3 of 5 DOCUMENTS

R v Sanders

Court of Appeal Wellington

[1994] 3 NZLR 450; 1994 NZLR LEXIS 634

30 March, 5 May 1994

DECIDED-DATE: 5 May 1994

CATCHWORDS:
[*1]

Criminal practice and procedure -- Search warrants -- Errors in applications, in warrants themselves and in manner of execution -- Whether cumulatively such a substantial chapter of errors rendered searches unlawful and unreasonable -- Summary Proceedings Act 1957, ss 198 and 204 -- New Zealand Bill of Rights Act 1990, s 21.

HEADNOTES:

The Solicitor-General for the prosecutor sought leave to appeal under s 379A(1)(aa) of the Crimes Act 1961 against a pretrial ruling given by a Judge of the High Court under s 344A holding that applications for search warrants under s 198 of the Summary Proceedings Act 1957, the warrants themselves and the manner of their execution represented cumulatively such a substantial chapter of errors that the searches were unlawful and unreasonable and that the evidence of the accused's financial affairs obtained thereby should be excluded.

As to the manner in which the warrants were executed, in essence this involved notification by the police to the financial institution or firm specified in the relevant warrant of the kind of documents relating to the affairs of the accused that were being sought; and the receipt by the police from the institution or firm of such documents [*2] or copies thereof. In addition, the Judge had found that there were independent deficiencies in the applications for the warrants and in the form and content of the warrants themselves.

The following facts were not disputed. In 1987 the respondent purchased a farm largely with borrowed money. In the following year a drought meant he had to sell most of his stock and caused him financial difficulties. He decided that his farm was not an economical unit and resolved to grow cannabis in an underground bunker, which he built with further borrowed money. By 1990 he was able to buy a second farm, borrowing another $100,000 for this purpose. By 1992 his net annual income had grown to $102,000 pa. The police then discovered cannabis growing on his farm. The respondent was arrested and charged with cultivating and dealing in cannabis and producing cannabis oil.

The jury was unable to agree on the charges and a second trial was ordered. To strengthen the Crown case for the second trial the police wished to have access to the respondent's financial affairs in the expectation of being able to demonstrate that only part of his income of $102,000 pa could have come from legitimate farming. [*3] The records the police wished to investigate were those relating to the respondent's dealings with various companies, his bank, his accountants and his mortgagees. Applications for search warrants were made and the warrants issued accordingly .

Held: 1 (per totam curiam) There was no reason in principle why the voluntary handing over by a custodian named in a search warrant of the category of documents covered by the warrant should not be lawful (see p 454 line 33, p 476 line 4).

2 (per Fisher J) As to search warrant applications:

(a) The formal requirements were that there be (i) an application for a warrant in writing accompanied by, (ii) a statement of fact in writing, (iii) compliance with ss 3, 4 and 15 of the Oaths and Declarations Act 1957 in swearing the statement of fact and (iv) an express or implied statement of the applicant's personal belief in the facts recited.

(b) The applicant's sworn statement of facts need not be confined to admissible evidence but must express or imply the source of the applicant's belief unless the fact is patently uncontroversial.

Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728 (CA), Rural Timber Ltd v Hughes [1989] 3 NZLR 178 (CA) referred [*4] to.

(c) For an application based on s 198(1)(b) of the Summary Proceedings Act 1957, the substantive requirements were that the sworn statement of facts provide reasonable ground for belief (as distinct from mere suspicion) that (i) an offence punishable by imprisonment had been committed, (ii) the things specified would be found in the designated place or repository and (iii) those things would be evidence as to the commission of the offence.

(d) It was for the applicant to give sworn evidence as to the primary facts and for the judicial officer to decide whether that evidence constituted reasonable ground for belief with respect to each of the said ultimate issues. There was nothing to prevent the applicant from expressing an opinion as to the ultimate issues but it was not necessary for him or her to do so.

(e) A defect of expression in an application was of no legal consequence unless it was so profound that the meaning of the document could not be ascertained. If on a reasonable interpretation of the document as a whole the intended meaning could be ascertained, the question was whether the result revealed any legal defect.

(f) A legal defect in an application would be of no [*5] legal consequence unless either the legislature had expressly or impliedly manifested an intention that such a defect would render the application a nullity or the defect was shown to have caused a miscarriage of justice.

(g) Formal defects such as incorrect positioning of a jurat or an abbreviated form of signature would not render the document a nullity unless the defect had frustrated an essential legislative aim.

(h) For present purposes an application was a nullity if, among other things, the primary facts deposed to in the application failed to disclose a reasonable ground for belief with respect to one or more of the three ultimate issues.

(i) The onus of proving a miscarriage of justice lies upon its proponent, albeit upon a balance of probabilities only. Whether a defect in an application had caused a miscarriage of justice could be

determined only by examining the events which had occurred since the application (see p 462 line 32).

3 (per Fisher J) As to form and content of search warrants:

(a) Search warrants were required broadly to follow Form 50 in the Summary Proceedings Regulations 1958 (SR 1980/84). Although minor variations from the prescribed form were permissible, [*6] the document must as a minimum show on its face that it was addressed to a constable, recited the foundation and purpose of the warrant, conferred authority to enter a defined location for the purpose of searching for and seizing defined things, and be issued by a District Court Judge, Justice or Registrar, not being a constable.

(b) The things to be taken and the purpose of the taking must also be defined in the warrant with sufficient particularity that the constable could keep within the intended scope of the warrant and the owner or occupier could understand the warrant and take legal advice with respect to it.

{452} (c) The warrant must not be over-broad in the sense that it purported to authorise a search and/or seizure at locations, for things, or for purposes beyond those justified by the evidence presented in the application but the things specified to be seized might include all other things which fell within the broad statutory formula in s 198(1)(b).

(d) As with applications, a mere defect of expression in a warrant would be of no legal consequence unless, read as a whole, the meaning of the document was unclear on a matter essential to its validity.

(e) A legal defect [*7] in a warrant would not invalidate it unless there is either an express or implied legislative intention that such a defect would render the warrant a utillity or the defect had caused a miscarriage of justice.

(f) Whether a failure in one or more of the matters referred to in para (a) hereof rendered the document a nullity must be determined on a case by case basis having regard to the seriousness of the defect and underlying legislative intentions.

(g) Formal legal defects such as the citation of an obviously inapplicable statutory purpose in terms of s 198(1)(a), (b) or (c) would not render the document a nullity if the meaning of the document was clear and essential legislative aims had been achieved.

(h) Whether a defect in a warrant had caused a miscarriage of justice could be determined only upon an examination of the events which had occurred since the issue of the warrant. If no one had been misled as to the legitimate scope and purpose of the warrant, and the warrant had been properly founded upon the application, there could be no relevant miscarriage of justice (see p 467 line 24).

4 (per Fisher J) As to execution of search warrants:

(a) The object of a search warrant [*8] was to override those interests in property, confidentiality, personal freedom, privacy and dignity which would otherwise be infringed by entry, search and seizure. If no such interests would be infringed, or if those persons whose interests were affected consent, no warrant was needed.

R v Coombs [1985] 1 NZLR 318 (CA), R v Mann [1991] 1 NZLR 458 (CA), R v Jefferies [1994] 1 NZLR 290 (CA) referred to.

(b) A company was free to surrender voluntarily its records to the police only where this would not infringe any interest in property or confidentiality of a suspect or where the suspect consented.

(c) In the absence of consent, a seizure would normally be justified only if effected

(i) as an incident of arrest, (ii) pursuant to a valid search warrant, or (iii) pursuant to other statutory authority.

McFarlane v Sharp [1972] NZLR 838 (CA) referred to.

Chic Fashions (West Wales) Ltd v Jones [1968] 2 QB 299; [1968] 1 All ER 229 (CA), Reynolds v Commissioner of Police of the Metropolis [1985] QB 881; [1984] 3 All ER 649 (CA), Rural Timber Ltd v Hughes [1989] 3 NZLR 178 (CA) distinguished. [*9]

(d) Entry, search and seizure pursuant to a warrant would be lawful only if confined to the location, purpose and seizable things identified in the warrant but the warrant would normally include things which there is "reasonable ground to believe" would be evidence as to the commission of the offence.

(e) Whether there was reasonable ground for such a belief was to be determined upon an objective assessment of the circumstances as they were presented to the executing constable at the time. Except where good faith was in issue, the opinion of the executing constable considered subjectively was irrelevant.

Crowley v Murphy (1981) 34 ALR 496; 52 FLR 123, Wilson v Maihi (1991) 7 CRNZ 178 (CA) referred to.

{453} (f) In deciding whether there was reasonable ground for belief, the circumstances presented to the executing constable relevantly included the representations of an apparently impartial and responsible representative of the company which possessed the documents.

(g) Although entry, search and seizure could be effected only by constables and persons acting under their personal supervision, there was no relevant entry or search [*10] where the possessor of the documents searched them in preparation for a response to a police demand for their production.

(h) A warrant authorised the three distinct acts of entry, search and seizure. A seizure which in all other respects complied with a warrant was not rendered unlawful by the absence of any antecedent entry or search.

(i) It followed that where documents could have been validly seized following an entry pursuant to a warrant, there was nothing objectionable in a police request that the possessor of documents should instead send them to the police from the place designated in the warrant. If the request was complied with the seizure occurred when the police received and retained the documents (see p 474 line 18).

5 (per Fisher J) The sample warrant quoted earlier was directed to financial records held by chartered accountants. Many of the documents relating to Mr Sanders might well have been his property and the remainder would undoubtedly have been held by his accountants subject to an implied contractual duty to maintain confidentiality. Consequently they could be surrendered to the police only with his consent or pursuant to the valid execution of a search [*11] warrant. Although he had been informed, there was no evidence that he consented (see p 475 line 5).

Appeal allowed: evidence obtained by search warrant admissible at trial.

Observation: (per Cooke P and Casey J) Shortcomings in procedure and documentation are so various, however, that we have reservations as to how far any formula could be evolved that would provide anything in the nature of an automatic analytical answer to issues under the two sections. In the end, it is always a question of the relative seriousness or otherwise of an error. If the error is so serious as to attract the description "nullity", s 204 will not assist. Inevitably questions of degree and judgment arise (see p 454 line 47).

CASES-REF-TO:

Ghani v Jones [1970] 1 QB 693; [1969] 3 All ER 1700 (CA).
Hill v Attorney-General (1990) 6 CRNZ 219 (CA).
New Zealand Stock Exchange v Commissioner of In Ian d Revenue [1992] 3 NZLR 1; [1991] 4 All ER 443 (PC).
R v Latta (1992) 8 CRNZ 520 (CA).
R v Laugalis (1993) 10 CRNZ 350 (CA).

INTRODUCTION:

Appeal This was an appeal by the Crown against a pretrial ruling of a High Court Judge excluding evidence obtained by certain search warrants.

COUNSEL:

JC Pike and DJ Boldt for the Crown; DL Stevens and RJ Stevens [*12] for the respondent.

JUDGMENT-READ: Cur adv vult. The judgment of Cooke P and Casey J was delivered by

JUDGES: Cooke P, Casey, Fisher JJ

JUDGMENT BY: COOKE P

FISHER J

JUDGMENTS: COOKE P: The Solicitor-General for the prosecutor seeks to appeal under the Crimes Act 1961, s 379A(1)(aa) against a pretrial ruling given by a Judge of the High Court under s 344A holding that applications for search warrants under {454} the Summary Proceedings Act 1957, s 198, the warrants themselves and the manner of their execution represented cumulatively such a substantial chapter of errors that the searches were unlawful and unreasonable and that the evidence of the accused's financial affairs obtained thereby should be excluded. By way of precaution the Judge left open the possibility that expert evidence based on an analysis of the financial information might be shown to the satisfaction of the trial Judge to be independent of the vitiating factors; that aspect does not arise on the view formed by this Court.

The pending trial is a retrial, the jury at the first trial having disagreed. The accused was indicted on three counts of cultivating cannabis, one of producing a cannabis preparation (Class B), and one of possession of cannabis for sale. [*13] The counts relate to July and October 1992. In evidence at the first trial the accused acknowledged that he had decided to grow cannabis in an

underground bunker, purpose-built by him on his farm in 1988, but he said that he had not carried on with that project and that the cannabis activities to which the charges related must have been conducted without his knowledge by people working on the farm. He also said, in summary, that the farm had been in serious financial difficulties in 1988 but that by 1992 he had restored it to such profitability that his net annual income was some $102,000. The purpose of the search warrants was to obtain evidence for the second trial showing that this level of income could not have been obtained by legitimate farming operations.

The retrial is scheduled to begin on 9 May 1994. Partly for that reason we do not propose to deliver an extensive judgment. We have had the advantage, however, of reading the full judgment prepared by Fisher J. We agree with his conclusions, which entirely accord with the view that we had formed on hearing the argument.

As to the applications and the warrants, there are various features of clumsiness, inaccuracy and [*14] irrelevance, but we are satisfied that in substance the affidavits showed reasonable ground for belief in terms of s 198(1)(b) and that the shortcomings in the expression of the warrants all fall within the words "defect, irregularity, omission, or want of form" in s 204. They occasioned no miscarriage of justice, so s 204 saves the documents from invalidity.

As to the manner in which the warrants were executed, in essence this involved notification by the police to the financial institution or firm specified in the relevant warrant of the kind of documents relating to the affairs of the accused that were being sought; and the receipt by the police from the institution or firm of such documents or copies thereof. We think that this procedure, as well as being obviously convenient and tending to avoid unnecessary intrusion into the accused's affairs or unnecessary disruption of business at the premises specified, was lawful. Of course each case must turn on its own facts. But there is no reason in principle why the voluntary handing over by a custodian named in a search warrant of the category of documents covered by the warrant should not be lawful. An actual entry on the premises [*15] by the police as authorised by the warrant is not always essential, and in our view was not essential in the present instances. Further, there was no breach of s 21 of the New Zealand Bill of Rights Act 1990: the seizures were reasonable as well as lawful.

Fisher J has provided a valuable general discussion of ss 198 and 204. We have no doubt that it will be helpful in the resolution of cases arising under those sections. Shortcomings in procedure and documentation are so various, however, that we have reservations as to how far any formula could be evolved that would provide anything in the nature of an automatic analytical answer to issues under the two sections. In the end it is always a question of the relative seriousness or otherwise of an error. If the error is so serious as to attract the description "nullity", s 204 will not assist. Inevitably questions of degree and judgment arise.

The Court being unanimous as to the result, leave to appeal will be granted, the appeal will be allowed and it will be ordered that the evidence obtained by the search warrants is admissible at the trial. {455}

FISHER J: The Crown appeals against a pretrial ruling that evidence relating [*16] to the financial affairs of the respondent Mr Sanders may not be led at his forthcoming retrial on a charge of possessing cannabis for supply. In the course of its ruling the Court disapproved current police practice relating to the recovery of documentary records from cooperating companies. It also found that there were other defects surrounding the issue and execution of the search warrants in

question. The Crown defends current police practice relating to cooperating companies and argues that other defects associated with these warrants were not serious enough to justify rejection of the evidence.

Factual background

For present purposes the following facts were not disputed. In 1987 Mr Sanders purchased a 148 acre farm, largely with borrowed money. In the following year a drought meant that he had to sell most of his stock and caused him financial difficulties. He decided that his farm was not an economical unit and resolved to grow cannabis in an underground bunker. With an additional $5000 loan he built the bunker and a verandah. By 1990 he was able to buy a second farm, borrowing another $100,000 for this purpose. By 1992 his net annual income had grown to $102,000 [*17] pa. The police then discovered cannabis growing on his farm.

Mr Sanders was arrested and charged with cultivating and dealing in cannabis and producing cannabis oil. At his trial he gave evidence in the course of which he conceded the foregoing facts. The jury was unable to agree on the charges and a second trial was ordered. It is still to be heard.

As a result of the evidence given by Mr Sanders at his first trial, the police decided that with further investigation they should be able to strengthen the Crown case for the second trial. They expected that an analysis of Mr Sanders' financial affairs would reveal that only part of his income of $102,000 pa could have come from legitimate farming. By this means they hoped to show that the remainder must have come from dealing in cannabis. The records which the police wanted to investigate were those generated in Mr Sanders' dealings with various companies over a period of about six years between 1987 and 1993. Most of the companies concerned were either based in Timaru or had their relevant branches there -- his chartered accountants, Messrs Martin Wakefield; his bank, Trust Bank South Canterbury; his stock and station firms, [*18] Pyne Gould Guinness Ltd and Wrightsons NMA Ltd; and his mortgagees, Countrywide Banking Corporation Ltd and South Canterbury Finance Ltd From further afield he had also borrowed from two other mortgagees -- Elders Rural Finance NZ Ltd and Housing Corporation of NZ whose relevant offices were in Auckland and Christchurch respectively.

