtaining of the warrant

[2] The first applicant was charged in October 2001 with perjury, as a result of evidence she gave as judgment debtor in an oral examination in the magistrates' court on 5 June 2001. The charge was particularised in a Notice to Appear as follows:

> "That on the 5th day of June 2001 at Caboolture in the State of Queensland one Wendy Ann Wright in a judicial proceeding, namely an oral examination in the Caboolture Magistrates Court knowingly gave false testimony to the effect that the said Wendy Ann Wright was financially unable to pay civil judgment and the false testimony touched a matter which was material to a question then depending in the proceedings."

[3] On 13 September 2001, about a month before the charge was laid, and in the course of the investigation, the second respondent, with Victorian police officers, executed a search warrant at the offices of the applicants' accountants in Melbourne.

On 29 November 2001, after the charge was laid, a further warrant was executed at the offices of solicitors acting for the first applicant in other proceedings.

[4] According to the affidavit of the second respondent, he attended the Brisbane Magistrates Court at midday on 27 December 2001 to seek a third search warrant, the subject of this application. (This was, of course, during the interval between Christmas and New Year.) A security officer told him that there were no magistrates available and that he would have to approach the "on-call" magistrate. He obtained the relevant telephone number and telephoned the "on-call" magistrate, who was the third respondent. He says that he asked if he could attend on her personally in relation to the warrant, but was advised by her that it would be more appropriate to deal with the matter over the telephone.

[5] According to the second respondent's affidavit, he gave the third respondent an outline of the matter and his reasons for seeking the warrant. She advised him that what he had said sounded appropriate, and asked him to read out the facts appearing on the Application to Ground Search Warrant. He did so, reading the information word for word. Occasionally the third respondent asked him a question, and he gave an explanation. She then said that the search warrant was approved and told him to write her name, the date, and the time of 1.00 p.m. on the bottom of the warrant (by which, presumably, was meant the draft prepared by him.). She asked him to send a copy of the application and warrant by facsimile transmission to her chambers. He attempted to do so, but there was some difficulty in getting the facsimile through. He telephoned the third respondent again and was advised to send the application and search warrant copies to her chambers. He retrieved the documents from the facsimile machine and mailed them in accordance with that instruction.

[6] The documents forwarded in that way by the second respondent to the third respondent were produced upon subpoena and became Exhibit 1. The Application for Search Warrant bears in three places a notation to the effect that it was granted over the telephone by A. C. Thacker - Magistrate on 27 December 2001. The warrant bears the following statement of the offence in respect of which it is issued:

> "Section 123 *Criminal Code* - Perjury".

At 7 o'clock on the following day the warrant was executed at the second applicant's residence at Hendra.

[7] The second applicant exhibits to her affidavit two documents which are collectively described as "the search warrant", but which are in fact a "Statement to Occupier" and a document headed "search warrant'. (Provision of such a statement and a copy of the warrant to an occupier is required by s 75 of the *Police Powers and Responsibilities Act* 2000). The copy of the search warrant given to the second applicant does not bear the endorsements as to time of issue or detail of issuer written on the Exhibit 1 copy. In other respects, the copy given to the second applicant is identical to that produced on subpoena, except that in the latter the word "justice" has been ruled through and the word "magistrate" substituted, and other items crossed out on both documents are initialled on the subpoenaed document.

[8] According to the affidavit of the second respondent, when the warrant was executed someone at the scene inquired as to the identity of the issuing magistrate. He informed the persons present, including the first and second applicants, that the issuing magistrate was the third respondent.

The applicants' arguments

[9] The applicants' first argument against the validity of the warrant executed by the second respondent is that there were no urgent or special circumstances justifying application for it by telephone rather than in person. Section 68 of the Act permits a police officer to apply for a warrant to enter and search a place to obtain evidence of the commission of an offence. That application may be made to a justice except in certain circumstances not applicable here; and it seems clear enough that what is contemplated in the ordinary course is personal attendance on the issuing justice or magistrate.

[10] However, s451 of the *Police Powers and Responsibilities Act* 2000 provides:

> "**451** (1) This section applies if under this Act, a police officer may obtain a warrant, approval, production notice, production order or another authority (a "**prescribed authority**").
>
> (2) A police officer may apply for a prescribed authority by phone, fax, radio or another similar facility if the police officer considers it necessary because of –
>
> (a) urgent circumstances; or
>
> (b) other special circumstances, including, for example, the police officer's remote location.
>
> (3) Before applying for the prescribed authority, the police officer must prepare an application stating the grounds on which the prescribed authority is sought.
>
> (4) The police officer may apply for the prescribed authority before the application is sworn."