The officer in charge of the case was Detective Lord. To gain access to the records held by those companies he applied for appropriate search warrants. The first application, made on 25 June 1993, related to Trust Bank South Canterbury, Housing Corporation of NZ, Elders Rural Finance and Martin Wakefield. The search warrant application materially stated:

"I, Michael Grant LORD of Timaru Detective make oath and say as follows:

1. On the 13th of October 1992, Charles Score SANDERS of Pareora River Road was arrested and charged with possession for supply of cannabis.

2. During the week of the 10th to the 14th of May 1993, a High Court Trial was held in Timaru in relation to this matter.

3. The jury in this matter was unable to reach a decision. As a result, a second trial will be conducted.

4. SANDERS gave evidence in his defence. During that time, [*19] he made several references to his financial position and condition of his farm and stock.

5. In 1987, SANDERS purchased 50 acres of land at Pareora for $50,000. {456} This money being made up of $40,000 mortgage from Housing Corporation and $10,000 from additional sources.

6. He later purchased a remaining 90 acres, making a 140 acre block for $20,000. This $20,000 was from his father-in-law which he has yet to pay back.

7. In late 1986, early 1987, SANDERS purchased a bulldozer and truck.

8. In 1987, SANDERS purchased a tractor and farm machinery by hire purchase.

9. In 1987/88, SANDERS was heavily committed financially, causing him to give up drinking, spending money on social occasions and making cuts in his personal expenditure.

10. In 1983, as a result of the drought, the farm was affected drastically. All his sheep were sold, a couple of pigs were purchased, some heifer calves were bought cheaply and no food was grown.

11. As a result of the drought, SANDERS got behind in his mortgage and hire purchase payments.

12. In 1988, the farm was not considered by Sanders an economical unit. At that stage, SANDERS decided that he would grow cannabis in an underground room.

13. In [*20] May 1988, SANDERS took out a $5000.00 overdraft with Trust Bank to enable him to carry out repairs to his house.

14. It was at this stage that he built a verandah and the bunker.

15. In 1990, SANDERS took out another mortgage of $100,000 with Elders Pastoral and purchased 300 acres of land at Morven.

16. By 1992, SANDERS' net income had grown to approximately $102,000 for the financial year 1991/92 from an uneconomical farm, in 1988.

17. Police believe that SANDERS was living beyond his listed assets and income and that this difference was made up with the income from the sale of cannabis.

I THEREFORE APPLY for a search warrant to be issued in respect of the said bank accounts operated solely or jointly by Charles Score SANDERS at Trust Bank South Canterbury, Stafford St, Timaru, Housing Corporation of New Zealand, Cathedral Square, Christchurch, Elders Rural Finance NZ Ltd Khyber Pass Road, Auckland and the account books, stock records and receipts held by W BAILEY of Martin Wakefield Accountants, 26 Canon Street, Timaru.

SWORN at Timaru

this 25th day of June 1993

before me:

MGL DET 8688 25/6/93

J Cuthbertson

[signed]

Deputy Registrar

18. Police believe that a search of all SANDERS' [*21] Trust Bank South Canterbury accounts, financial documents held by Elders Pastoral, Housing Corporation of New Zealand and accounts, receipts and stock records held by SANDERS' accountant W BAILEY of Martin Wakefield Chartered Accountants, will reveal discrepancy in SANDERS' listed income and his actual income.

19. Police believe that an audit of all recorded income, stock records and bank accounts will prove that SANDERS' income is less than that of his stated income and that this difference will be the result of SANDERS selling cannabis.

{457} 20. Possession of cannabis for supply is an offence pursuant to the Misuse of Drugs Act 1975 and punishable by a term of imprisonment.

J Cuthbertson

[signed]".

Arising from that application four search warrants were issued. The following relating to Martin Wakefield was broadly representative of the others:

"SEARCH WARRANT

Summary Proceedings Act 1957

CRN 395/93

To: Every Constable.

I am satisfied on an application

.*(in writing made on oath)

[material deleted]

THAT there is reasonable ground for believing that there is (are) in accounts relating to Charles Score SANDERS held by W BAILEY of Martin Wakefield Accountants 26 Canon Street [*22] Timaru the following thing(s), namely:

Account books/records

Stock records

Receipts

*(upon or in respect of which an offence of

Possession of Cannabis for Supply . . . has been

[material deleted]

*(which there is reasonable ground to believe will be evidence as to the commission of an offence).

Possession of Cannabis for Supply

[material deleted]

THIS IS TO AUTHORISE YOU at any time or times within one month from the date of this warrant to enter and search the said accounts relating to Charles Score SANDERS held by W

BAILEY of Martin Wakefield Accountants, 26 Canon Street, Timaru with such assistance as may be necessary, and if necessary to use force for making entry, whether by breaking open doors or otherwise, and also to break open the [material deleted] (any box or receptacle therein or thereon) by force if necessary; and also to seize

*(any thing upon or in respect of which the offence has been or is suspected of having been committed)

*(any thing which there is reasonable ground to believe will be evidence as to the commission of the offence)

[material deleted]

DATED at Timaru this 25th day of June 1993.

J Cuthbertson

[signed]

(Deputy) Registrar (not being a constable)."

Over [*23] the next three months Detective Lord obtained further warrants with respect to the remaining companies and, in the case of Martin Wakefield, an additional warrant following the expiry of the first. With certain differences to which I will come later, the applications and warrants were similar to the samples quoted above.

The Timaru warrants were all executed in essentially the same way. Detective Lord would telephone a representative of the company in question, introduce himself, say he had the warrant, and explain the nature of his investigation. In each case the representative agreed to assist in assembling the relevant documents, {458} in the case of Martin Wakefield and Pyne Gould after checking with Mr Sanders first. A few days later Detective Lord would call at the company's premises and show the representative the warrant. He would then uplift documents assembled for him by the company, in one case immediately and for the rest after returning two or three days later.

For the companies out of Timaru, the approach was different. The warrant was not pursued in the case of the Housing Corporation. In the case of Elders, there was a similar preliminary discussion by telephone [*24] but the Detective never visited the actual premises themselves. Instead, he faxed a copy of the search warrant to the Elders' Auckland office. The Detective had further telephone discussions with Elders and their solicitors over the nature and the content of the documents. After some delay the documents were eventually posted to the Detective.

None of the companies with whom the Detective had dealings objected to the form of the search warrants or the process by which they were executed. Upon receipt of the various documents, the Detective put them into a folder which he kept at the police station. The Crown engaged two experts, a farm consultant and a chartered accountant. The Detective sent a photocopy set to each and another set to the defence. The proposed evidence of the two Crown experts would apparently now support the Crown case that a substantial proportion of Mr Sanders' income must have come from some source other than his legitimate farming operations.

High Court proceedings

The defence objected to the evidence of the two Crown experts on the basis that the financial records upon which they relied were obtained unlawfully and unreasonably. The Judge upheld the

[*25] objection in a pretrial ruling under s 344A of the Crimes Act 1961 [(High Court, Timaru, T 4/93, 8 December 1993, Tipping J)]. He found that there were independent deficiencies in the applications for search warrants, in the form and content of the warrants themselves, and in the manner in which they had been executed. The warrants and their execution were beyond redemption under s 204 of the Summary Proceedings Act 1957 because the defects had made the warrants nullities and in any event had produced a miscarriage of justice. The seizure of the financial records was also unreasonable for the purposes of s 21 of the New Zealand Bill of Rights Act 1990. The evidence of the two experts, resting as it did upon material obtained unlawfully and in breach of the Bill of Rights Act, was ruled inadmissible although the Judge left it open to the Crown to persuade the ultimate trial Judge that the material could still be obtained and proved by some means other than the tainted search process.

In this Court the same ground has been traversed. For the Crown Mr Pike conceded that the applications and the warrants were "slipshod" but -- submitted that there was no defect so fundamental that [*26] it could not be cured under s 204. There was nothing wrong with the process of execution. Overall the search and seizure process had not produced any miscarriage of justice. There was no basis for condemning the process as unreasonable for the purposes of the Bill of Rights Act or for excluding the resultant evidence. For the respondent, Mr Stevens took the contrary position on each of those issues.

(1) Principles applicable to search warrant applications

Section 198 of the Summary Proceedings Act 1957 provides:

198. Search warrants -- (1) Any District Court Judge or Justice, or any Registrar (not being a constable), who, on an application in writing made on oath, is satisfied that there is reasonable ground for believing that there is in any building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place -

{459} (a) Any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed; or

(b) Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or

(c) Any thing which there is reasonable ground to believe is intended to be used for the purpose [*27] of committing any such offence- may issue a search warrant in the prescribed form.

(2) Every search warrant shall be directed either to any constable by name or generally to every constable. Any search warrant may be executed by any constable.

(3) Every search warrant to search any building, aircraft, ship, carriage, vehicle, premises, or place shall authorise any constable at any time or times within one month from the date thereof to enter and search the building, aircraft, ship, carriage, vehicle, premises, or place with such assistants as may be necessary, and, if necessary, to use force for making entry, whether by breaking open doors or otherwise; and shall authorise any constable to break open any box or receptacle therein or thereon, by force if necessary.

(4) Every search warrant to search any box or receptacle shall authorise any constable to break open the box or receptacle, by force if necessary.

(5) Every search warrant shall authorise any constable to seize any thing referred to in subsection (1) of this section.

(6) In any case where it seems proper to him to do so, the [District Court Judge], Justice, or Registrar may issue a search warrant on an application made [*28] on oath orally, but in that event he shall make a note in writing of the grounds of the application.

(7) Every search warrant may be executed at any time by day or by night.

(8) It is the duty of every one executing any search warrant to have it with him and to produce it if required to do so.

The Judge concluded at p 4 that s 198(1) required that four matters be established, the first two on the part of the applicant and the second two on the part of the officer issuing the warrant:

"(1) The applicant must have a qualifying belief not just a suspicion.

(2) The applicant must clearly articulate the grounds for that belief so that its reasonableness can be gauged.

(3) The judicial officer must be satisfied that those grounds are capable of supporting a belief and not just a suspicion.

(4) The judicial officer must also be satisfied that the grounds for the applicant's belief are reasonable."

Applying those principles, he held that the applications in the present case displayed four defects. Detective Lord had recounted the belief of the "police", as distinct from his own belief. It was doubtful whether the Detective personally had even a suspicion, let alone a belief. The Detective [*29] did not state the grounds for the police belief. The Detective had drawn no clear link between the things to which the intended search warrant was directed and reasonable grounds to believe that they would be evidence as to the commission of the offence in question. The Judge concluded that for these reasons the applications were invalid.

Unlike search warrants themselves (ss 198(1) and 212(2)(a); Summary Proceedings Regulations 1958 (SR 1980/84) reg 3; Form 50) no particular form is prescribed for search warrant applications. For these one is thrown back upon s 198(1). From that source it is apparent that although the two have been elided into one phrase ("an application in writing made on oath") the document filed in support of the application must serve two quite distinct functions. One is the request for a warrant and the other the provision of evidence establishing the facts necessary for the issue of a warrant.

{460} The evidence provided by or on behalf of the applicant is normally to be provided in writing (s 198(1)) but in appropriate cases it can be provided orally and recorded in writing at the time of delivery (s 198(6)). Section 198(1) makes it plain that the [*30] facts are to be drawn from sworn evidence. "Sworn" in this context means that there must be an assertion of personal belief accompanied by an oath given in accordance with the requirements of ss 3, 4 and 15 of the Oaths and Declarations Act 1957. The applicant is not confined to evidence which would be admissible in a Court of law (Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728 at p 735; Rural Timber Ltd v Hughes [1989] 3 NZLR 178 at p 183) but the very fact that the statute requires sworn evidence indicates that the deponent must expressly or impliedly assert his or her personal belief in the truth of the primary facts to which he or she is deposing. Normally when a deponent asserts particular facts, the context will justify an inference that he or she has personal knowledge of

the facts asserted. If the context suggests otherwise, and some other reliable foundation for the deponent's belief is not given, the bald assertion will normally carry little or no weight. Much will depend, however, upon the context and the inherent likelihood of the facts asserted. The ultimate test of the evidence is whether the applicant has provided the judicial officer (a District Court [*31] Judge, Justice or Registrar (not being a constable)) with reasonable ground for belief in the elements necessary for the issue of a warrant.

On the subject of beliefs, it is important to distinguish between the role of the applicant and that of the judicial officer. The applicant has the twofold task of requesting a warrant and providing sworn evidence. As already noted, the fact that the evidence must be sworn indicates that the deponent must have a personal belief in the primary facts alleged in the affidavit portion of the application. And as with most determinations of a quasi-judicial nature, there will be nothing to prevent a search warrant applicant from going on to make submissions, or perhaps even to express personal opinions, with respect to the ultimate issues. Nor would any particular harm be done in this context if these submissions or opinions were expressed on oath. But strictly speaking, the role of a non-expert witness is to give evidence as to primary facts, not evidence as to the conclusions to be drawn from those primary facts. There is nothing in s 198 which requires the applicant to express an opinion as to the ultimate issues upon which the issue of a warrant [*32] will turn, still less that such an opinion be expressed on oath. It is for the judicial officer, and the judicial officer alone, to decide what conclusions should be drawn from the evidence as to primary facts provided by or on behalf of the applicant. Only the judicial officer has to decide whether that evidence provides reasonable ground for belief with respect to the ultimate issues.

Those ultimate issues are to be found in s 198(1). They differ according to the category or categories of warrant provided for. The most common is a warrant issued under s 198(1)(b) to secure evidence. In such a case the judicial officer can issue a warrant only if satisfied that there are reasonable grounds for belief in three matters: first that there has been the commission of an offence punishable by imprisonment, second that there are things present at or in a stated location and third that the things to be found there will be evidence as to the commission of the offence.

With respect to each of those three issues the judicial officer must be satisfied that there is reasonable ground for belief. At first sight this may seem less than obvious so far as commission of the offence is concerned. [*33] Where the application is made in reliance upon s 198(1)(a) rather than (b), the lesser test of mere suspicion that an offence has been committed, and not necessarily even the suspicion of the judicial officer at that, is apparently sufficient. Paragraph (b) adopts an unspecified portion of para (a) by referring to "any such offence". However, it seems reasonably clear that the phrase "any such offence" in para (b) relates back to no more than {461} the words "offence punishable by imprisonment" in para (a) and not to the fuller phrase "offence punishable by imprisonment [that] has been or is suspected of having been committed". This would accord with the implied policy of the statute and also with the way in which the same phrase "any such offence" appears to have been used in para (c).

I therefore agree with the Judge that the issuing judicial officer must have reasonable ground for belief with respect to all three of those ultimate issues. I agree also that a distinction must be drawn between belief and mere suspicion: R v Laugalis (1993) 10 CRNZ 350 (CA) and Hill v Attorney-General (1990) 6 CRNZ 219, 222 (CA). Even suspicion probably goes beyond mere recognition that something [*34] is possible to the point that, while final judgment must be suspended pending proof, the proposition in question is regarded as inherently likely. However, I

accept the Judge's point that there is a distinction between belief and mere suspicion and his formulation that before there could be a belief there must be the view that the state of affairs in question actually exists. So in the present context the judicial officer must be presented with reasonable ground for belief in that sense.

With respect to each of the three ultimate issues -- commission of offence, presence of thing and thing constituting evidence of offence -- there must be a reasonable ground for belief. As to the first, the statute contemplates a specific offence. The offence alleged must relate to one or more specific incidents, as distinct from the assertion that somewhere among a large group of people, and over an extended period, offending must have occurred: Auckland Medical Aid Trust at pp 736, 740, 749 (CA)). As to the second, the things alleged to be present at the stated location may be defined in generic terms (as, for example, in Rural Timber Ltd at p 181, (CA)) but the exercise must be more than a [*35] fishing expedition with nothing in particular in mind. As to the third, a thing will constitute evidence of the commission of an offence if its form or existence would directly or indirectly make one or more of the factual elements of the offence itself more likely. By this point I have identified a series of legal requirements for search warrant applications. Where one or more has not been satisfied, s 204 of the Summary Proceedings Act is relevant. It provides:

204. Proceedings not to be questioned for want of form -- No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice.

A number of points affect the application of s 204. First, a distinction can usefully be drawn between legal defects and mere defects of expression. The latter will be of consequence if they are so profound that the meaning of the document cannot be ascertained. But if on a reasonable interpretation of [*36] the document as a whole the true meaning can be ascertained, the focus moves to the legal implications of the message ultimately conveyed by the document. Section 204 is at least primarily concerned with the latter stage only. It is difficult to see how the section could assist in the initial process of comprehending what, if anything, the document means.

Secondly, I agree with the Judge that where a legal defect is so fundamental that the relevant document should be regarded as a nullity, the document will be beyond the curative powers of s 204. Whether it is a nullity is essentially a matter of ascertaining the express or implied legislative intention. It is reasonable to infer that a substantive defect such as failure to satisfy the statutory grounds for the issue of a warrant was intended to invalidate any warrant issued in reliance thereon. To invoke s 204 in those circumstances on the basis that no miscarriage {462} had resulted could frustrate one of the implied objectives of s 198: it could encourage the belief that so long as a search ultimately produced incriminating evidence, with the associated difficulty of showing a miscarriage of justice, substantive omissions [*37] in the original application might not matter.

But the implied legislative intention is different when it comes to purely formal defects such as the incorrect positioning of a jurat or an abbreviated or misplaced form of signature. Such defects will not normally render the affidavit a nullity because they will not normally frustrate any essential legislative aim. In the context of those particular examples, the implied legislative aim behind ss 3, 4 and 15 of the Oaths and Declarations Act is that deponents will commit themselves to the truth of all the assertions made in the affidavit and that this act of commitment will be appropriately

recorded in the document. Where the document as a whole gives rise to a reasonable inference that the deponent has done so, there is no justification for regarding the affidavit as a nullity.

If there is a legal defect, but not one which nullifies the application, the final I question under s 204 is whether the Court is satisfied that there has been a miscarriage of justice. Three points arise here. First, the onus of proving a miscarriage of justice lies upon its proponent, albeit merely upon the balance of probabilities. Secondly, it must [*38] have been the defect in the application which caused the miscarriage of justice. Thirdly, whether it did so could be determined only by examining the events which had actually occurred since the application. In a case like the present one there could be a miscarriage of justice only if the defect had caused significant prejudice to the accused. With respect to the Judge, it could not be enough to say in the abstract that even if the problems in this case could fairly be described as defects, irregularities, omissions or wants of form, as distinct from features which nullified the applications, there had nevertheless been a miscarriage of justice in that the detective unjustifiably obtained search warrants on the basis of the applications made. This is to confuse the defects themselves with the specific consequences to the accused.

For a case like the present one I would therefore summarise the principles applicable to search warrant applications as follows:

(a) The formal requirements for a valid search warrant application are that there be (i) an application for a warrant made or recorded in writing accompanied by (ii) a statement of fact made or recorded in writing, (iii) compliance [*39] with ss 3, 4 and 15 of the Oaths and Declarations Act 1957 in swearing the statement of fact and (iv) an express or implied statement of the applicant's personal belief in the facts recited.

(b) The applicant's sworn statement of facts need not be confined to admissible evidence but must express or imply the source of the applicant's belief unless the fact is patently uncontroversial.

(c) For an application based on s 198(1)(b), the substantive requirements are that the sworn statement of facts provide reasonable ground for belief (as distinct from mere suspicion) that (i) an offence punishable by imprisonment has been committed, (ii) the things specified will be found in the designated place or repository and (iii) those things will be evidence as to the commission of the offence. Those are the three ultimate issues.

(d) It is for the applicant to give sworn evidence as to the primary facts and for the judicial officer to decide whether that evidence constitutes reasonable ground for belief with respect to each of the said ultimate issues. There is nothing to prevent the applicant from expressing an opinion as to the ultimate issues but it is not necessary for him or her to do [*40] so.

(e) A defect of expression in an application is of no legal consequence unless it is so profound that the meaning of the document cannot be ascertained. If on a reasonable interpretation of the document as a whole the intended {463} meaning can be ascertained, the question is whether the result reveals any legal defect.

(f) A legal defect in an application will be of no legal consequence unless either the legislature has expressly or impliedly manifested an intention that such a defect will render the application a nullity or the defect is shown to have caused a miscarriage of justice.

(g) Formal defects such as incorrect positioning of a jurat or an abbreviated form of signature will not render the document a nullity unless the defect has frustrated an essential legislative aim.

(h) For present purposes an application is a nullity if, among other things, the primary facts deposed to in the application fail to disclose a reasonable ground for belief with respect to one or more of the three ultimate issues.

(i) The onus of proving a miscarriage of justice lies upon its proponent, albeit upon a balance of probabilities only. Whether a defect in an application has caused a miscarriage [*41] of justice can be determined only by examining the events which have occurred since the application.

Sufficiency of applications in the present case

There are places in which these applications could have been better worded but that in itself does not detract from their validity.

The applications also reveal formal defects. For example in the sample quoted earlier, the jurat appears between paras 17 and 18, Detective Lord has endorsed his initials rather than a normal signature, and he has done so in an inappropriate place. There are other drafting infelicities. But read as a whole, it could not be said that the document leaves in doubt that it is an application for a search warrant accompanied by a sworn statement by Detective Lord. Detective Lord begins with the words "I . . . make oath and say as follows" which is a form of statement of personal belief. Those defects in the mere form of the document were plainly well within the scope of s 204. It has not been suggested that they caused any miscarriage of justice.

Other defects of a more serious nature have been suggested. Detective Lord did not express clear personal opinions that Mr Sanders was guilty of possession of cannabis [*42] for supply, that his financial records were to be found in the companies in question and that these records would constitute evidence of the alleged offence. That he personally held those views might well have been a reasonable inference from the applications viewed as a whole but in any event their presence or absence was of no legal consequence. The question is whether the Detective expressed a belief in primary facts which in turn equipped the Deputy Registrar with reasonable grounds for belief with respect to those issues.

The first ultimate issue was whether Mr Sanders had committed the offence of possessing cannabis for supply. Mr Stevens did not attempt to take the point that strictly speaking the offence would need to have been either possession of cannabis for supply to persons under 18 years of age (Misuse of Drugs Act 1975, s 6(1)(d) and (f)) or possession of cannabis for sale (s 6(1)(e) and (f)). There would have been nothing in the point in any event, an allegation under either of those more detailed headings being implicit. So long as the intention of the application is reasonably clear, loose language in describing an offence is unlikely to be fatal: see, for example, [*43] Auckland Medical Aid Trust at p 736.

Read as a whole, I think that the application quoted earlier does establish that Mr Sanders had a farm which by 1988 had proved uneconomic, that he personally was short of money by that date, that he then decided to grow cannabis in an underground room which he proceeded to build with borrowed money, that within two years he was able to buy another farm, that within four years his income had grown to $102,000 pa and that at his trial in May 1993 the Crown must have been able to come up with enough credible evidence to satisfy at least some jurors {464} beyond reasonable doubt that Mr Sanders had possessed cannabis for supply. It is a reasonable interpretation of the affidavit as a whole that the information recorded in paras 5 to 16 had as its source the evidence given by Mr Sanders in the course of the first trial. In my view the totality of these matters did provide reasonable ground for believing that Mr Sanders had committed the offence alleged.

Essentially there was an unexplained reversal in his financial fortunes dating from a time at which he had not only decided to grow cannabis but had taken active steps to do something about it. [*44]

The second ultimate issue was whether the things alleged (financial records during the period of alleged illegitimate income from cannabis dealings) would be found in the places alleged (the premises of the company named). Here, the Crown must rely for its primary facts upon para 18. On a literal reading it is confined to the belief of the "police" as distinct from the belief of the deponent Detective Lord. This could be of real moment if there were grounds for seriously thinking that Detective Lord's own belief might diverge from that of the amorphous police department to which he referred, or if the existence of financial records of Mr Sanders at the various companies referred to were likely to be a controversial topic. However, neither is the case. Three of the four companies (Housing Corporation, Trust Bank and Elders Pastoral) appear to have been the subject of express concessions by Mr Sanders in his evidence at trial (see paras 4, 5, 13 and 15). The particular allegation that Messrs Martin Wakefield, Chartered Accountants were the accountants for Mr Sanders and that they would be likely to hold his financial records is inherently uncontroversial. In my view reasonable [*45] grounds for belief were provided on this topic.

The third ultimate issue was whether the financial records in question would amount to evidence that Mr Sanders had committed possession of cannabis for supply. This subject substantially overlaps the first. If there had been a dramatic and unexplained increase in income following an acted upon decision to grow cannabis, and if Mr Sanders also conducted a legitimate farming business, his financial records would almost inevitably provide a basis for determining any distinction between legitimate income and the total income to which he had admitted. Indeed, the records could well go further and point positively to an illegitimate source. The admissions made at trial lay a proper foundation for anticipating that these records would exist and would strengthen the Crown case. The primary facts adduced by Detective Lord therefore provided reasonable grounds for belief on the third and final issue.

The foregoing remarks relate to the quoted application. The other applications followed a largely similar pattern except that in three (Pyne Gould Guinness 19 August 1993, Wrightsons 24 August 1993 and Martin Wakefield 10 September 1993) the [*46] Detective forgot to include in the applications a reference to Mr Sanders' 1988 decision to build an underground bunker for cannabis cultivation. This does not pose a difficulty for two of three (Wrightsons and Martin Wakefield) since in those cases the same Deputy Registrar, Mr RS Thompson of Timaru, had already processed earlier affidavits in the same matter containing the requisite evidence. Since they all related to the same proceedings, I see no reason why Mr Thompson should not have drawn upon knowledge he had gained from earlier affidavits to fill any breaches in that regard.

Not so easy to explain is the Pyne Gould Guinness application of 19 August 1993. This application was dealt with by a Justice of the Peace, Mr N E Savage, who had not dealt with any earlier ones. The failure to mention Mr Sanders' decision to grow cannabis in 1988 takes this application to the very brink of invalidity. However, the application does include sworn evidence which goes beyond that contained in the earlier ones. It shows that by this stage, inquiries of Mr Sanders' accountants had revealed that of the total net income of $102,000 estimated by Mr Sanders for 1991/1992, his known legitimate [*47] net income was only $24,288. {465} This is precisely the point the police had been hoping to uncover when in June 1993 they had begun their further investigation into his financial affairs. This application also contains the new evidence that

between 1986 and 1992 Mr Sanders was from time to time able to clear sundry hire purchase arrears by making very large payments in cash. So what the Justice was presented with was most of the evidence quoted in the original application, new evidence that he had a major unexplained source of income and new evidence that he had access to large cash sums. To that one must add one indirect indication of guilt which I have not discussed so far: the jury disagreement at the first trial. The Justice was told in effect that the Crown must have had sufficient evidence of guilt to satisfy at least some of the jury at the first trial, and moreover to the higher standard of proof beyond reasonable doubt. Without putting this to the forefront, I think that in combination with the other factors it was just enough to give the Justice reasonable grounds for believing that Mr Sanders had committed the offence.

My conclusion is that the applications were [*48] validly made and that in each case they provided the Deputy Registrars and Justice with a sufficient evidentiary foundation for the issue of search warrants. Whether they justified warrants in the form that were in fact issued is the next question.

(2) Principles applicable to form and content of search warrant

The Judge pointed to several defects in the sample warrant: a nonsensical authority to enter and search the accounts themselves rather than the premises where they were to be found, the absence of temporal limits upon the alleged offence, the absence of temporal limits upon the period to which the accounts were to relate, and confusion between the different potential purposes of the search in terms of paras (a), (b) and (c) of s 198(1). The Judge concluded that the warrant was radically flawed and beyond the curative powers of s 204 of the Summary Proceedings Act.

The requirements for a valid search warrant are derived from s 198 and Form 50 in the Summary Proceedings Regulations. The latter is as follows:

"SEARCH WARRANT

Section 198, Summary Proceedings Act 1957

To every constable;

(Or To [Full name], constable:)

I AM satisfied on an application in writing made on oath [*49] (or on an application made on oath orally, the grounds for which I have noted in writing) that there is reasonable ground for believing that there is (are) in [Here describe building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place] the following thing(s), [Here insert description of the things to be searched for] upon or in respect of which an offence of [State offence, being an offence punishable by imprisonment] has been or is suspected of having been committed (or which there is reasonable ground to believe will be evidence as to the commission of an offence of [State offence, being an offence punishable by imprisonment]) (or which there is reasonable ground to believe is intended to be used for the purpose of committing an offence of [State offence, being an offence punishable by imprisonment]).

This is to authorise you at any time or times within one month from the date of this warrant to enter and search the said . . . with such assistants as may be necessary, and if necessary to use force for making entry, whether by breaking open doors or otherwise, and also to break open the box (receptacle) (or any box or receptacle therein or thereon) by force if [*50] necessary; and also to seize any thing upon or in respect of which the offence has been or is suspected of having been

committed (or any thing which there is reasonable ground to believe will be evidence as to the commission of the {466} offence) (or any thing which there is reasonable ground to believe is intended to be used for the purpose of committing the offence).

Dated at . . . this . . . day of . . . 19 . . .

District Court Judge

(or Justice of the Peace

or Registrar (not being a constable))."

Prescribed forms must, of course, be adaptable to some degree to suit the circumstances of the individual case. Nor will it normally matter if for other reasons there are drafting variations which effect no changes of substance. However, the purposes indicated in s 198 suggest that certain irreducible elements must be expressed or implied in the warrant. These are that the warrant be addressed to a constable, recite the foundation and purpose of the warrant, confer authority to enter a defined location for the purpose of searching for, and seizing, defined things, and be issued by a District Court Judge, Justice or Registrar, not being a constable.

Of those elements, only two require [*51] further elaboration here. One concerns the recitation of the foundation for the issue of the warrant in the first half of the document. It will be convenient to refer to this part of the application as the "recitals". They amount to a statement by the judicial officer that he or she has been satisfied as to the requirements for the issue of a warrant under s 198(1). There would seem to be several reasons for including this in the warrant. One is that it provides a convenient checklist for the issuing judicial officer. It is difficult to see any other purpose for such phrases as "(or on an application made on oath orally, the grounds for which I have noted in writing)". Another is that it provides an essential aid to the proper interpretation of the operative provisions which follow. It is impossible to interpret the later phrase "any thing which there is reasonable ground to believe will be evidence as to the commission of the offence" without referring back to the offence which had been identified by the judicial officer in the recitals. But more importantly, it seems to have been intended that the warrant will give the owner some rudimentary background so that he or she [*52] can better understand the warrant and, if necessary, take legal advice about it (cf the similar point made by McCarthy P in Auckland Medical Aid Trust at pp 736 and 737 with respect to the permissible limits of the search). If the warrant contains nothing intelligible as to the basis upon which it had been issued that apparent aim would be at least partially frustrated. So I would see the recitals as legally essential.

More must also be said about the requirement that the warrant define the things which may be the subject of search and seizure. The first point in that regard is that although the italicised instruction "Here insert description of the things to be search ed for" in the recitals plainly contemplates something more than simply a verbatim repetition of paras (a), (b), or (c) of s 198(1), the bald statutory formula is adopted when it comes to the operative part of the form. For a warrant issued to gain evidence, the actual authority to the constable is to seize "any thing which there is reasonable ground to believe will be evidence as to the commission of the offence". The seizure power is not limited, in other words, to the particular things whose presence had been [*53] established to the satisfaction of the judicial officer. By virtue of s 198(5) a search warrant authorises a constable to seize "any thing referred to in subsection (1) of this section." Earlier debate as to whether this was limited to the particular items which the judicial officer had reasonable ground for believing were in the place or repository in question (Auckland Medical Aid Trust at pp

738, 740, 746, 748, 749) has now been resolved in favour of the wider view: Rural Timber Ltd v Hughes at p 186.