[11] Mr Glynn SC for the applicants argued that the magistrate's preference for dealing with the matter by phone did not amount to a circumstance of urgency. Nor was there anything to suggest urgency in the circumstances surrounding the execution of the warrant. It was issued at 1.00 p.m., but was not executed until 7.00 a.m. the following day. One might infer, he suggested, that the real motivation for the way in which matters proceeded was a desire to avoid the questions which might be asked on a personal attendance; while, rather than there being any need for urgent search, the point of obtaining the warrant during the afternoon of the 27th and holding it for execution at 7am on the morning of the 28th December was to make it improbable that the applicants' lawyers would be available to advise them.

[12] Mr Glynn relied on the decision of the New South Wales Court of Appeal in *Commissioner of Police v Atkinson*[1]. In that case, the *Search Warrants Act* 1985 (NSW) precluded a justice from issuing a search warrant on a telephone application unless he was satisfied that it was required urgently and that it was not practicable for the application to be made in person. (It can be seen that the burden of considering those matters fell on the issuing justice rather than, as under s 451(2), on the applying police officer.) On the facts of that case, the magistrate had not sought any information from the applying police officer as to when he had decided that he wanted to search the premises in question. He had, therefore, no means of knowing whether the police officer had simply left it to the last minute to make the application and whether he might, in the circumstances, have been quite able to apply for it in the ordinary way. Pointing out that telephone application was "not to be regarded as merely an alternative method of obtaining a search warrant which may be employed to suit the convenience of the applicant for the warrant"[2] the court upheld an order quashing the search warrant.

[13] Secondly, Mr Glynn took two points in relation to the form of the warrant. The copy of the search warrant which was provided to the second applicant as occupier of the premises did not contain the details of the name of the justice issuing it or the time or date of issue.

[14] Section 452 is in the following terms:

> "(1) After issuing the prescribed authority, the issuer must immediately fax a copy to the police officer if it is reasonably practicable to fax the copy.
>
> (2) If it is not reasonably practicable to fax a copy to the police officer -
>
> (a) the issuer must tell the police officer -
> (i) what the terms of the prescribed authority are; and
> (ii) the day and time the prescribed authority was issued; and
>
> (b) the police officer must complete a form of prescribed authority (a **"prescribed authority form"**) and write on it -
> (i) the issuer's name; and
> (ii) the day and time the issuer issued the prescribed authority; and
> (iii) the terms of the prescribed authority.
>
> (3) The facsimile prescribed authority, or the prescribed authority form properly completed by the police officer, authorises the entry and the exercise of the other powers stated in the prescribed authority issued by the issuer.

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1 (1991) 23 NSWLR 495.

2 At 499.

> (4) The police officer must, at the first reasonable opportunity, send to the issuer-
>
> (a) the sworn application; and
>
> (b) if the police officer completed it – the completed prescribed authority form.
>
> (5) On receiving the documents, the issuer must attach them to the prescribed authority."

[15] Section 75 of the *Police Powers and Responsibilities Act* requires provision of a copy of the warrant to the occupier of the premises together with a statement in the approved form (Form 11) summarising the occupier's rights and obligations.

[16] Since by ss 452(3) the properly completed prescribed authority form was what authorised the entry, it followed, Mr Glynn said, that the warrant as provided to the occupier must also be in that properly completed form. That meant that it must include the details required by s 452 (2) (b).

[17] Next, Mr Glynn contended, the search warrant itself was defective, because it did not provide brief particulars of the offence. Section 73 of the Act sets out the matters which a search warrant must state. They include at s 73(b)(i), where the warrant is issued in relation to an offence, "brief particulars of the offence for which the warrant is issued". These were, Mr Glynn submitted, mandatory requirements. He relied, in particular, on this passage from the decision of the High Court in *George v Rockett*[3]:

> "State and Commonwealth statutes have made many exceptions to the common law position, and s. 679 is a far-reaching one. Nevertheless, 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."

The consequence of the defects in the warrant as issued and in the copy provided to the occupier was, in each case, the invalidity of the warrant. Similarly, the failure to apply in person for the warrant in circumstances that were neither urgent nor special rendered it invalid.

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3 (1990) 170 CLR 104 at 110-111.

The first and second respondents' arguments

[18] Mr Kimmins for the first and second respondents argued that the magistrate's direction to the second respondent, who was not on an equal footing with her, that he should proceed by telephone did amount to a special circumstance within the meaning of s 451(2)(b). As to the form of the copy warrant provided to the second applicant, he pointed out that the applicants had been told when the warrant was executed and whom it was issued by. The particularisation on the warrant itself was, he argued, adequate. It provided not only the specification of the offence but the relevant *Criminal Code* provision. In any event, the first applicant had previously been provided with particulars in the Notice of Charge which had been provided to her in October.