Since the scope of the things to be taken is largely determined by reference {467} to the offence, it is important that the latter be defined in the warrant. But the warrant need not contain the detail appropriate for a charge sheet, particularly since warrants are normally executed when the police are still at an investigatory stage in the case. The degree of particularity required will differ from one crime to another (Auckland Medical Aid Trust at p 737) but the warrant must convey that it was issued in respect of a particular instance or instances of the crime in question, as distinct from a general warrant to search for any crimes, known or unknown and merely suspected (ibid [*54] at pp 737, 749). In the end the question must be whether, looking at the document as a whole, it is likely that anyone would be misled as to its scope and purpose.

A quite distinct question is whether the warrant is over-broad in the sense that it purports to authorise entry, search or seizure beyond that which had been justified by the evidence placed before the judicial officer. Here it is not a case of finding broadness in the language of the warrant seen in isolation, but rather a case of comparing that language with the evidence originally provided in the application. If that evidence points merely to one possible abortion relating to one woman on one particular occasion, the warrant cannot authorise the taking of all the records of an abortion clinic: Auckland Medical Aid Trust. That mischief is avoided if the judicial officer has properly identified the particular offence disclosed in the application and has then limited the scope of the seizure to items which will be evidence of that particular offence.

To summarise:

(a) Search warrants are required broadly to follow Form 50 in the Summary Proceedings Regulations. Although minor variations from the prescribed form are [*55] permissible, the document must as a minimum show on its face that it is addressed to a constable, recite the foundation and purpose of the warrant, confer authority to enter a defined location for the purpose of searching for and seizing defined things, and be issued by a District Court Judge, Justice or Registrar, not being a constable.

(b) The things to be taken and the purpose of the taking must also be defined in the warrant with sufficient particularity that the constable can keep within the intended scope of the warrant and the owner or occupier can understand the warrant and take legal advice with respect to it.

(c) The warrant must not be over-broad in the sense that it purports to authorise a search and/or seizure at locations, for things, or for purposes, beyond those justified by the evidence which the applicant had placed before the District Court Judge, Justice or Registrar with the qualification that the things to be seized may extend beyond those which had been specifically identified in the application to all other things which fall within the broad statutory formula provided for in s 198(1)(b).

(d) As with applications, a mere defect of expression in a warrant will [*56] be of no legal consequence unless, read as a whole, the meaning of the document is unclear on a matter essential to its validity.

(e) A legal defect in a warrant will not invalidate it unless there is either an express or implied legislative intention that such a defect will render the warrant a nullity or the defect has caused a miscarriage of justice.

(f) A warrant must recite the foundation and purpose of the warrant, confer authority upon a constable to enter a defined location for the purpose of searching and seizing defined things, give enough particulars to enable the constable to keep within the intended scope of the warrant and the owner or occupier to understand the warrant and take legal advice with respect to it and be issued by a District Court Judge, Justice or Registrar, not being a constable. Whether a failure in one or more of these respects renders the document a nullity must be determined on a case by case basis having regard to the seriousness of the defect and underlying legislative intentions.

{468} (g) Formal legal defects such as the citation of an obviously inapplicable statutory purpose in terms of s 198(1)(a), (b)or (c) will not render the document a [*57] nullity if the meaning of the document is clear and essential legislative aims have still been achieved.

(h) Whether a defect in a warrant has caused a miscarriage of justice could be determined only upon an examination of the events which have occurred since the issue of the warrant. If no one had been misled as to the legitimate scope and purpose of the warrant, and the warrant had been properly founded upon the application, there could be no relevant miscarriage of justice.

Sufficiency of warrant in the present case

The warrant quoted earlier in this judgment broadly follows Form 5P 50 as prescribed in the Summary Proceedings Regulations. It appears on its face to be addressed to a constable and to have been issued by a Deputy Registrar. Its format also follows the prescribed form with a purported recital of the background against which the warrant was issued followed by the purported grant of authority to enter something for the purpose of searching for and seizing defined things. The manner in which the entry and search is to be effected correctly reflects s 198(3) and (4) and the prescribed form.

Criticisms are rightly made, however, of other aspects of the warrant. The [*58] first is the evident confusion when attempting to define the purpose of the search. In both the recitals and the operative authority to seize, the warrant correctly quotes the relevant portion of s 198(1)(b). This makes it plain that the warrant was issued to obtain "evidence as to the commission of the offence". Unfortunately the warrant also goes on to add confusing references to s 198(1)(a). In the recitals one finds a nonsensical reference to part of that provision ("upon or in respect of which an offence of") and this is followed by the full phrase "any thing upon or in respect of which the offence has been or is suspected of having been committed" in the operative part.

Before turning to any question of legal consequences I think it important to arrive at the message which the ordinary reasonable reader would take from the warrant as a whole. The failure to delete the references to s 198(1)(a) does nothing for the warrant's instant clarity but in my view no one would be left in any real doubt as to its purpose. The purpose was plainly to secure the financial records of Mr Sanders so that they could be used as evidence that he had possessed cannabis for supply. That much [*59] is plain from the phrase "evidence as to the commission of the offence", which appears twice in the warrant, in combination with the references to Mr Sanders, to the accountants, to the financial records and to the offence.

I do not think that the gratuitious references to s 198(1)(a) detracted from that apparent purpose. As the Judge pointed out, it would be a logical impossibility to commit the offence of possessing cannabis for supply "upon or in respect of" financial records. No one could have taken those words seriously, quite apart from the fact that the first reference to s 198(1)(a) is incomprehensibly incomplete. One can therefore discern the true meaning of the document and on that meaning

there is no legal defect. In those circumstances it is doubtful whether s 204 needs to be invoked on this aspect. But if it did, it would cover the point, since no eligible miscarriage of justice has been suggested. I conclude that the validity of the warrant cannot be impugned on this account.

The second criticism was that the warrant purported to authorise the police to enter and search the accounts themselves rather than the premises where they were to be found. Similar comments [*60] apply. Literally read, the words are nonsense but no one could be in any doubt as to the intended meaning. The full authority is to "enter and search the said accounts relating to Charles Score SANDERS held by W Bailey of Martin Wakefield Accountants, 26 Canon Street, Timaru . . . {469and} if necessary to use force for making entry, whether by breaking open doors or otherwise . . .". I do not see how anyone could escape the conclusion that the intention was to authorise an entry to the accountant's premises. If the true meaning is plain, and on that meaning no legal defect is revealed, that is the end of the matter.

The third criticism concerned the absence of temporal limits upon the period to which the sought-after accounts were to relate. The Judge's concern appears to have been that if the accounts were not confined to a stated period the police would be free to seize records dating back for many years, and potentially well beyond those which could be relevant to the alleged offence. However, there may be a misunderstanding here. As discussed earlier, the authority to search in the operative part of the warrant is not defined by reference to those particular things which [*61] the judicial officer had found to be present in the premises. It is necessary and sufficient that the thing to be taken is one "which there is reasonable ground to believe will be evidence as to the commission of the offence". That phrase imposes its own limits but nothing further is needed to restrict the compass of the things which may be taken. This case is not analogous with Auckland Medical Aid Trust. There, the defect in the warrant was not the use of a broad statutory formula in the operative part of the warrant, or even the reference to very broad classes of records in the recitals. It was the purported authority to take records relating to all women who had attended the abortion clinic over a lengthy period when this could not be justified on the evidence which had been placed before the issuing judicial officer. The latter had reasonable ground for belief with respect to one woman only. Thus to define the things to be taken by reference to the unqualified word "abortion" was fatal to the validity of the warrant.

This brings into focus the fourth criticism of the present warrant: the absence of temporal limits upon the offence specified. The warrant should have referred [*62] to possession of cannabis for supply on a specified date or during a specified period. As it was, the warrant authorised the police to seize evidence relating to any such offence, however far back in history. That was overbroad because the evidence which had been placed before the issuing judicial officer provided reasonable ground for belief with respect to only the period since 1988. I accept this as a legitimate criticism. To put it in context, however, the case is in no way comparable to Auckland Medical Aid Trust. This warrant clearly showed that the allegation was limited to an identified suspect, Mr Sanders. The offence of possession is a continuing one. The issuing officer was justified in concluding that it had extended over a period of four or five years. In those circumstances the failure to define the period in the warrant can not have assumed great significance. It is a classic case for invoking s 204. The onus of showing consequent miscarriage of justice lies on Mr Sanders. He has made no attempt to discharge it.

The other warrants follow a similar pattern although the defects differ in minor respects. The worst of the warrants was the Countrywide one which, [*63] unlike the others, displayed a

complete deletion of the s 198(1)(b) phraseology and was confined to the seizure of the things "upon or in respect of which the offence has been or is suspected of having been committed". Given the fact that the purpose stated was a logical impossibility, and that the proper ground ("which there is reasonable ground to believe will be evidence as to the commission of an offence") was still legible under the deletion, it is difficult to believe that anyone could have been misled on the point. It is a case for invoking s 204 of the Summary Proceedings Act. As it happens, the same conclusion was arrived at with respect to an identical error in the search warrant considered in Rural Timber Ltd

My conclusion is that the warrants were not invalid. The final question is whether they were invalidly or unreasonably executed.

(3) Principles applicable to execution of search warrants

With minor variations, the essential sequence followed in the execution of {470} these warrants was that the Detective telephoned a representative of the company to be searched, the Detective told the representative of the existence of the warrant and the nature of the documents [*64] sought, the company itself located the records which it considered to be relevant in the light of the Detective's explanation, the Detective visited the premises and produced the warrant, there was brief discussion about the documents and cursory examination of them by the Detective, and the Detective then removed the documents from the premises. In the case of Elders, the sequence differed only in that instead of visiting the premises the Detective faxed a copy of the warrant and after further discussion received the documents by post.

We were told that practices along those lines are commonly followed where documentary records are recovered from cooperating companies pursuant to search warrants. Although there is no evidence on the point one way or the other in the present case, Mr Pike informed us that where documents are recovered by the police in this fashion, irrelevant ones are extracted and returned without delay. It is not difficult to see why both the police and the commercial community favour an approach along those lines. For independent police experts to call at the company's premises and sift through often complex and unfamiliar systems must waste time and money, [*65] unnecessarily disrupt the company's activities and risk inadvertent perusal of confidential records unrelated to the matter in hand. An intermediate position would be to have the police and their experts examine the documents at the premises after selection by the company but this too would be time-consuming and disruptive.

In the present case the Judge concluded that the way in which these warrants had been executed was unlawful, stating at pp 12-13:

"While the procedure adopted by Mr Lord is understandable and no doubt convenient, I do not think it should be endorsed. There is absolutely nothing wrong with the executing officer courteously advising business houses in advance what in general terms is to be sought under the search warrant. Indeed such a procedure is to be encouraged. There is no justification, however, for the executing officer delegating entirely, as appears to have happened in this case, to the management of the organisation what material is to be supplied and consequently seized. There is inherent in subs (5) a third filter. The first filter is the need for the applicant to have a reasonable ground for believing. The next filter is the need for the issuing [*66] officer to perform his or her task in a judicial manner as outlined above. The third filter is that the executing officer must

properly address his or her mind to whether the documents being seized qualify for seizure as being things referred to in subs (1).

I agree with Mr Stevens' submission that in the present case there is nothing to show that Mr Lord addressed his mind to the qualification of the documents. There is no evidence that he formed the requisite belief on reasonable grounds that the documents he was seizing would be evidence as to the commission of the stipulated offence. While appreciating the difficulties inherent in such a case as this for a constable, it is to be noted that subs (3) allows the person executing the warrant to do so with such assistants as may be necessary. In such a case as this it would have been desirable for the executing officer, before actually seizing documents, to have the assistance of someone qualified to advise him whether the documents being seized qualified. If someone with the necessary expertise informs the executing officer that in his opinion the document qualifies then there would be reasonable grounds for the executing officer [*67] to believe that to be so."

The starting point must be that the police need a search warrant only where entry, search and seizure would otherwise infringe recognised rights and interests. {471} Broadly speaking, the rights and interests in question consist of those rights of property and confidentiality protected at common law together with certain additional interests in personal freedom, dignity and privacy protected by the Bill of Rights Act. For present purposes such rights and interests are protected by excluding the resultant evidence whether in the interests of securing a fair trial (R v Coombs [1985] 1 NZLR 318, 321 (CA)), or policing the activities of enforcement authorities (R v Mann [1991] 1 NZLR 458) or vindicating rights affirmed under s 21 of the Bill of Rights Act (R v Jefferies [1994] 1 NZLR 290 (CA)).

Where a right or interest of that kind would otherwise be infringed, the police must be able to point to some legal justification for overriding it. Justification is found where the seized items are taken (i) with the consent of those affected, (ii) pursuant to the valid execution of a search warrant (s 198 of the Summary Proceedings Act), (iii) as an incident of [*68] the suspect's arrest (McFarlane v Sharp [1972] NZLR 838, 841 (CA)) or (iv) pursuant to some other statutory authority. The justification where a thing is taken in the reasonable belief that it falls within the categories authorised by a warrant (Chic Fashions (West Wales) Ltd v Jones [1968] 2 QB 299; Reynolds v Commissioner of Police of the Metropolis [1985] QB 881; Rural Timber Ltd v Hughes at p 185), seems to be of no real consequence in the usual case where the warrant is based wholly or in part upon s 198(1)(b). In such a case the warrant itself will authorise the taking of "any thing which there is reasonable ground to believe" will be evidence as to the commission of the offence.

Of the four possible sources of justification just referred to, the two which have particular relevance here are consents and search warrants. There are two limitations associated with consents. First, a consent is effective only if given by all those with a right or interest to protect. A company can voluntarily surrender its records or copies thereof where this would not infringe any right or interest of the suspect. Some of the documents in the present case could probably have been surrendered [*69] voluntarily on that basis. In most cases, however, voluntary surrender by an impartial company would breach the suspect's property rights (as, for example, annual statements of account held by a client's chartered accountants) or would breach a duty of confidentiality derived from contract or equity (as, for example, personal financial particulars obtained by a prospective mortgagee in support of a loan application). The police cannot lawfully demand documents in the knowledge that their surrender by a company would breach the suspect's property

or confidentiality rights. To do so would make the police parties to the breach and the resultant evidence would be unlawfully obtained.

The other point concerning consents is that where, as here, a police request for copy documents is accompanied by the production of a search warrant, or by advice that a relevant warrant exists, the subsequent receipt and retention of the documents by the police should be regarded as a search and seizure for Bill of Rights Act purposes (see by analogy New Zealand Stock Exchange v Commissioner of Inland Revenue [1992] 3 NZLR 1 (PC)). The fact that an object may come into police hands without overt objection [*70] from the owner or suspect cannot be regarded as an acquisition by consent if the document had been supplied in the police-induced belief that the document would otherwise be taken in any event pursuant to an extant search warrant (for an analogy see Ghani v Jones [1970] 1 QB 693, 705E-F (CA)).

The chief alternative to consent in the present case is a search warrant. Where the police are reliant upon the valid execution of a warrant, the execution must of course conform to the terms of the warrant. The things can be taken only from the place or repository designated in the warrant. The things can be taken only for one of the three purposes referred to in s 198(1), that is to say to remove something upon or in respect of which an offence has been committed, to obtain evidence of such offence, or to prevent such an offence being committed in the future. The only items which may be seized are those which answer the description {472} given in the warrant, whether specifically or generically. But the accused must discharge an evidential burden before the Court will concern itself with the possibility that the items taken fell outside those authorised by the warrant (see by analogy [*71] R v Latta (1992) 8 CRNZ 520, 522 (CA) concerning Bill of Rights issues).

Whether the things seized answer the description given in the warrant is to be viewed objectively. Except where the good faith of the police has been impugned (Crowley v Murphy (1981) 34 ALR 496, 521 (FCA); Wilson v Maihi (1991) 7 CRNZ 178, 180, 181 (CA)) the subjective belief of the executing constable is irrelevant. Neither s 198 nor the prescribed form adverts to the state of mind of the executing constable. The closest the section comes to it is that pursuant to s 198(1)(b) a constable is authorised to take a thing only where there is "reasonable ground to believe" that the thing will be evidence as to the commission of the offence. But even in that instance there is a critical difference between reasonable ground for belief (the statutory test) and belief upon reasonable grounds (not required by the statute). The former requires nothing more than an objective assessment of the grounds provided. Only the latter introduces actual belief on the part of the individual concerned in addition to the objective test. It is true that at one point in his judgment in Auckland Medical Aid Trust at p 746 line 35 [*72] McMullin J said that "the executing constable must be satisfied on reasonable grounds that anything that he is minded to seize will be evidence as to the commission of the offence to which the warrant refers." But there is nothing in the judgment to suggest that this conversion of the statutory language into a partly subjective test was anything other than inadvertent. No reasons for such a change are given and there is no equivalent suggestion in the judgments of the other two members of the Court.