[19] Mr Kimmins' principal argument was that the court ought not to interfere with the criminal process. He relied on an unreported decision, *Johnson & Anor v Whitehouse & Anor*[4]. In that case a search warrant had been executed in December 1992; an application for relief under the *Judicial Review Act* 1991 was made in 1996, by which time the applicant had been committed to stand trial at the District Court in Sydney. In those circumstances Helman J concluded it was inappropriate to proceed with the application "concerning a matter which will no doubt be considered in the course of criminal proceedings begun nearly four years ago in New South Wales". Accordingly, he stayed the application until completion of the criminal proceedings in New South Wales.

[20] Moreover there was, Mr Kimmins contended, a difference between the position of a mere suspect seeking the return of material seized improperly and that of a person against whom prosecution was already underway. Even if the court were minded to make the declarations sought, it should not make any order requiring the return of the seized material. That ought to be left for a determination of its admissibility by the trial court on *Bunning v Cross*[5] principles.

Should the application be stayed?

[21] Notwithstanding Mr Kimmins' submission, I do not think that the mere fact that criminal proceedings have commenced against the first applicant should cause me to desist from considering the validity of the warrant. As Mr Glynn pointed out in his written submissions, *George v Rockett*[6] is an instance where review proceeded notwithstanding that charges had been laid against the subject of the warrant. In any event, the proceedings against the first applicant have not yet reached committal stage, and it is difficult to see why the concern to which Mr Kimmins adverted of "fracturing the criminal process" should exist. Indeed, it is arguable that a disruption of the criminal process is far more likely if it is left to a criminal trial

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4 OS 4293 of 1996; 23 July 1996.

5 (1978) 141 CLR 54.

6 (1990) 170 CLR 104.

judge to determine the attack on the validity of the warrant.[7] However that may be, if indeed an invalid warrant has been executed to the detriment of the applicants, they are entitled to have that declared.

Was there a warrant?

[22] The search warrant provisions of the *Police Powers and Responsibilities Act* are territory relatively uncharted by authoritative construction. The first obstacle I have encountered lies in determining in what form a prescribed authority as contemplated by s 451 and s 452 may issue. That particular tangle arises in this way. Mr Glynn's argument that the warrant as served on the applicants was defective because it did not give the name of the issuer or the date and time of issue proceeds on the premise they were required to be served with a prescribed authority form. In fact s 75 makes no such requirement. A police officer executing a search warrant must under that section provide a copy of the warrant, and it is clear from the terms of s 451(1) that a warrant may equally be termed a "prescribed authority". But a "prescribed authority" is not the same thing as a "prescribed authority form". One is issued by the magistrate; the other is a document prepared by the police officer who has applied for such an authority, setting out its terms and the additional details as to issue required by s 452(2)(b). Either may authorise a search but there is nothing in the Act which would equate a prescribed authority form with a warrant so as to require its service under s 75. This is an anomaly which might warrant the attention of the legislature.

[23] But contemplation of this state of affairs and the circumstances of the present case raise a thornier question: was there ever a prescribed authority issued in this case? It seems quite clear that the only authority given by the magistrate was verbal.

[24] Section 451 allows for the obtaining of a warrant, which may be referred to as a "prescribed authority", while s 75 requires provision of a copy of the search warrant to the occupier. In the present case, however, it does not appear that the magistrate, the third respondent, was in possession of any document which could be called a prescribed authority until, at the earliest, she received the documents mailed by the second respondent, almost certainly after the execution of the warrant.

[25] What occurred here seems to have been the reverse of what s 452 requires. The first applicant unsuccessfully attempted to fax his draft of the warrant to the third respondent, rather than her faxing a copy of it to him. The reality is, I think, that magistrates issuing warrants are generally reliant on an applicant to provide in draft form the authority sought. In this case it may have been that had the attempt at transmission been successful, the magistrate, having seen the draft that the second respondent sought to forward, would have endorsed it and returned it by facsimile, as s452 contemplates.

[26] The question is whether it can be said that any prescribed authority came into existence in the absence of an actual document endorsed by the magistrate. At best

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[7] See the comments of McHugh J in *Ousley v R* (1997) 192 CLR 69 at 104.

for the Crown one might say that the magistrate's approval by telephone of the contents of the draft search warrant (although it is by no means clear from the first applicant's affidavit, which merely refers to being told that "the search warrant was approved", that its contents were considered and approved) amounted to the issuing of the form then in the second respondent's possession. Thus the second respondent's search warrant became the prescribed authority, and when he endorsed on it the name of the issuer and the date and time it was issued it became also the prescribed authority form.

[27] There are indications that the legislature intended that the issuer of a prescribed authority in the circumstances contemplated by s 451 actually be in physical possession of it. Section 452(1) refers to faxing a copy to the police officer, although s (2) contemplates circumstances in which it may not be reasonably practicable to do so, allowing instead for the completion of a form of prescribed authority. That form, by s (3), authorises the exercise of the powers "stated in the prescribed authority issued by the issuer". These features of the provision suggest a requirement that a written authority emanate from the issuer.