For present purposes the question is therefore whether the things taken in fact fell within the description given in the warrant. If they did, that is the end of the matter. If they did not, the seizure will be unlawful. There is no additional requirement that the constable hold a personal belief on that subject. Obviously in practice one would not expect an executing constable to take an item unless he or she personally thought that it fell within the warrant. To act otherwise would

be to run the risk of an illegal seizure, exclusion of the resultant evidence, and civil liability. But it is another matter to supplement the statute by adding a subjective belief to the stated requirements [*73] when none is expressed.

It follows that I can see nothing objectionable in the police execution of a search warrant in a way which relies in the first instance upon the possessor's selection of the relevant documents so long as, upon an objective assessment, the documents do in fact fall within the scope of the search warrant. Here it is important to consider the scope of the warrant in a case of this kind. A warrant founded upon s 198(1)(b) extends beyond documents which are in fact evidence as to the commission of the offence alleged to those which there is merely reasonable ground to believe will constitute such evidence. Whether there is reasonable ground to believe must be assessed in the light of the circumstances as they were presented to the constable at the time of the execution.

When it comes to assessing the circumstances presented to the executing constable I can see no reason for excluding representations as to the nature and content of the documents from those officers of the company with whom the constable is dealing. Whether it is reasonable to form a belief in reliance upon such representations must turn upon their apparent reliability. Factors relevant at this [*74] point will include the thoroughness with which the constable had briefed the company officers before they made their own investigation and selection and the apparent impartiality and expertise of the company officers concerned. As the Judge pointed out at p 13 in connection with authorised assistants who accompany the executing officer, "If someone with the necessary expertise informs the executing officer that in his opinion the document qualifies then there would be reasonable {473} grounds for the executing officer to believe that to be so." I agree. But I can see no reason for confining this to those persons who accompanied the constable to the scene.

A company's officers will normally understand their own systems and records better than anyone else, especially since in most cases these will now be computerised. Where the police have requested the selection of documents answering criteria given in the warrant, and they are dealing with company employees who to all outward appearances are impartial and responsible, it will not usually be unreasonable to rely upon the selection then made by the employees, especially if the police make a cursory check of the documents at the [*75] scene and their appearance seems consistent with the request. Nor will the search and seizure be rendered unlawful or unreasonable merely by the inclusion of irrelevant documents if, in circumstances which made it reasonable to do so, the constable had relied upon a selection made by the possessor of the documents. There would, however, seem to be an implied obligation to return irrelevant documents under s 199(3)(b) as soon as there has been a reasonable opportunity to examine them.

A related point is that s 198 appears to contemplate that some aspects of the executing officer's role will be non-delegable. Only a constable has authority to execute a search warrant: s 198(2). Only a constable is authorised to enter premises and break open receptacles, although he or she may be accompanied by assistants: s 198(3). It is the constable who is authorised to seize things pursuant to the warrant: s 198(5). The word "assistants" implies that those accompanying the constable may also enter, search and seize, but the legal responsibility plainly remains with the constable to ensure that the methods and limitations stipulated in subss (3) to (8) of s 198 are complied with. Only if the [*76] constable is personally present supervising the assistants could that responsibility be discharged. An examination of a company's records by or on behalf of the police at the location stipulated in the warrant plainly constitutes a "search" for present purposes.

However, I do not think that entry and search by a constable and his assistants is to be confused with an examination of its records by members of the company itself. It is open to the lawful possessor of documents to search them at any time. There is no police search for present purposes if the owner or lawful possessor of documents searches through them in preparation for a response to a police demand or request for production. In those circumstances the internal investigation of records does not invade any of those rights of property, confidentiality, privacy, freedom of person and dignity for which there would have been common law and Bill of Rights protections had the same action been taken by the police and their assistants. Only when there is an entry, search or seizure by the police is it necessary for special forms of legal protection to operate. Technically, I think that in a case like the present one, where [*77] the Detective has asked that certain documents be located and has then visited the premises of the company in question in order to take possession of them, the entry, search and seizure takes place only at the time of the Detective's visit and is effected by the Detective himself.

The final question concerns seizures which have not been preceded by any police visit to the company's premises at all. A search warrant authorises three acts: an entry, a search, and a seizure. Each of those powers is a discrete one. There is nothing in s 198 indicating that they can be exercised only in combination. Each would seem to be capable of being exercised independently of the others so long as exercised solely for a purpose authorised in the warrant. Search and seizure are not made contingent upon a prior entry. Nor is a seizure necessarily contingent upon a prior search so long as the items removed are confined to things falling within the scope of the warrant, are taken from the location referred to in the warrant, and are taken for the purpose referred to in the warrant. The point of the Court's power to exclude evidence is to protect suspects and others against unwarranted invasion [*78] of property and privacy rights, personal freedom of {474} movement and personal dignity. Those objects would not be advanced by making a search contingent upon entry or by making a seizure contingent upon entry or search.

As indicated earlier, there is a seizure for present purposes where a police request for copy documents is accompanied by the production of a relevant search warrant or advice that such exists, and in consequence the police receive and retain the documents requested. That must be so whether or not the police have visited company premises to collect the documents. However, if a constable's seizure of a document complies in all other respects with a search warrant, I do not think that the fact that the constable did not effect any entry to the place referred to in the warrant could make the seizure unlawful. I can see nothing objectionable in a police request that there be produced, from the location referred to in the search warrant, documents falling within the scope of the search warrant followed by the police receipt and retention of documents which could have been validly seized in the course of a personal visit to the location in question.

To summarise: [*79]

(a) The object of a search warrant is to override those interests in property, confidentiality, personal freedom, privacy and dignity which would otherwise be infringed by entry, search and seizure. If no such interests would be infringed, or if those persons whose interests are affected consent, no warrant is needed. Once an object comes into police hands lawfully and reasonably, there is no relevant search or seizure and s 21 of the Bill of Rights Act does not prevent its use in inquiries or as evidence thereafter.

(b) A company is free to voluntarily surrender its records to the police only where this would not infringe any interest in property or confidentiality of a suspect or where the suspect consents.

There is no effective consent if records are surrendered only because of a police-induced belief that the records would otherwise be taken in any event pursuant to an extant warrant. Receipt in the latter circumstances amounts to a seizure.

(c) In the absence of consent, a seizure will normally be justified only if effected (i) as an incident of arrest, (ii) pursuant to a valid search warrant, or (iii) pursuant to other statutory authority.

(d) Entry, search and seizure pursuant [*80] to a warrant will be lawful only if confined to the location, purpose and seizable things identified in the warrant but the warrant will normally include things which there is "reasonable ground to believe" will be evidence as to the commission of the offence.

(e) Whether there is reasonable ground for such a belief is to be determined upon an objective assessment of the circumstances as they were presented to the executing constable at the time. Except where good faith is in issue, the opinion of the executing constable considered subjectively is irrelevant.

(f) If deciding whether there is reasonable ground for belief, the circumstances presented to the executing constable relevantly include the representations of an apparently impartial and responsible representative of the company which possesses the documents.

(g) Although entry, search and seizure can be effected only by constables and persons acting under their personal supervision, there is no relevant entry or search where the possessor of the documents searches them in preparation for a response to a police demand for their production.

(h) A warrant authorises the three distinct acts of entry, search and seizure. A seizure [*81] which in all other respects complies with a warrant is not rendered unlawful by the absence of any antecedent entry or search.

(i) It follows that where documents could have been validly seized following an entry pursuant to a warrant, there is nothing objectionable in a police request that the possessor of documents should instead send them to the police from {475} the place designated in the warrant. If the request is complied with, the seizure occurs when the police receive and retain the documents.

Sufficiency of execution in the present case

Applying the foregoing principles to the present case, the sample warrant quoted earlier was directed to financial records held by chartered accountants. Many of the documents relating to Mr Sanders may well have been his property and the remainder would undoubtedly have been held by his accountants subject to an implied contractual duty to maintain confidentiality. Consequently they could be surrendered to the police only with his consent or pursuant to the valid execution of a search warrant. Although Mr Sanders was informed, there is no evidence that he consented.

The sequence followed with respect to the accountants was that Detective [*82] Lord telephoned in advance to advise that he had a warrant and the nature of the documents he was seeking. The accountants located the relevant documents. The Detective visited their premises and showed them the search warrant. There was some discussion between the accountant and the Detective as to their content during which the Detective glanced through them in a cursory fashion. The Detective then removed the documents. Technically, the entry, search and seizure therefore occurred during the Detective's visit to the accountants' office.

There is no evidence to suggest that documents outside the scope of the warrant were taken on that occasion. The defence did not attempt to discharge the evidential burden upon them in that respect. The suggestion that irrelevant documents were taken was not put in cross-examination. Given the disparity between legitimate and stated income referred to in later affidavits, it is not difficult to see why. All the indications are that the financial records taken from the accountants did in fact constitute evidence of the offence. But more to the point, no arguable case has been raised that the Detective lacked reasonable grounds for belief [*83] on that subject. By the time he left the accountant's office, the four sources he had were (i) his background knowledge of the case as recorded in the affidavit presented in support of the application, (ii) a warrant recording the Deputy Registrar's perception that there were reasonable grounds to believe that account books/records, stock records and receipts held by Mr W Bailey of Martin Wakefield Chartered Accountants of Timaru would be evidence of possession of cannabis for supply by Mr Sanders, (iii) the accountants' express and implied representations as to the relevance of the documents and (iv) the Detective's own brief consideration of the documents at the scene. However cursory, the Detective's own examination of the documents must have at least confirmed the accountants' representation that they were financial records relating to Mr Sanders. Taken in combination, those sources provided reasonable ground for belief. The sequence followed with respect to the other Timaru companies was broadly similar.

There is nothing in those sequences to suggest that there was anything other than a valid execution of the warrants. It was not a case of delegation to the company employees. [*84] Rather, the Detective was presented with reasonable grounds to believe that the documents he ultimately removed would constitute evidence of possession of cannabis for supply by Mr Sanders. Whether the Detective personally had that belief is not relevant for present purposes. Objectively viewed, there was reasonable ground for belief.

The sequence followed for Elders Rural Finance differed in that the Detective never visited the premises. On the analysis given earlier, this episode involved a police seizure without any antecedent entry or search. Plainly there was no police entry because the police never visited the premises in question. Nor was there a police search. The investigation and compilation of documents was conducted by Elders and its own agents, not by the police or their agents. Consequently a constable did not have to be present. When the documents were posted to the police {476} and not returned forthwith there was a relevant seizure. But as in the other cases, there is nothing to suggest that any of the documents seized fell outside the scope of the warrant.

My conclusion is that the warrants were validly executed. This makes it unnecessary to decide whether, [*85] as Mr Pike contended, the execution of a search warrant qualifies as a "process" for the purposes of s 204 of the Summary Proceedings Act nor whether the section ought to have been invoked in this case. It is also unnecessary to go on to consider residual discretions with respect to the admissibility of the Crown evidence now in question.

ORDER:

Appeal allowed: evidence obtained by search warrants admissible at trial.

SOLICITORS:

Solicitors for the appellant: Crown Law Office (Wellington).

1 of 1 DOCUMENT

R v Briggs

Court of Appeal Wellington

[1995] 1 NZLR 196; 1994 NZLR LEXIS 674

19 September, 6 October 1994

DECIDED-DATE: 6 October 1994

CATCHWORDS:
[*1]

Criminal law -- Evidence -- Search warrant -- Sufficiency of grounds for grant of warrant -- Form of warrant -- Announcement of identity and request for admission -- Whether entry unreasonable -- Summary Proceedings Act 1957, ss 198 and 204 -- Privacy Act 1993 -- New Zealand Bill of Rights Act 1990, s 21 -- Crimes Act 1961, s 379A -- Summary Proceedings Declarations 1958 (SR 1980/84), Form 50.

HEADNOTES:

The police obtained a search warrant to search Briggs' premises for electrical tools, televisions, toasters, and watches which had been stolen from premises in Palmerston North. In referring to movement of packages from Palmerston North to Briggs' Auckland address the police officer applying for the warrant had inadvertently used the date 3 October 1992 instead of 3 November 1992 when describing the consignment of two packages to that address. When executing the warrant the police found instead packets of cattle drench which were the subject of receiving charges against Briggs. Briggs challenged the admissibility of the evidence of finding the cattle drench on three grounds, that there was insufficient evidence to justify the issue of a warrant, that the warrant was excessively general, and [*2] that the search and subsequent seizure of the goods were illegal and were also unreasonable in terms of s 21 of the New Zealand Bill of Rights Act 1990. The evidence was ruled admissible and the defendant appealed.

Held: 1 The obvious error of using a wrong date in the information when the search warrant was applied for, did not affect the quality of the information presented and the information was fully adequate to justify the issue of the warrant (see page 198 line 28).

2 There was nothing in the Privacy Act 1993 that could prevent a judicial officer from examining the Court's own records (see p 198 line 41).

R v Sajfiti [1994] 2 NZLR 403 (CA) applied.

3 While further particulars of some of the goods could have been provided it was unlikely that such further detail would have added anything to the understanding of the police or of the occupier of the premises as to the scope of the authority. The receiver could not have been named as the police did not know who it was. Non-deletion of the optional wording in the prescribed form indicated a slipshod approach to an important duty but the actual purpose and scope of the warrant was sufficiently clear. The warrant was valid (see [*3] p 200 line 17, p 200 line 26).

R v Sanders [1994] 3 NZLR 450 (CA) adopted.

Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 738 (CA) referred to.

4 A forced entry of occupied premises without prior refusal following appropriate advice was likely to render the search unlawful and also unreasonable in terms of s 21 of the New Zealand Bill of Rights Act 1990. The evidence satisfied the Court that the police had not been in breach of their duty. More importantly, it could not be said that the search was unreasonable, or that any unfairness arose, such as to justify the Court in excluding the evidence (see p 202 line 3, p 202 line 52).

Semayne's Case (1604) 5 Co Rep 91a; 77 ER 194, Launock v Brown (1819) 2 B & Ald 592; 106 ER 482, Burdett v Abbot (1811) 14 East 1; 104 ER 501, Eccles v Bourque [1975] 2 SCR 739; (1974) 19 CCC (2d) 129 referred to.

Appeal dismissed.

CASES-REF-TO:

Lippl v Haines (1989) 18 NSWLR 620; 47 A Crim R 148 (CA).
Richard Curtis, Case of (1757) Fost 135; 168 ER 67.
Simpson v Attorney-General [Baigent's Case] [1994] 3 NZLR 667 (CA).
Swales v Cox [*4] [1981] QB 849; [1981] 1 All ER 1115.

INTRODUCTION:

Appeal This was an appeal against a ruling that evidence was admissible.

COUNSEL:

AGV Rogers for the accused; RLB Spear for the Crown.

JUDGMENT-READ: Cur adv vult The judgment of the Court was delivered by

JUDGES: Hardie Boys, Gault, McKay JJ

JUDGMENT BY: HARDIE BOYS J

JUDGMENTS: HARDIE BOYS J: This is the applicant's second application for leave to appeal under s 379A of the Crimes Act 1961 against a ruling of a District Court Judge on his challenge to the admissibility of certain evidence on his forthcoming trial on two charges of receiving stolen goods. The first application followed a ruling by Judge Satyanand that he had no jurisdiction to go into the grounds on which the challenge was founded. On 17 May 1994 this Court granted leave

to appeal and, holding that the Judge had jurisdiction, allowed the appeal: see (1994) 11 CRNZ 467. On 3 June 1994 the matter came before Judge Imrie, who having heard evidence, ruled the disputed evidence admissible. The present application is in respect of that ruling.

The goods which are the subject of the charges are described in the indictment as animal products; they were in fact packets of cattle drench, stolen from Elders Pastoral Ltd, Hastings, on 2 or [*5] 3 November 1992. On 4 November they were found, allegedly in Mr Briggs' possession, at a house at 109 Shelly Beach Road, Herne Bay, Auckland, by a police party executing a search warrant issued by a Deputy Registrar of the District Court at Auckland that day. As will be explained, these were not the goods in respect of which the warrant was issued, for the latter were not at the address, but fortuitously the packets of drench were. Mr Briggs challenges the evidence of the find on three grounds. (There was a fourth when the matter was last before this Court but that has sensibly been abandoned.) They are that there was insufficient evidence to justify the issue of the warrant; that the warrant was excessively general; and that the search and subsequent seizure of the goods were illegal, and were also unreasonable in terms of s 21 of the New Zealand Bill of Rights Act 1990. In the course of his ruling, Judge Imrie referred to the onus of proof, and in this Court Mr Rogers took issue with what he said. However on the view we take no question of onus arises in this case, and it is therefore inappropriate to discuss it.

We accordingly deal with the three grounds of challenge in turn. [*6]

Sufficiency of the evidence

Authority to issue a search warrant is conferred by s 198(1) of the Summary {198} Proceedings Act 1957 on a District Court Judge, or Justice, or Registrar who, relevantly for present purposes, must be satisfied that there is reasonable ground for believing that there is in the premises any thing in respect of which an offence punishable by imprisonment has been committed. A warrant is not to be granted lightly. The grounds for it must be made out. In order that the judicial officer can be "satisfied" of them, he or she must exercise a personal judgment. It is no rubber stamp process; the duty is a judicial one: Simpson v Attorney-General [Baigent's Case] [1994] 3 NZLR 667.

The warrant in this case was directed to locating not cattle drench, but "electrical tools, televisions, toasters, and watches of Seiko, Olympic, Pulsar and Astina brands". In applying for it, the police officer stated on oath that the police had information as to the activities of a group of professional shoplifters in Palmerston North who were sending the proceeds of their crimes to Auckland by post or courier; that on the night of 2-3 September 1992 electrical tools, televisions, [*7] toasters and ten packaged sets of door hardware had been stolen from premises in Palmerston North; that on 28 October 1992 one of the group had been observed consigning packages to one J Thomas at the Herne Bay address; that the packages had been intercepted and found to contain the ten hardware sets; that these had been duly delivered to the Herne Bay address on 30 October; that on the night of 1 November 1992 40 watches of the brands already mentioned had been stolen from other premises in Palmerston North; that "on 03/10/92" two further packages had arrived in Auckland, having been consigned from Palmerston North "in November 1992", for delivery to the same Herne Bay address; and that J Thomas at that address was the regular consignee of parcels addressed in the same handwriting as that delivered on 30 October. On these grounds, the officer applied for a warrant to search the address to recover the watches and the property stolen on 2-3 September.

Mr Rogers' submission that the information was insufficient focused on the date "03/10/92". The evidence was that the Deputy Registrar who issued the warrant did not ask any questions of the police officer, and was thus presented with [*8] a date a month before the date of the burglary in which the watches, part-subject of the proposed warrant, were stolen. The submission was thus that either there was no link between the packages and the watches, or that there was an error of such magnitude as to invalidate the application. We do not accept the submission. It is abundantly plain that there was an error; the date should have read "03/11/92". The Deputy Registrar may not have noticed it -- we must assume he read the application, for that was his duty -- or he may have seen it as so obvious an error as not to call for mention. In either event, the error cannot affect the quality of the information, which, despite two other rather trifling points Mr Rogers made, we consider was fully adequate to justify the issue of the warrant.

Before turning to the second ground, we mention a quite different matter. When the case came before Judge Imrie, he dealt with it by reference to an expurgated or edited copy of the application for the warrant. Portions referring to the police's informant and to the criminal record of some of the suspects had been deleted. Counsel for the Crown wished the Judge to see the document in its [*9] entirety, but the Judge refused. We understand this was because of concerns about the Privacy Act 1993. We find this difficult to understand. How can a Judge assess the adequacy of the information if some of it is withheld from him? The position is little different from that considered by this Court in R v Saifiti [1994] 2 NZLR 403. That case was concerned with the adequacy of the material placed before a Judge who issued an interception warrant under Part XIA of the Crimes Act 1961, which by s 312H(7) enables a Judge to withhold production of information identifying informants or undercover police officers. The Court held that the exercise of that power did not prevent the Judge from considering all the material on the basis of which the warrant was issued. Whether or not the {199} withholding of information from parties in a case such as the present is permissible either under the Privacy Act or in the exercise of some more general power of the Court need not be decided. It is sufficient to note that there is nothing in the Privacy Act that can prevent a judicial officer from examining the Court's own records.

It should be added that in this Court Mr Rogers supported Judge [*10] Imrie's stand, but having been shown the full document acknowledged that his client would not be prejudiced if the Court saw it too. The Court did see it.

Generality of the warrant

Section 198(1) of the Summary Proceedings Act provides for a search warrant to be issued "in the prescribed form", ie that set out in the Summary Proceedings Regulations 1958 (reprinted as SR 1980/84) as Form 50. The Form has provision for the insertion of particulars: a description of the place to be searched, of the things to be searched for and of the nature of the suspected offences. The need for particulars reflects the law's aversion to general warrants. Inadequate particulars will render the warrant invalid.

In Auckland Medical Aid Trust v Taylor [1975] 1 NZLR 728, this Court discussed at some length the extent of the particulars that must be inserted to obviate that result. McCarthy P said at p 736 that there must be sufficient particularity to enable the officer executing the warrant to know to what offence the articles he is searching for must relate and to enable the owner of the premises to understand, and if necessary to obtain legal advice about, the permissible limits of the search. [*11] Richmond J at p 743 and McMullin J were to the same effect. But as they recognised, whether the particulars in a given case are sufficient must turn on the particular crime and the

particular circumstances. That point was emphasised by Fisher J in this Court in his judgment in R v Sanders [1994] 3 NZLR 450. His conclusion was that in the end the question must be whether, looking at the document as a whole, it is likely that anyone would be misled as to its scope and purpose.

The warrant in this case was issued in this form:

"SEARCH WARRANT

SUMMARY PROCEEDINGS ACT 1957 SECTION 198

TO: Every Constable

I am satisfied on an application in writing made on oath;

THAT there is reasonable grounds for believing that there is (are) in a building, carriage, vehicle, box, receptacle, premises or place at: 109 Shelly Beach Road, Herne Bay, Auckland

the following thing(s) namely: Electrical tools, televisions, toasters; and watches of Seiko, Olympic, Pulsar and Astina brands

(upon or in respect of which an offence of) Receiving

(has been or is suspected of having been committed)

(which there is reasonable ground to believe will be evidence as to the commission of an offence of) Receiving

"THIS [*12] IS TO AUTHORISE YOU at any time or times within one month from the date of this warrant to enter and search the said building, carriage, vehicle, box, receptacle, premises or place at: 109 Shelly Beach Road, Herne Bay, Auckland

with such assistants as may be necessary to use force for making entry, whether by breaking open doors or otherwise, and also to break open the (box), (receptacle) (any box, receptacle therein or thereon) by force if necessary; and also to seize

(anything upon in respect of which the offence has been or is suspected of having been committed)

{200} (anything which there is reasonable ground to believe will be evidence as to the commission of the offence)

(anything which there is reasonable ground to believe is intended to be used for the purpose of committing the offence)

DATED AT Auckland this 4th day of November 1992

(Signature)

(Deputy) Registrar (not being a Constable)"

Mr Rogers submitted that the warrant was fatally deficient in three respects. The first was that the list of goods was too general: "electrical tools" should have been particularised; and television sets and toasters should have been identified by brand and/or serial numbers: the average [*13] home being likely to have at least one of each. The second respect, which needs to be considered along with the first, was that the offence was defined too generally, no person being named as receiver and no date given as to when the receiving was alleged to have occurred.

No doubt further particulars of some at least of the goods could have been provided, as could some dates although realistically they would have had to be the dates of the thefts. But in the particular circumstances of this case, it is unlikely that such further detail would have added anything to the understanding of the police or the occupier of the premises as to the scope of the authority. This was not an authority directed to single items but to goods in quantity, their very quantity of itself identifying them as stolen property and not the normal contents of a household. Obviously the receiver could not have been named; the police did not know who it was. We think there is no substance in these objections.

The third respect in which it was said the warrant was flawed lay in the non- deletion of the optional or alternative wording contained in the prescribed form. While it may have been wise for the warrant [*14] to have contained further identifying details of the goods and of the offence, if only to avoid later argument, it is indefensible for the form not to have been adapted to suit the particular circumstances. To leave it so that all the options appear to apply almost makes a nonsense of it, and indicates a disturbingly slipshod approach to the discharge of an important duty. Nonsensical the document almost is, but not totally. The ordinary reader would simply discard the portions that are plainly inapplicable, leaving it sufficiently clear what the actual purpose and scope of the warrant are. Thus it passes the test in R v Sanders. And it is not so fundamentally flawed as not to be amenable to s 204 of the Summary Proceedings Act. This declares that, amongst other things, no warrant shall be held invalid by reason only of any defect, irregularity, omission or want of form, unless the Court is satisfied that there has been a miscarriage of justice. No miscarriage of justice can be suggested here.

For these reasons we consider that the warrant was valid.

Illegality and unreasonableness

There was nothing unusual about the circumstances in which the search was carried out: there [*15] was no threat or fear of violence, no emergency or urgency. That being so, Mr Rogers submitted that the police were under an obligation before entering the premises to give notice (1) of their presence by knocking or ringing the doorbell; (2) of their authority, by identifying themselves as police officers; and (3) of their purpose, by stating a lawful reason for entry. He added: "Minimally they should request admission and have admission denied."

This submission adopts the words of Dickson J in the Supreme Court of Canada in Eccles v Bourque (1974) 19 CCC (2d) 129 at p 134, in a judgment in which in this respect the other members of the Court concurred. That was a claim for damages for trespass against police officers who entered the appellant's {201} apartment in pursuit of a suspect whom they were entitled to arrest without warrant. The case takes its place in a long line of common law authority establishing that although "the house of every one is to him as his castle and fortress" (Semayne's Case (1604) 5 Co Rep 91a) there are circumstances in which the officers of the Crown may demand entry, and if it is denied, force entry. The requirement of [*16] an announcement of identity and a request for admission as a precondition of the right to enter forcibly has an obvious purpose of reducing the risk of a violent response by the occupier: "for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost": Launock v Brown (1819) 2 B & Ald 592 per Abbott CJ at p 594. Dickson J put it in this way at pp 133-134:

"An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police office[r] identify himself and request admittance."

It is of course in this context that Dickson J's minimal requirement of a request for and a denial of admission is to be understood. The request affords the occupier the opportunity to permit entry without force. The officer is fully entitled to enter if he is given [*17] permission and also, probably, if entry can be gained without force.

Eccles v Bourque was followed by the New South Wales Court of Appeal in Lippl v Haines (1989) 18 NSWLR 620, another case of forcible entry to arrest without warrant. As Hope AJA pointed out, the requirement of prior announcement and request applied at common law equally to cases of forcible entry to arrest with warrant: see Case of Richard Curtis (1757) Fost 135, and also the great constitutional case of Burdett v Abbot (1811) 14 East 1, 154. It also applied where the forcible entry was pursuant to a search warrant: Launock v Brown was such a case.

In New Zealand, the authority of a constable executing a search warrant is conferred and governed by s 198 of the Summary Proceedings Act. Subsection (3) of that section authorises the constable "if necessary, to use force for making entry, whether by breaking open of doors or otherwise". The section does not give guidance as to when the use of force should be considered necessary, nor indeed as to what is meant by "force". As to the latter, in Swales v Cox [1981] QB 849, 854 Donaldson LJ sitting in a Divisional [*18] Court with Hodgson J (who concurred with him), said that it meant the application of any energy to an obstacle with a view to removing it, and that it therefore included the opening of a closed door or the pushing further open of a door already ajar. It is unnecessary in the present case to express any view about that.

The section says nothing about announcement or request. But some requirement is implicit, both from the section itself and from the fundamental common law principle that underlies the decided cases. The citizen has a basic right to the privacy of his or her home. It includes the right to refuse entry to unauthorised persons. As a corollary to that right, the police must, except in special circumstances, intimate their authority before they enter. This involves as a minimum informing the occupier of their presence, of their identity and of their purpose. A request for permission is not necessary, for the requisite permission is conferred by the warrant itself. The warrant need not be produced, although it must be available for inspection if the occupier so requires: s 198(8).

The necessity to use force will arise only where entry cannot be obtained without it. [*19] That may be because the premises are unoccupied, or because the occupier having been given the necessary information, refuses entry or prevaricates, and maintains that attitude in the face of advice that force will be used if it is {202} maintained. The circumstances in which force may be used presuppose that adequate information is provided at the outset.

While each case turns on its own facts, an unannounced peaceable entry of occupied premises, or a forced entry of occupied premises without prior refusal following appropriate advice, is likely to render the search unlawful, and also unreasonable in terms of s 21 of the Bill of Rights Act.

The only evidence of what happened in the present case was that of two members of the police party. Mr Briggs did not give evidence. Detective Gonthier said that he and two other plain

clothed officers, together with a uniformed officer, went to the front door. This is the record of the cross-examination as to what followed:

"The situation was was it that you or some other officer knocked at the door. -- Yes.

Was that you. -- Yes I think it was me.

And Mr Briggs answered the door. -- Yes.

He would have been standing about 18 inches approximately [*20] inside the door when he opened it. -- I can't recall the exact distance but obviously yes, just opened the door.

He was inside. -- Yes.

He didn't immediately step out on the front porch. -- No

One of the officers it may have been you stepped forward into the house holding the warrant for him to see. -- Yes I think it was me.

Mr Briggs took hold of that and started to read it. -- Yes he was given his copy.

That would be this document here. -- Yes that's the one I saw before.

If I could ask that be produced as exhibit. -- Exhibit A produced.

Did you say something to the effect that the document was a search warrant and you were conducting a search of premises. -- Yes as normal I would have told him we were from police, showed him ID, and we had a uniformed officer there to remove any doubt we might not have been police officers and proceeded to enter their premises.

As to show him ID, is that what you recall or what is normal practice. -- It's what I recall I did but also normal practice. I normally have my ID in my hand with the warrant.

Can I just have a look at that. But there was no question of you requesting admission. -- No I didn't request admission. I told him we [*21] were searching the premises."

Then later:

"When you first went into the house would it be fair to say that as you were showing Mr Briggs the search warrant and speaking to him that the other officers were moving around the two of you into the house. -- That I would imagine would be the normal procedure.

You accept that's what happened in this case. -- Yes."

The evidence of the other officer, Detective Constable Blakeley, on the point was very brief: "On entering the address I introduced myself to the defendant BRIGGS who then showed me through to the kitchen area of the house." He was not cross-examined.

Mr Rogers submitted that no officer should have stepped across the threshold until they had identified themselves, stated their purpose, asked to be allowed in, and either been granted permission or refused.

It will be apparent from what we have already said that as a matter of law the submission goes too far. The officers had authority to enter, and their obligation was to identify themselves and inform Mr Briggs of their purpose. This they did. As to the facts, it is not clear whether Detective Gonthier made the necessary {203} introduction before or after he and others stepped [*22] inside. If anything was to be made of the distinction, it ought to have been brought out in

cross-examination. In any event, the distinction can have no significance. As the actual decision in Eccles v Bourque shows, compliance with the police's duty is often a matter of degree. Here, it is clear that the necessary information was imparted, and that Mr Briggs not only raised no protest, but was cooperative. The evidence satisfies us that the police were not in breach of their duty. Even more importantly, it cannot be said that this was an unreasonable search, or that any unfairness arises, such as to justify the Court in excluding the evidence.

For these reasons leave to appeal is refused and the application dismissed.

There will be an order that, until the conclusion of the trial or any earlier order of the District Court Judge or this Court, the contents of the present judgment, so far as they relate to the identity of the accused or the nature of the charges, be not published.

ORDER:

Appeal dismissed.

SOLICITORS:

Solicitors for the appellant: Peter Jacobson (Auckland); (Solicitors for the Crown: Crown Law Office (Wellington).

8 of 16 DOCUMENTS

State of Minnesota, City of Minneapolis, petitioner, Appellant, v. Jason Thomas Cook, et al., Respondents, Jason Charles Meili, Respondent, Peter Joseph Speilbaur, Respondent.