[28] However, there are arguments for a construction of ss 451 and 452 which does not require a written authority to be executed by the issuer. Section 451 plainly enough contemplates for the ability to obtain warrants in circumstances of exigency, whether caused by the demands of time or distance. It would seem absurd that such a section could not operate in the absence of a facsimile link with the issuing magistrate. Indeed, s 452(2) contemplates the absence of such a link. While clearly there is a need for the terms of an authority to be set out in writing so that its validity and the scope of the powers conferred by it can be tested, it may be that the need is met by the provision for a prescribed authority form contained in s 452(2)(b).

[29] I do not wish to be taken as concluding that an authority given verbally in the absence of any written prescribed authority meets the requirements of ss 451 and 452. For present purposes, since the point has not been taken by the applicants, I prefer to leave the matter open and proceed on the basis more favourable to the Crown and implicitly accepted by the applicants; that is, that the form of the warrant held by the second respondent, once approved by the third respondent, became the prescribed authority. That being so, the endorsements on a copy as to identity of issuer and time of issue were relevant only to creating a prescribed authority form and were immaterial details so far as the prescribed authority itself was concerned.

Must the s 452 (2) (b) details be included on the face of the warrant?

[30] The *Police Powers and Responsibilities Act* 2000 may, in my view, fairly be described as a code. Its purposes, as set out in s 4, are consistent with that view. Section 73 sets out the matters which must be stated in a search warrant. There is no reason to suppose that those matters do not constitute a complete list[8], the assumption being that "when a legislature specifies what must appear in a warrant it

[8] *Ousley v R* (1997) 192 CLR 69 at 83, 111, 128.

intends its statement to be exhaustive of the matters that the warrant must disclose"[9]. Even if one were to take the wider view of Gaudron J in *Ousley v R*, that the warrant must state those matters upon which its validity depends and those which define the extent of the authority conferred[10], it is difficult to see how the details in questions – the name of the issuer and the date and time of issue – could affect the ability of those against whom the warrant was executed to ascertain the scope of the authority conferred by it or the jurisdiction by which it was issued. Assuming the document served on the applicants was indeed a warrant, I do not consider that the absence of the details in question amounted to an invalidating defect.

Was there a failure to provide "brief particulars" of the offence?

[31] The second of Mr Glynn's arguments as to form was that the provision of the name of the offence (perjury) and the relevant section number of the *Criminal Code* did not meet the description "brief particulars of the offence" as required by s 73(1)(b)(i). He is, I think, literally correct; one cannot regard provision of the name of the offence as "particulars". Matters are not improved for the Crown when one looks at the requirement in a common law context. It is clear that the purpose of stating the offence is to set some boundaries for the search itself. In *Ex Parte Bradrose Pty Ltd and Albezia Pty Ltd*[11] the principle that the description of the offence should be such as to enable the persons affected "to know the exact object of the search" was adopted. That expression had been used with some regularity in the Federal Court in the context of search warrants issued under s 10 of the *Crimes Act* 1914 (Cth)[12]. In more recent times, however, the question has been stated more broadly as whether the warrant discloses the nature of the offence "so as to indicate the area of search"[13]; although McHugh J in *Ousley*[14] referred to the need for a warrant to be sufficiently precisely worded to enable a person affected to "know the object of the search".

[32] Whether one takes a narrow or broad approach to that necessity, it seems clear that the insertion merely of the name of offence and section could not meet it. Nor is it an answer to say that the second applicant at least would have known the details of the offence alleged, having been charged. The question of whether a warrant meets the requirements of the Act must, in my view, be answered objectively by reference to its contents[15]. A reader without ancillary information would not have known from its face by whom the offence was alleged to have been committed, let alone where and when. Having regard to the need for the persons affected to be able to

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9 *Ousley v R* (1997) 192 CLR 69 at 111.

10 *Supra* at 94

11 (1989) 41 A Crim R 274 at 277 and 284.

12 See for example, *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151; *Parker v Churchill* (1986) 9 FCR 334 per Jackson J at 348.

13 *Harts v Australian Federal Police* (1997) 75 FCR 145 at 152; *Beneficial Finance Corporation v Commissioner of Australian Federal Police* [1991] 103 ALR 167 at 188.

14 *Ousley v R* (1997) 192 CLR 69 107.

15 "The question is one of impression, looked at from the standpoint of the ordinary person reading the warrant": *Brewer v Castles & Ors (No. 2)* 52 ALR 577 at 579 citing Fox J in *R v Tillett* (1969) 14 FLR 101*; Ozzy Tyre & Tube Pty Ltd v CEO of Customs* [2000] FCA 891.

understand the bounds of the search to be conducted, and the Act's stated purpose in s 4(e) "to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under this Act" it is clear that the requirement for brief particulars cannot be met by a bald naming of the offence and relevant section. I will return in due course to consider the effect of that non-compliance with the Act.

Was the application validly made under s 451?

[33] I conclude also that the Act was not complied with when the second respondent applied for the warrant by phone. Mr Glynn is no doubt correct when he says that the circumstances of the application were neither special nor urgent. Certainly there is no means of knowing what was in the magistrate's mind when she directed that means of proceeding. More fundamentally, the second respondent does not swear that he considered it necessary to apply in that way, much less that he turned his mind to the circumstances, which would allow him to arrive at such a view. The inevitable conclusion is that there was nothing to render s 451 applicable or the procedure adopted permissible.

The effect of non-compliance on validity

[34] There remains for consideration the question of how non-compliance with s 73 (as to stating brief particulars of the offence) and s 451 (as to the state of mind necessary to justify application by telephone) affects the validity of the warrant. There is a conspicuous absence in the *Police Powers and Responsibilities Act* of any stated consequence for non-compliance with its provisions.[16]

[35] In determining whether the respective requirements are mandatory one must turn to the principles of statutory construction set out in *Project Blue Sky v Australian Broadcasting Authority*[17] and ask "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid". In that exercise, "regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'".

[36] *Hatton v Beaumont*[18] was one of the cases referred to in *Project Blue Sky* as evincing that approach. The following passage from the judgment of Mahoney JA assists:

> "In determining whether a provision is mandatory or directory, the question is not: What did the legislature intend?; it intended that the provision be observed. The relevant question is: What is the consequence if it is not observed: *Chadwick v. Commissioner of Stamp Duties*[19]. That question is to be answered by looking at the

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16 Nor does it contain any equivalent to s 23 of the *Search Warrants Act* 1985 (NSW) which provides that a search warrant is not invalidated by any defect other than one which affects the substance of the warrant in a material particular.

17 (1998) 194 CLR 355 at 389-391.

18 (1977) 2 NSWLR 211.

19 (1977) 1 NSWLR 151 at 156

> subject matter of the legislation and the relation of the particular provision to the general object to be secured by the Act……..
>
> In assessing the significance of the particular provision to the attainment of the general object of the legislation, it is, in my opinion, important to bear in mind the effect of determining that the provision is mandatory. This, in general, will be that non-compliance with the provision will result in the "total failure": *Howard v. Bodington*[20]; of anything sought to be done under the legislation, and of any rights which otherwise would flow from it. And this will be so, whatever be the circumstances of the non-compliance and whatever, in the particular case, be the injustice to flow from it. There will, no doubt, be cases in which such a severe sanction will be necessary or appropriate to the attaining of the general object to be secured by the Act, and I am conscious of the authority which exists for the view that, in the context of judicial proceedings, statutory provisions are generally construed as mandatory: see *Chadwick's* case. But the rigidity of the operation of a provision, if mandatory, and the fact that its consequences will flow regardless of the merits of the individual case, must, in my opinion, be carefully weighed. Before a provision is held mandatory, a court should be clearly satisfied that the part played by the particular provision in the attainment of the general object intended to be secured by the legislation is such that it is necessary or appropriate to visit non-compliance with consequences of that kind."[21]

[37] The passage from *George v Rockett*[22] already quoted as part of the applicants' submissions illustrates some of the considerations which must be kept in mind in approaching the construction of statutes such as the *Police Powers and Responsibilities Act*.

[38] There is, of course, an argument that, while on the one hand strict compliance ought to be observed where the interests of the individual's privacy and protection against oppressive use of powers are involved, there is also a need in the interest of public security and protection to ensure that police powers of investigation are not unduly impeded by an excessive insistence on correctness in every detail, however minor. As Handley JA observed in *Commissioner of Police v Barbaro*[23]: "The court should not adopt a hypercritical approach to warrants". He went on to quote from the judgment of Kirby J in *Ousley v R*[24]*:*

> "Courts properly tend to take a practical rather than an unduly technical view of challenges to warrants permitting intrusion into the property and privacy of those subject to them."

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20 (1877) 2 PD 203 at 210
21 At p 226.
22 (1991) 70 CLR 104 at 110-111.
23 (2001) 51 NSWLR 419 at 422.
24 (1977) 192 CLR 69 at 144.

Non-compliance with the "brief particulars requirement"

[39] Thus an error in the description of an offence may not warrant a conclusion of invalidity[25]; it will depend on its extent and effect. But that is a different matter from non-compliance with the requirement to provide brief particulars. It would be unwise to attempt any formulation of what brief particulars should comprise, and it is the case that often an applicant will not be able to give much in the way of particulars[26]. However, one would expect, as a minimum, where a specific offence is alleged, that the name of the alleged offender would be given. While it is conceivable that in other circumstances the suspect's identity may not be known, one would then expect, at least, some details of the offence.