C0-92-411

SUPREME COURT OF MINNESOTA

498 N.W.2d 17; 1993 Minn. LEXIS 220

March 19, 1993, Filed

PRIOR HISTORY: [**1]

Review of Court of Appeals

DISPOSITION:

Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The State appealed a decision of the Court of Appeals (Minnesota), which affirmed a trial court's judgment granting defendants' motion to suppress evidence seized based on a telephone search warrant after they were charged with misdemeanor counts for violation of a city ordinance against noisy parties and disorderly conduct under Minn. Stat. § 609.72(1)(3) (1990), and fireworks in possession under Minn. Stat. § 624.21 (1990).

OVERVIEW: The trial court granted the defendants' motion to suppress ruling that the State failed to show a reasonable need for obtaining a search warrant over the telephone. The trial court took judicial notice that the location of the party was less than 10 miles from a judge's home and at least six other judges resided even closer, so that there was time for an officer to have appeared personally before a judge with a written affidavit. The trial court observed that given the nature of the evidence seized, there was no significant risk of it being destroyed before a written warrant could have been obtained. The appellate court affirmed upholding the trial court's judgment. The court held that the defects in the search warrant obtained by telephone required suppression of the evidence seized in the search because there was total noncompliance with the procedures set out in Fed. R. Crim. P. 41(c)(2). The court found that no recording of the telephone conversation between the police officer and the judge was made, that neither party made notes at the time of the conversation, and that the officer did not speak from notes prepared in advance of his phone call.

OUTCOME: The court affirmed the appellate court's judgment affirming the trial court's judgment suppressing evidence seized as a result of a telephone search.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

[HN1] A telephone search warrant should only be used when circumstances dictate a need to dispense with the more time-consuming process of obtaining a traditional warrant.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > General Overview
Criminal Law & Procedure > Search & Seizure > Search Warrants > Issuance by Neutral & Detached Magistrates
Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope

[HN2] Fed. R. Crim. P. 41(c)(2) provides in issuing a search warrant, the magistrate must place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. A record must be made of the entire call after the caller has informed the magistrate of his purpose in calling, preferably on a voice-recording device, but if none is available, then a stenographic or longhand record should be made. The record is to be certified or signed, and filed with the court. The person requesting the warrant must prepare a document known as the duplicate original warrant in writing in advance of his or her conversation with the magistrate. This document is read to the magistrate verbatim and simultaneously entered verbatim by the magistrate on a similar document form called the original warrant. If the magistrate is then satisfied that it is reasonable to dispense with a written affidavit and that the warrant should issue, he or she should direct the caller to sign the magistrate's name to the duplicate original warrant, and the magistrate should sign the original warrant. The exact time of the execution of the warrant should be written on both the original warrant and the duplicate original.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Accusatory Instruments > General Overview

[HN3] Even though a search warrant issued on an oral presentation to the judge may be constitutional, violation of the rules of procedure for obtaining the warrant may result in suppression of the evidence seized.Procedural defects, which are minor and relatively insignificant, need not require suppression. Serious violations, which subvert the purpose of established procedures, will justify suppression.

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview

[HN4] There are two judicial concerns in connection with obtaining a search warrant by telephone: (1) Was there a demonstrated need for a telephone warrant in lieu of the traditional written application? and (2) Were the procedural requirements for obtaining a warrant by telephone duly followed?

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview

[HN5] In requesting a search warrant by telephone, the police officer should demonstrate that the circumstances make it reasonable to dispense with a written affidavit. Fed. R. Crim. P. 41(c)(2)(A).

SYLLABUS:

Substantial violations of the procedural rule followed by this court for obtaining a telephone search warrant require, in this case, the suppression of the evidence seized in the search.

COUNSEL:

For Appellant: Hubert H. Humphrey, III, Attorney General, Suite 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 and Robert J. Alfton, Minneapolis City Attorney, Brian Bennett Huling, Assistant Minneapolis City Attorney, A-1700 Government Center, Minneapolis, MN 55487.

For Jason Thomas Cook, et al., Respondents: Warren Sagstuen, Assistant Hennepin County Public Defender, Suite 20, 317 Second Ave. South, Minneapolis, MN 55402. For Peter Joseph Speilbaur, Respondent: Michael F. Sullivan, 160 West Bank Skyway, Minneapolis, MN 55455. For Jason Charles Meili, Respondent: Jerry Strauss, Bernick & Lifson, Suite 225, 250 Second Ave. So., Minneapolis, MN 55401.

JUDGES: En Banc. SIMONETT

OPINIONBY: SIMONETT

OPINION:

[*18] Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

Under the facts of this case, the defects in the search warrant obtained by telephone require suppression of the evidence seized in the search. For the reasons stated, we affirm the court of appeals [**2] and the trial court.

At about 11 p.m. on Sunday, July 21, 1991, Minneapolis police officers responded to complaints of a noisy, unruly party at defendants' duplex in south Minneapolis. As Sgt. Michael Fossum approached the residence he could hear music from a block away. As he got closer he observed more than a dozen individuals drinking and shouting from the second floor deck of the duplex.

This was not the first time the police had received complaints about defendants' activities. In the 5 months preceding July 21, officers had been to the duplex dozens of times in response to more than 75 citizen complaints for noisy parties, loud fireworks, fights, and other disturbances. Typically, the officers were confronted with large parties involving live music and crowds of 100 or more people carousing. On July 2, 1991, there had been a mediation session attended by several of the defendants, a police department representative, some neighbors, and a city council member. At this session, defendants admitted having parties and selling alcohol as a moneymaking enterprise. Defendants promised not to have any more large parties and not to disturb neighbors. Within a week, the promises were broken. [**3] More than ten citizen complaints for loud parties were made in the 20 days between the mediation session and the evening in question.

On the occasions when the officers would respond to the complaints, they could see and hear the party going on but were refused entrance to the duplex. Because the residents would not consent to a police entry and the police were without a search warrant, the officers could not enter the duplex. Consequently, on the evening of July 21, Sgt. Fossum felt he would need a search warrant to enter the premises. The sergeant believed it would take 3 to 4 hours to obtain a written warrant in the regular manner, and, therefore, he decided to obtain a telephonic warrant. Two officers were assigned to watch the house,

additional officers were summoned, and Sgt. Fossum then placed a telephone call to Judge H. Peter Albrecht.

After being placed under oath, Sgt. Fossum explained the situation to Judge Albrecht and described the police department's past experiences at the duplex. The officer testified that he specifically requested authority to search for and seize alcohol, dispensing equipment, cash boxes, currency, [*19] and other items evidencing sales of alcohol, and [**4] to identify the party's sponsors and make observations of the physical surroundings of the dwelling. Based on Sgt. Fossum's statements, the judge found probable cause and sufficient need for a search warrant. At 11:58 p.m. the judge, by telephone, authorized a search of the premises. This telephone conversation was not recorded. The officer did not read his statement from a prepared written application or from any notes, nor, apparently, did the judge make any significant notes of what was said over the telephone.

Sixteen minutes later, the officers approached the duplex. Seeing the officers coming, defendant Trevor Cook closed and locked the door. The officers announced their presence three times, stating they had a search warrant; and, when no one responded, they broke through the door with a sledge hammer. Once inside the duplex, the officers seized beer kegs, bar supplies, promotional banners, bottles of alcohol, fireworks, and a small amount of marijuana.

After completing the search, Sgt. Fossum went to precinct headquarters where the warrant application form was completed (including a two-page, single-spaced typed affidavit setting out the facts previously given the judge over [**5] the telephone), and the warrant itself was completed. The officer signed the application as the affiant and also signed the jurat with the phrase "for Judge H. Peter Albrecht." The officer also wrote on the warrant "for Judge H. Peter Albrecht," thereby indicating he had signed on the judge's behalf. A handwritten inventory of the items seized was also prepared and signed by Sgt. Fossum. The sergeant then returned to the duplex and left a copy of the search warrant and inventory. At 8 a.m. the morning of July 22, Judge Albrecht initialed and dated the search warrant, supporting affidavit, and inventory. The original copies of these documents were filed with the court.

All defendants were charged with misdemeanor counts for violation of the city ordinance against noisy parties, disorderly conduct under Minn.Stat. § 609.72, subd. 1(3) (1990), and fireworks in possession under Minn. Stat. § 624.21 (1990). Defendant Meili was further charged with the petty misdemeanor of possession of a small amount of marijuana under Minn. Stat. § 152.027, subd. 4 (1990).

Judge Charles Porter, the presiding trial judge, granted defendants' motion to suppress the evidence seized, ruling that the state [**6] had failed to show a reasonable need for obtaining a search warrant over the telephone. The trial court took judicial notice that the duplex was less than 10 miles from Judge Albrecht's home and at least six other judges resided even closer, so that there was time for an officer to have appeared personally before a judge with a written affidavit. The trial court further observed that given the nature of the evidence seized, there was no significant risk of it being destroyed before a written warrant could have been obtained. The court of appeals affirmed in an unpublished opinion. We granted the state's petition for further review in light of our recent decision in State v. Lindsey, 473 N.W.2d 857 (Minn. 1991).

I.

In State v. Lindsey, supra, we reaffirmed our recognition of telephone search warrants, noting that we had first ratified their use in 1985 in State v. Andries, 297 N.W.2d 124 (Minn. 1980). In both cases we cited Fed. R.

Crim. P. 41(c)(2), and in Lindsey we quoted the rule in its entirety, indicating it was the procedure to be followed in obtaining a search warrant by telephone. In both cases we said, [**7] too, that [HN1] a telephone search warrant should only be used when circumstances dictated a need to dispense with the more time-consuming process of obtaining a traditional warrant.

We will not again set out verbatim [HN2] Fed. R. Crim. P. 41(c)(2). It is enough to say there are very specific procedures to be followed. For example, the magistrate must place under oath "each person whose testimony forms a basis of the application and each person applying for that warrant." A record must be made of the entire call after the caller has informed the [*20] magistrate of his purpose in calling, preferably on a voice recording device, but if none is available, then a stenographic or longhand record should be made. The record is to be certified or signed, and filed with the court. The person requesting the warrant must prepare a document known as the duplicate original warrant in writing in advance of his or her conversation with the magistrate. This document is read to the magistrate verbatim and simultaneously entered verbatim by the magistrate on a similar document form called the original warrant. If the magistrate is then satisfied that it is reasonable to dispense with a written affidavit and that the [**8] warrant should issue, he or she should direct the caller to sign the magistrate's name to the duplicate original warrant, and the magistrate should sign the original warrant. The exact time of the execution of the warrant should be written on both the original warrant and the duplicate original.

The purpose of these procedures is to have a record made contemporaneously with the authorization of the search warrant that will show both probable cause for a search and a reasonable need for the warrant to be issued telephonically, so that later, if need be, there is a basis for challenging the warrant that is not dependent solely on after-the-fact recollections. Lindsey, 473 N.W.2d at 865 (Wahl, J., dissenting) (there should be a contemporaneous recording for there to be a probable cause challenge); State v. Meizo, 297 N.W.2d 126, 129 (Minn. 1980) (Todd, J., concurring) (if no contemporaneous record, the judge might have to testify at a probable cause challenge, which would unseemly enlist the judicial branch as a witness for the executive branch). In addition, the federal rule procedures ensure that the police officers will [**9] actually have a warrant to carry with them and to display when they execute the search.

[HN3] Even though a search warrant issued on an oral presentation to the judge may be constitutional, violation of the rules of procedure for obtaining the warrant may result in suppression of the evidence seized. Lindsey, 473 N.W.2d at 863 (citing our decisions for the well-established proposition in this state that violation of a rule can result in exclusion of evidence). Procedural defects which are minor and relatively insignificant need not require suppression. On the other hand, serious violations which subvert the purpose of established procedures will justify suppression. The purpose of suppression is not to vindicate a defendant's rights nor to affirm the integrity of the courts, but to deter police from engaging in illegal searches. In other words, the risk of having seized evidence suppressed is intended to persuade police officers to follow the rules and to act lawfully when searching and seizing private property. See Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment, 44 Vand. L. Rev. 473, 483 (1991). [**10]

II.

We turn now to this appeal. In Lindsey we held that "given the facts and circumstances of this case," suppression was not required. We then added, "In a different case, of course, the

result might be otherwise." Id. at 865. See also State v. Andries, 297 N.W.2d 124, 125-26 (Minn. 1980) ("nor do we suggest that all telephone warrants, no matter what procedure is used, will be valid").

[HN4] There are two judicial concerns in connection with obtaining a search warrant by telephone: (1) Was there a demonstrated need for a telephone warrant in lieu of the traditional written application? and (2) Were the procedural requirements for obtaining a warrant by telephone duly followed?

As to the first requirement, the federal rule says summarily that [HN5] the police officer should demonstrate that "the circumstances make it reasonable to dispense with a written affidavit." R. 41(c)(2)(A). In Lindsey, we pointed out that federal judicial administrators had issued separate guidelines entitled "Demonstrating Need for Dispensing With a Written Affidavit," listing some of the circumstances where a [*21] telephone warrant would be justified. n1 In the case now before [**11] us, the trial judge, applying the federal guidelines quoted in Lindsey, determined that a demonstrated need for a telephone warrant had not been shown.

> n1 Examples of such criteria could include the following:
>
> (a) The agent cannot reach the magistrate in his office during regular court hours;
>
> (b) The agent making the search is a significant distance from the magistrate;
>
> (c) The factual situation is such that it would be unreasonable for a substitute agent, who is located near the magistrate, to present a written affidavit in person to the magistrate in lieu of proceeding with a telephonic application;
>
> (d) The need for a search is such that without the telephonic procedure a search warrant could not be obtained and there would be a significant risk that evidence would be destroyed.
>
> State v. Lindsey, 473 N.W.2d 857 at 863 (Minn. 1991), quoting Memorandum of William E. Foley, Deputy Director, Administrative Offices of United States Courts (September 20, 1977), quoted at E. Marek, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 Clev. St. L. Rev. 35, 41 nn. 30-31 (1978).

[**12]

The state disagrees with the trial court determination, arguing that the need for a search warrant arose late on a Sunday night and that it would have taken 3 to 4 hours to have made a written application in a personal appearance before a judge, by which time the party might have been over. Some of the evidence (such as cash, price lists, etc.) was easily disposable, and, furthermore argues the state, the neighbors should not have to be "held hostage" by a raucous party continuing unabated for the extended time it would take to get a traditional warrant. On the other hand, defendants counter that Judge Albrecht lived "only * * * 10 minutes" from the duplex and six other judges lived even closer. Defendants say the officers should have thought it likely the party would continue into the wee hours; and, finally, some of the items seized were not easily disposable (beer kegs, bottles, etc.) and, anyway, there was no indication the defendants

would have gotten rid of these items to avoid seizure. Everyone agrees, we might add, that the police had probable cause to search the duplex.

The need for a telephone warrant is not as strong in this case as it was in Lindsey, where the property [**13] sought to be seized was easily disposable cocaine and there was reason to believe the apartment occupants might at any moment be alerted to the police presence. Even so, as we said in Lindsey, "It does not follow, however, that a failure to demonstrate a need for such a warrant required the suppression of evidence seized * * *." Id. at 863.

At the time Sgt. Fossum made his telephone call, this court had not yet decided Lindsey. True, the court of appeals' opinion in that case had been published, and our Andries decision was available, but neither opinion prescribed with any specificity the applicable criteria to be applied by a police officer in making a judgment whether to dispense with traditional warrant procedures. Indeed, the court of appeals' opinion noted the lack of guidance provided police officers in this regard. State v. Lindsey, 460 N.W.2d 632, 635 (Minn. App. 1990) (the telephonic warrant "is a novel procedure still ungoverned by guidelines"). If the purpose of suppression is to deter police officers from doing what they should not do, the officers should first have some guidance on what it is they should be doing. Consequently, [**14] we are not inclined to impose the drastic sanction of suppression in this case on the grounds that the officer should not have sought a warrant by telephone.

We next consider the manner in which the telephone warrant application was processed. In both Andries and the court of appeals' opinion in Lindsey, the court cited Fed. R. Crim. P. 41(c)(2) and the procedures therein contained with approval. In other words, the procedures to be followed, especially the requirement of a contemporaneous written record, were established and well known. In this case, it is evident that there was total noncompliance with the procedures which should have been followed, with the exception that Sgt. Fossum was placed under oath for his telephone conversation. We have allowed oral sworn but unrecorded testimony given by the applicant [*22] in person to the judge to supplement a written search warrant application, State v. Meizo, 297 N.W.2d 126 (Minn. 1980), but here there is no written documentation to supplement. There was no recording of the telephone conversation between the police officer and the judge. No notes of the conversation were made at the time by either party. [**15] Nor had the officer spoken from notes prepared in advance of his phone call. In other words, we have no record made at the time the warrant was authorized which can be challenged by the defendants. We are not questioning the truthfulness of the officer's recollections of what occurred. We are simply saying there is no way to question these recollections, and the purpose of the federal rule we follow is to provide a documentary basis for such questioning or, better yet, to obviate the need to question. Neither, we might add, did the officer here have a duplicate original of the warrant with him to take along on the search.