[40] To ask more than a bare specification of the offence itself is not to impose a crippling requirement on applicants for search warrants. The legislature, in imposing the requirement that brief particulars be given was, in my view, setting a minimum standard not difficult of achievement, but constituting an essential safeguard for those who might be affected by the execution of warrants. I conclude therefore, that the requirement is mandatory and that non-compliance with it renders the warrant invalid. The applicants are entitled to a declaration to that effect.

Non-compliance with the requirements of s 451

[41] The circumstance entitling a police officer to apply for a warrant by telephone is not expressed in which was traditionally regarded as the mandatory "must" but the permissive "may". Nonetheless, the basis for that entitlement is the formation of a view, by reference to whether there are urgent or special circumstances, that it is necessary to apply in that way. The question is whether the legislature intended that a telephone application made without the authority of s 451 could found the issue of a valid warrant.

[42] In contrast to the situation which applied in *Commissioner of Police v Atkinson*[27], the issuing of the search warrant itself is not expressed to be conditional upon the formation of that view. It is to be noted, too, that the explanatory memorandum to the *Police Powers and Responsibilities Bill* refers to s 451 as "a machinery clause", a term which might be considered more consistent with "the alternative method of obtaining a search warrant which may be employed to suit the convenience of the applicant" abjured in *Commissioner of Police v Atkinson*[28].

[43] However, I doubt that the explanatory memorandum can assist in construction of s 451, which is clear in its terms as to what is required of the police officer. The construction of this provision and its effects is, in my view, properly approached in

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25 See for example, *Parker v Churchill* (1986) 9 FCR 334.

26 An extreme instance is given by Pincus J in *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 103 ALR 167 at 169.

27 Section 11(3) of the *Search Warrants Act* 1985 provided "An authorised justice shall not issue a search warrant upon an application made by telephone unless the authorised justice is satisfied that the warrant is required urgently and that it is not practicable for the application to be made in person.

28 (1991) 23 NSWLR 495 at 499.

accordance with the principle "that the court should construe a statute which encroaches upon liberty so that it encroaches upon it no more than the statute allows, expressly or by necessary implication"[29]. A justice from whom a warrant is sought in person has before him or her the application to grant search warrant and, ordinarily, a draft warrant. He or she has the opportunity to reflect upon what is sought, and on what grounds, and to quiz the applicant accordingly, is an important safeguard of the citizen's rights of privacy and protection from oppression. The procedure for application by telephone and other media is an inroad upon that protection. It is paramount that it be confined to those instances which the legislature has seen fit to permit. To do otherwise, by overlooking neglect of the requirements of s 451, would be to risk a further whittling away of what safeguards there are. It would, indeed, risk encouraging a casual approach to the section's dictates. To visit non-compliance with invalidity is to insist that police officers fulfil their obligations of adherence to the section's requirements, consistent with the express purpose of the Act of ensuring fairness and protection of rights..

[44] What follows is that there was, because of that non-compliance with the pre-conditions of s 451, no application for the warrant, and nothing upon which a valid warrant could issue. On this ground also I would declare the warrant invalid.

Does Ghani v Jones apply?

[45] The remaining question is as to what should become of the seized items. Mr Glynn, in his written submission, contended that I should prefer the approach of Heerey J in *Challenge Plastic Ltd v The Collector of Customs*[30] to that of Hill J in *Puglisi & Anor v AFM Authority & Ors*[31] with the result, he says, that I would decline, as Heerey J did, to follow *Ghani v Jones*[32], and would order the return of the items seized. That submission seems to me to risk confusion of two separate issues: on the one hand, whether an application of the principles in *Ghani v Jones* would produce the result that the seizure of items from the applicants was, notwithstanding the absence of a valid warrant, legal; and on the other, whether, even if the items were unlawfully seized, my discretion should be exercised against ordering their return. (Ghani v Jones is, in my view, concerned only with the lawfulness of seizure in the absence of a warrant, and in what circumstances items so lawfully seized may be retained; it does not have anything to say about retention of unlawfully seized items.[33])

[46] As to the first issue, I note that the refusal of Heerey J to follow *Ghani v Jones* was endorsed by Nathan J in *Ozzie Discount Software (Aust) Pty Ltd v Muling*[34]. Nonetheless, I would be hesitant to decline to follow *Ghani v Jones* which has, on

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29 *Inland Revenue Commissioner v Rossminster Ltd* [1980] AC 952 per Lord Salmon at 1017.

30 (1991) 42 FCR 397.

31 (1997) 148 ALR 393.

32 [1970] 1 QB 696.

33 Were it otherwise, the last of Lord Denning's requisites (at p709), that the lawfulness of police conduct be judged at the time of seizure, would be superfluous.

34 (1996) 86 A Crim R 387 at 395.

the whole, been accepted as good law in this country[35], although there is an absence of appellate authority. What makes the point academic, in the present case, is that the first and second respondents have not sought to support the search by reference to common law powers. There is before me no evidence on which I could determine whether what Lord Denning MR described as the "requisites" to justify the taking of an article independently of a warrant are satisfied in the present case. The second respondent does not identify the items seized, or give his reasons for seizing them or retaining them. Because, as I have already found, the search warrant, if such it was, was invalid, and because no independent justification, on *Ghani v Jones* principles, has been made out for the seizure of the items, the second of the declarations sought, that the seizure of documents was unlawful, should be made.

Return or retention of the seized items?

[47] It does not follow, however, that the further relief sought, in the form of an injunction requiring delivery up of all documents seized and copies of them, and the original and copies of the police videotape of the execution of the search warrant should be granted. (The videotape was said to be made in exercise of the power given by s 74(1)(j) to photograph anything reasonably suspected of providing evidence of the commission of an offence. That power is dependent on the existence of a valid search warrant; there was therefore, no power to make the videotape).

[48] In *Challenge Plastics* Heerey J, as already noted, declined to follow *Ghani v Jones* and concluded that there was no common law power enabling the removal of documents without a warrant on the basis of a reasonable belief that they constituted evidence. It is implicit in his statement at the end of the judgment, that documents which were obtained pursuant to a warrant could lawfully be retained, that he had concluded those otherwise procured could not. He did not however, consider the exercise of any discretion as to return of those documents not lawfully obtained; and it is important to note that he was not considering the question of return of documents in a context of concurrent criminal proceedings.

[49] Mr Glynn referred to *George v Rockett* as supporting a view that seized items would be returned. He relied on the following passage:

> "We were invited to adjourn the formal proceedings pronouncing this order if we were of the view that the warrant was invalid. That course would allow the swearing of a fresh complaint which may ground the issue of a valid warrant and thereby preclude the possibility of the return of the documents to the appellant and their loss to the prosecution. But it is not sufficient reason for withholding the relief to which the appellant is otherwise entitled."[36]

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35 See for example *Parker v Churchill* (1985) 9 FCR 316; *Tye v The Commissioner of Police* (1995) 84 A Crim R 147; *Island Way Pty Ltd v Redmond* [1990] 1 Qd R 431.

36 (1991) 70 CLR 104 at 122.

[50] But the Court in *George v Rockett* did no more by way of order than to make absolute an order nisi for review of the warrant. It considered and made no ancillary orders as to the fate of the seized items, and referred only to the "possibility" of return of the items to the appellant solicitor. That return might in fact have depended on a further application by the appellant, or on negotiations between the parties. At any rate, I do not think the statement is of assistance as to the existence or otherwise of a discretion as to the return of seized documents when criminal proceedings are on foot.

[51] In *Puglisi v Fisheries Authority* Hill J undertook a review of the authorities as to retention of invalidly seized goods. Among the cases cited is *Parker v Churchill*[37], a judgment of Burchett J at first instance, in which Hill J says Burchett took the view "that *Ghani v Jones* was authority for the proposition that the police were justified in holding articles for the purposes of a prosecution notwithstanding that they had been illegally obtained". That seems to me a conflation of two separate areas of consideration in the judgment. Rather, as I read the case, Burchett J, having expressed the view that in accordance with *Ghani* the common law would support the seizure of items not covered by the warrant, went on to consider a different position, that is, what orders should be made even if the documents were illegally seized. He referred to the Canadian position that there was no right of recovery of illegally seized articles until the conclusion of criminal proceedings, and concluded by saying that if he had reached the view that there had been an illegal seizure, he would have been disposed to permit inspection of the documents to enable argument in support of any claim that particular documents ought to be retained in any case as evidence. In Australia, he said, the *Bunning v Cross* discretion could permit the admission of illegally obtained evidence; there would be an inconsistency in holding that the prosecution's right to tender that evidence could be abrogated by proceedings for the return of the illegally seized articles.

[52] *Rowell v Larter*[38], a decision of the New South Wales Supreme Court was next considered in Hill J's review. In that case, Young J followed *Ghani v Jones* referring to a decision of Hope J in *Marinko v Rames*[39] in which *Ghani v Jones* had similarly been followed[40]. Hope J had also adverted to the court's discretion:

> "In general terms, and certainly I do not suggest that this is a rule of inevitable application, it seems to me that when the police have instituted prosecution, and claim to be holding an article to be used as evidence in that prosecution, this court would not exercise its discretion upon an investigation of the justification by the police of that retention until after those proceedings had been determined."

Young J concluded that in the case before him a diary significant to committal proceedings should not be the subject of an order for its return, whether on the *Ghani v Jones* rules or by application of the discretion referred to by Hope J.

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37 (1985) 9 FCR 316.
38 (1986) 6 NSWLR 21.
39 Unreported, 13 August 1971.
40 *GH Photography Pty Ltd v McGarrigle* (1974) 2 NSWLR 635.