The state argues that the procedural deficiencies here are no more serious than in Lindsey, where we refused to suppress the seized property. We disagree. In Lindsey, the officer first called an assistant county attorney for advice. When he was finally able to locate a judge, he advised the judge he was prepared to tape record the conversation and was told it would not be necessary. Even so, the officer had prepared notes of his warrant application and, after being sworn, testified to the judge from these notes. Lindsey, 473 N.W.2d at 859. [**16] The officer used the same notes in typing up the warrant papers a few hours later. "Given these facts and the fact that a substantially contemporaneous record was

made," we denied suppression of the seized evidence. Id. at 864.

In Lindsey we said that the contemporaneous recording was not what it should be id. at 862, and the clear import of that decision was that in the future more compliance with announced procedures would be required. We request the Advisory Committee on Criminal Rules to prepare and submit for our consideration a rule covering the use of such means as telephone, radio and facsimile transmission for search warrant applications. Until we have such a rule, the procedures set out in Fed. R. Crim. P. 41(c) should be followed, including the supplemental guidelines of Demonstrating Need for Dispensing With a Written Affidavit set out in footnote 1, supra.

Affirmed.

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DOLAN MEDIA

COURT OF APPEALS

State of Minnesota, Respondent, vs. Randy Raines, Appellant.

A04-1481

January 10, 2006

Affirmed

Stoneburner, Judge

Pine County District Court

File No. K203830

Mike Hatch, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

John Carlson, Pine County Attorney, Steven C. Cundy, Assistant County Attorney, Pine County Courthouse, Suite 8, 315 Main Street, Pine City, MN 55063 (for respondent)

John M. Stuart, Minnesota Public Defender, Cathryn Middlebrook, Assistant Public Defender, Suite 425, 2221 University Avenue Southeast, Minneapolis, MN 55414 (for appellant)

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, §10.

SYLLABUS

Minor procedural violations in obtaining a search warrant based on oral testimony under Minn. R. Crim. P. 36 do not require invalidation of the warrant and suppression of evidence seized during a search under the warrant if the defendant is not prejudiced.

OPINION

STONEBURNER, Judge (Hon. James T. Reuter, District Court Judge)

Appellant challenges his conviction of controlled-substance crimes in the first degree, arguing that the district court erred by denying his motion to suppress evidence gathered pursuant to a warrant that he argues was defective because procedures for obtaining a warrant based on oral testimony were not followed. Because we conclude that the procedural defects were not serious violations that subverted the purpose of the procedures for obtaining a warrant based on oral testimony, we affirm.

FACTS

In the very early morning hours, the police found methamphetamine-manufacturing paraphernalia in a vehicle legally stopped for a traffic violation. The driver was arrested and provided information that he was assisting appellant in the manufacturing of methamphetamine and intended to return to appellant's residence later that day to complete the "cook." Appellant had been under investigation for alleged methamphetamine manufacturing for months. Based on information from the driver and information previously received from a confidential informant, an officer (applicant) prepared a search-warrant application for appellant's residence. Applicant then telephoned a judge at 3:10 a.m. and requested that the warrant be issued by telephone request. The applicant read the prepared application and provided additional information requested by the judge, which was added to the written application. The judge approved the issuance of a nighttime, no-knock warrant, but never signed the warrant. The applicant recorded the entire telephone request.

The warrant was executed at 5:00 a.m. The police seized evidence of "cooked" methamphetamine, ingredients, and equipment used to manufacture methamphetamine. After attempting to flee, appellant was arrested and transported to jail. The inventory of his personal possessions at the jail listed "misc papers" among other possessions. Appellant was charged with first-degree controlled-substance crimes.

The recording of the warrant application was transcribed approximately 49 days after the warrant was executed. The original search warrant, the original application, the applicant's affidavit, and a copy of the transcript were filed with the district court on the day of appellant's omnibus hearing. Appellant moved to suppress the evidence seized under the warrant due to numerous violations of the procedures for obtaining a telephonic warrant under Minn. R. Crim. P. 36. Appellant also contended that he was not given a copy of the warrant when it was executed. Two days after the omnibus hearing, a copy of the warrant was found among appellant's possessions at the jail despite the fact that appellant's attorney was told by a jailer immediately

after the omnibus hearing that a warrant was not among appellant's possessions.

The district court denied appellant's motion to suppress. Appellant submitted the matter to the court for trial pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (1980), and was found guilty of first-degree controlled-substance crimes. Appellant was sentenced to 81 months in prison and now appeals his conviction based on the denial of his motion to suppress.

ISSUES

I. Did the district court err in denying appellant's motion to suppress evidence seized pursuant to the execution of a telephonic warrant when several violations of the procedures set forth in Minn. R. Crim. P. 36 for warrants based on oral testimony occurred?

II. Is the district court's finding that appellant received a copy of the warrant when it was executed clearly erroneous?

ANALYSIS

I. Rule 36 violations

When reviewing pretrial orders regarding suppression motions, an appellate court "may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing - or not suppressing - the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

All of the cases relied on by the parties and the district court on this issue predate promulgation of Minn. R. Crim. P. 36 in 1994. In *State v. Andries*, 297 N.W.2d 124 (Minn. 1980), the supreme court upheld a warrant based on information obtained by the judge in a three-way telephone call with the judge, county attorney, and police officer. *Id.* at 125. The supreme court noted that the procedures followed were "remarkably similar" to the procedures established by Fed. R. Crim. P. 41(c). *Id.* The court concluded that the issuing judge's failure to sign the warrant did not require suppression of the evidence seized under the warrant, stating it was a "purely ministerial task that... may be delegated to the applicant." *Id.* The supreme court also noted the demonstrated need for the oral request, that the statutory procedures requiring the issuing judge to sign the warrant were "substantially followed," and that the recordation of the oral request provided the defendant with a means of later challenging the issuance of the warrant. *Id.* at 126.

In *State v. Lindsey*, 473 N.W.2d 857 (Minn. 1991), the defendant moved to suppress evidence seized pursuant to a telephonic warrant in which the oral request was not recorded. The supreme court identified the issue as "whether the noncompliance with Minnesota statutes, which do not provide for or anticipate the use of telephone warrants, requires the suppression of evidence obtained through the execution of this type of warrant." *Id.* at 860. The supreme court noted the lack of any guidance at that time to police officers or courts in the issuance of telephonic search warrants. *Id.* at 861. The supreme court reiterated its prior holding that "whether or not to suppress evidence because police obtained the evidence in violation of a statute or rule is 'quintessentially a judicial issue.'" *Id.* at 863 (quoting *State v. Mitjans*, 408 N.W.2d 824, 830 (Minn. 1987)). And the court noted that a number of cases already made clear its "judicial intent that a violation of a procedure such as that set forth in Fed. R. Crim P. 41 will not necessarily result in the suppression of evidence seized." *Id.* The court noted that this is the approach it has "taken in deciding whether to suppress evidence seized in searches that, though constitutional, involve statutory violations." *Id.* at 863-64 (citing *State v. Smith*, 367 N.W.2d 497, 504-05 (Minn. 1985) (refusing to suppress because the violation was a technical violation of a statute where there was little doubt a court order would have been issued on request); *State v. Schinzing*, 342 N.W.2d 105, 108-09 (Minn. 1983) (citing other cases to the same effect); *State v. Mollberg*, 310 Minn. 376, 386-87, 246 N.W.2d 463, 470 (1976) (agreeing with the approach adopted by federal courts for violations of Fed. R. Crim. P. 41)). The supreme court concluded that the failure to record the oral application did not require suppression and urged police officers, prosecutors, and judges to consider the procedures contained in the federal rules until regulation of telephonic warrants was addressed by statute or rule in Minnesota. *Id.* at 864.

In *State v. Cook*, 498 N.W.2d 17 (Minn. 1993), no contemporaneous record of the telephonic application for a warrant was made, and the supreme court upheld the suppression of the evidence seized in the search. *Id.* at 18-19. Revisiting the procedures of the federal rule, the supreme court reiterated that "[p]rocedural defects which are minor and relatively insignificant need not require suppression," but that "serious violations which subvert the purpose of established procedures will justify suppression." *Id.* at 20. The supreme court stated that the purpose of the telephonic-request procedure

is to have a record made contemporaneously with the authorization of the search warrant that will show both probable cause for a search and a reasonable need for the warrant to be issued telephonically, so that later, if need be, there is a basis for challenging the warrant that is not dependent solely on after-the-fact recollections.

Id. (citing *Lindsey*, 473 N.W. 2d at 865 (Wahl, J., dissenting)). "There are two judicial concerns in connection with obtaining a search warrant by telephone: (1) Was there a demonstrated need for a telephone warrant in lieu of the traditional written application? and (2) Were the procedural requirements for obtaining a warrant by telephone duly followed?" *Id.*

In the *Cook* opinion, the supreme court specifically requested that the Advisory Committee on Criminal Rules prepare and submit for the court's consideration a rule covering the application for warrants based on oral testimony. *Id.* at 22. Rule 36, governing the issuance of telephonic warrants, became effective in 1994. This is the first case that we are aware of involving a challenge to the validity of such a warrant based on violations of the procedures set out in the rule. Appellant argues that there was no need for a telephonic warrant in this case, and that even if need is conceded, violations of the procedural rules for obtaining and filing such a warrant require that evidence obtained under the warrant be suppressed.

a. Demonstrated need

"An oral request for a search warrant may only be made in circumstances that make it reasonable to dispense with a written warrant. The judge or judicial officer should make this determination the initial focus of the oral warrant request." Minn. R. Crim. P. 36.02; *see also Lindsey*, 473 N.W.2d at 863 (stating that under

the federal rules for obtaining a telephonic warrant, "a showing of need ought to be made as part of the telephonic search warrant application process"). General criteria for determining the need for a telephonic warrant include (1) whether the officer can reach the judge in her office during regular court hours, (2) whether a significant distance exists between the officer and the judge, (3) whether the situation makes it unreasonable for a substitute officer located near the judge to present a written affidavit in person, and (4) whether the need for the warrant is such that without the telephonic procedure a warrant could not be obtained and there would be significant risk that evidence would be destroyed. Minn. R. Crim. P. 36 cmt. (citing *Lindsey*, 473 N.W.2d at 863).

In this case, the applicant informed the judge that an accomplice, who had been arrested after leaving appellant's residence, was planning to return to appellant's residence "to help [appellant] complete the cook." The applicant expressed concern to the judge that appellant would learn of the accomplice's arrest over a police scanner that appellant was known to possess. The applicant also told the judge that the accomplice could not be kept from using the telephone in the jail for an extended period because he had expressed a desire to call his mother. The judge responded "okay" to this information but did not make any further inquiry into the circumstances that made it reasonable to dispense with a written warrant.

The application occurred at 3:10 a.m., but the judge's home was less than ten miles from the sheriff's department where the applicant had already prepared a written search-warrant application to use in the event that the judge declined to issue the warrant on oral testimony. In fact, the applicant read the written application to the judge over the telephone. The application expressed the concern about destruction of evidence if the search was not conducted immediately. The judge did not find that concern sufficient to establish the need for a nighttime, no-knock warrant and obtained additional information from the applicant about appellant's history of violence and the applicant's personal knowledge that appellant carried a knife. At the judge's request, this additional information was added to the written application. The applicant testified at the suppression hearing that obtaining the warrant on written application would have added approximately thirty minutes to the process.

The state argues that despite the lack of a direct discussion about the necessity of obtaining the warrant on oral testimony, the transcript of the oral request demonstrates that the need for the telephonic warrant was expressed to and accepted by the judge. At the suppression hearing, the applicant testified that the accomplice's statement led him to believe that the manufacture of methamphetamine was in progress at appellant's residence when the accomplice was arrested. The applicant, who is also a certified clandestine-lab technician, testified about his investigative experience that "often times as soon as the [methamphetamine] is manufactured and completed, if parties are involved they all split the product and they leave." He further testified about the general mobility of methamphetamine labs, that an oral request for the warrant was more expedient and less inconvenient for the judge given the early morning hour, and that producers endanger themselves when manufacturing methamphetamine because of the toxicity and explosive nature of the ingredients.

Appellant argues that because the judge did not make a "contemporaneous determination" of the reasonableness of the telephonic warrant, the evidence obtained as a result of the search should have been suppressed, and that even if the failure to make a determination of need is overlooked, the evidence did not establish the need for a telephonic warrant. We conclude that a sufficient contemporaneous *record* existed to allow appellant to challenge the warrant on a basis not dependent solely on after-the-fact recollections, fulfilling the purpose of the procedural requirement of demonstrated need. We also conclude that the expressed need was sufficient under the circumstances to make issuance of the telephonic warrant reasonable. Furthermore, based on the supreme court's historic refusal to suppress evidence for minor violations, we conclude that even if failure to make a determination of need on the record violated rule 36.02, and even if this record was insufficient to establish need for a telephonic warrant, the violations were minor and did not require suppression of evidence seized under the warrant. There can be little doubt that the warrant would have been issued if the written application had been personally presented to the judge.

b. Other procedural defects

Appellant argues that other "pervasive non-compliance" with rule 36 requires that the warrant be declared defective and the evidence seized as a result of the warrant be suppressed. Appellant first argues that although the telephone conversation between the applicant and the judge was properly recorded, it was not timely transcribed and filed with the district court. When the recording is made by the applicant, as in this case, the tape "shall be submitted to the issuing judge or judicial officer as soon as practical, and in any event, not later than the time for filing as provided by Rule 33.04." Minn. R. Crim. P. 36.04(1). Rule 33.04(b) provides that search warrants and related documents "need not be filed until after execution of the search or the expiration of ten days." The record of an oral warrant request must be transcribed "[a]s soon after the testimony is received as practical," and the judge or judicial officer shall certify the accuracy of the transcription. Minn. R. Crim. P. 36.04(3). The recording in this case was transcribed 49 days after the warrant was executed and was filed on the date of the omnibus hearing. The district court found that it was "unclear whether [the transcript] had been filed with the Court in a timely fashion, as required by [rule 36.04] clause (1)."

Although appellant asserts that the lack of timeliness "left the process subject to manipulation and/or destruction of evidence," and that the late filing denied him the opportunity to preview the evidence and to prepare and question the sufficiency of evidence until the day of the hearing, he has not provided any factual support for these assertions or any authority that he is entitled to suppression of the evidence as a result of an untimely filing. Appellant also complains that the applicant never submitted the original search warrant for the judge's signature as required by rule 36.05, but does not assert that the filing of an unsigned warrant prejudiced him in any manner. The district court concluded that these procedural defects were minor and did not require suppression of evidence seized under the search warrant. We agree and hold that minor violations of rule 36 in the issuance of a warrant based on oral testimony which do not subvert the purpose of the procedures do not require suppression of evidence seized under the warrant.

II. Minn. Stat. § 626.16

We find no merit in appellant's assertion that the district court's finding that he was provided with a copy of the warrant when it was executed, as required by Minn. Stat. § 626.16 (2004), was clearly erroneous.[1]

[1] Appellant's brief refers to Minn. Stat. § 626.09 (allowing the district court to examine under oath any person seeking a warrant).

But because appellant argues that he did not receive a copy of the search warrant at the time of its execution, we assume he means Minn. Stat. § 626.16 (2004) (requiring an officer conducting the search to leave a copy of the warrant with a person in possession of the premises or property).

The record supports the finding. And, even if appellant had not received a copy of the warrant when it was executed, the supreme court has rejected the argument that suppression of evidence is required for such a failure. *See Mollberg*, 310 at 385, 246 N.W.2d at 469 (labeling the failure to leave a copy of the warrant with the defendant a "minor and technical" defect).

DECISION

The district court's determination that minor violations of Minn. R. Crim. P. 36 in the issuance of a telephonic warrant which occurred in this case do not require suppression of evidence seized under the warrant is affirmed.

Affirmed.

a