[53] Hill J also referred to the majority judgment in *Gollan v Nugent*[41] where the following observation[42] is made:

> "Thus, no issue is raised that the articles are required as evidence in any prospective trial, in which event there would be a legitimate ground for retention of them by the police, *Malone v Metropolitan Police Commissioner*[43]."

Mr Glynn points out that the comment was obiter, and apparently based on a misunderstanding of *Malone* because in that case the money in question had been lawfully seized. In his first point he is clearly correct, but I do not think that the second criticism follows. At any rate, I think that the balance referred to by Stevenson LJ in *Malone*[44] between "public interest in the conviction of the guilty against the right of the individual presumed innocent, not to be deprived of his own property, even for a time" is precisely what is at issue in the present case.

[54] Finally, Hill J cited *Tye v Commissioner of Police*[45] and *Ozzie Discount Software (Aust) Pty Ltd v Muling*[46]. In the former case, Studdert J concluded that the requirements set out in *Ghani v Jones* had been met, and also referred to the public interest, which would militate against return of the item in question (there a sample of blood) depriving the court in the criminal proceeding of evidence. Whether such evidence should be admitted was, he considered, a matter properly to be decided at trial; and he ought not to make an order which would have the effect of excluding such evidence. In *Ozzie Discount*, Nathan J ordered the return of CD-ROMs which had been illegally seized; but he emphasised the distinction between the case before him and the position where criminal proceedings were on foot:

> "*In the absence of extant criminal proceedings or the certainty that some will be initiated*, the police should not be permitted to illegally seize, and then retain a citizen's goods"[47] (italics added).

[55] Having completed his review of the authorities Hill J concluded that the preponderance of authority was in favour of refusing to order the return of items illegally seized where criminal proceedings were pending. He identified the balance involved in the exercise of discretion in this way:

> "While the court would not wish to be seen to be rewarding members of the police who obtained possession of material without lawful authority, there is to be weighed against that a public interest in the administration of and non-interference with justice. Should the court order that material, albeit invalidly obtained, to be used in evidence in a pending prosecution be delivered up to those from whom it was taken in the prosecution, which might otherwise succeed, could be frustrated."[48]

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41 (1988) 166 CLR 18.
42 At 44-45.
43 [1980] QB 49.
44 [1980] QB 49 at 60.
45 (1995) 84 A Crim R 147
46 (1996) 86 A Crim R 387.
47 At 397.
48 (1996) 86 A Crim R 387 at 405.

The existence of the *Bunning v Cross* discretion disposed him against interference in the pending prosecution and towards leaving to the presiding judicial officer the question of whether the illegally obtained material should be admitted into evidence. He went on to make declarations as to the invalidity of the warrants in question, but refused to make an order for the return of any item.

[56] To the authorities cited by Hill J might be added *Cassaniti v Croucher*[49] in which Dunford J noted the existence of

> "a discretion to permit the police to retain items illegally seized which appear to provide evidence of the commission of criminal offences and which are required for the prosecution of such offences"[50]

and *R v Fraser-Adams*[51] in which Mildren J observed that the court would not usually order the return of illegally obtained material relevant to the prosecution of criminal proceedings[52]. In this State, the majority in *Hedges v Grundmann ex parte Grundmann*[53] ordered the return of a number of medical files seized under an invalid warrant but declined to extend that order to

> "other property seized at the time of the execution of the warrants in view of the pending criminal proceedings".[54]

[57] The overwhelming weight of persuasive authority, in my opinion, supports the existence of a discretion to be exercised in considering an application for the return of illegally seized items; and moreover points to a refusal to exercise that discretion where criminal proceedings are on foot. On balance in this case, the greater interest lies in preserving the evidence; the question of admissibility may properly be left to the trial judge. Accordingly, I would not be prepared to make any order for the return of items seized pursuant to the invalid warrant if they are required for the prosecution of the first applicant, nor for the delivery of the videotape of the search if it affords evidence of the commission of the alleged offence. There is however, no material presently before me as to the evidentiary value of the seized items. I would be prepared to receive further material and hear argument, should the parties so wish, as to whether any or all of the material seized does in fact afford evidence of an offence. It may be that the question can be resolved between the parties.

Orders

[58] For the reasons given I will make declarations in the following terms:

1. I declare that the warrant issued by the third respondent on 27 December 2001 is invalid.

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49 (1997) 37 ATR 269.
50 At 280.
51 (2001) FLR 120.
52 At 135.
53 [1985] 2 Qd R 263.
54 At 265.

2. I declare that the seizure of documents from 23 Goble Street, Hendra on 28 December 2001 was unlawful.

[59] I dismiss the application so far as it seeks an injunction requiring the first and second respondents to deliver up all documents seized and all copies of them, but I will, if the parties wish it, adjourn for further consideration the question as to whether an order should be made for the return of any documents or the video tape.

[60] I will hear the parties as to costs.