George v Rockett [1990] HCA 26; (1990) 170 CLR 104 (20 June 1990)

HIGH COURT OF AUSTRALIA

GEORGE v. ROCKETT [1990] HCA 26; (1990) 170 CLR 104
F.C. 90/026

Justices (Q.)

High Court of Australia
Mason C.J.(1), Brennan(1), Deane(1), Dawson(1), Toohey(1) Gaudron(1) and McHugh(1) JJ.

CATCHWORDS

Justices (Q.) - **Search warrant** - Issue - Requirements - Reasonable grounds for suspicion or belief - Whether justice must entertain suspicion or belief - Facts to found reasonable suspicion or belief - Sworn complaint - Relevance of statements otherwise than on oath - The Criminal Code (Q.), s. 679.

HEARING

1990, April 11-12, June 20. 20:6:1990
APPEAL from the Supreme Court of Queensland.

DECISION

MASON C.J., BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND McHUGH JJ. On 22 August 1989 the first respondent, Detective Sergeant Rockett, attended at the office of the second respondent, a stipendiary magistrate, and applied for the issue of a **search warrant** under the provisions of s.679(b) of The Criminal Code (Q.). Section 679 reads as follows:

" If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft, or place -
(a) Anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or
(b) Anything whether animate or inanimate and whether living or dead as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of any offence; or

(c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence;
he may issue his warrant directing a police officer or police officers named therein or all police officers to enter, by force if necessary, and to search such house, vessel, vehicle, aircraft, or place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law.
Any such warrant is to be executed by day unless the justice, by the warrant, specially authorises it to be executed by night, in which case it may be so executed.
Where it appears on the complaint that an offence involving the safety of an aircraft has been is being or may be committed on board or in relation to the aircraft the justice may direct in his warrant that any person on board the aircraft or any person who is about to board the aircraft may be searched."

2. Detective Sergeant Rockett placed before the magistrate a statutory declaration relating to the existence of some documents allegedly in the handwriting of Sir Terence Lewis, a former Commissioner of Police, against whom two charges of perjury were pending. In addition to the statutory declaration, a form of complaint to ground the issue of a **search warrant** and a pro forma of a **search warrant** were produced to the magistrate. The magistrate asked Rockett some questions about the matter and these questions were answered. Then Rockett swore the complaint before the magistrate. The sworn complaint read as follows:

> "COMPLAINT TO GROUND **SEARCH WARRANT**
> The Complaint of Michael Daniel ROCKETT of The Office of the Special Prosecutor, 15-23 Adelaide Street, Brisbane in the State of Queensland made this 17th day of August, 1989 before the undersigned, a Justice of the Peace for the said State, who says:
> (1) that there are reasonable grounds for suspecting that there is in the rooms of Q.D. George, Hillhouse and Company, Solicitors, situated at 9th floor, Bank of New Zealand building, 410 Queen Street, Brisbane in the said State certain property, to wit a bundle of A4 pages in the handwriting of Sir Terence LEWIS containing his comments on the evidence taken before the Commission of Inquiry conducted by Mr. G.E. Fitzgerald, Q.C. and part of the transcript of the evidence taken before the aforesaid Commission of Inquiry and annotated in the handwriting of the said Sir Terence LEWIS all of which were in the possession of one Dr. Joseph M. SIRACUSA until the 11th day of August, 1989 when they were forwarded by the said Dr. Joseph M. SIRACUSA to Messrs. Q.D. George, Hillhouse and Company, Solicitors.
> (b) as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of offences, namely
> 1. that on the 17th day of October, 1988 at Brisbane in the State of Queensland, the said Terence

Murray LEWIS in a judicial proceeding, namely an inquiry by a Commission within the meaning of the Commissions of Inquiry Act 1950-1988, whilst giving evidence before the said Commission, knowingly falsely swore to the effect that he then had no idea what certain notations in his own handwriting in his 1980 and 1981 notebooks referred to, and that the said false evidence was material to a question then depending in the said proceedings.

2. that on the 11th day of October, 1988 at Brisbane in the State of Queensland, the said Terence Murray LEWIS, in a judicial proceeding, namely an inquiry by a Commission within the meaning of the Commissions of Inquiry Act 1950-1988, whilst giving evidence before the said Commission, knowingly falsely swore to the effect that he had never met in a private room at the Crest Hotel with Jack ROOKLYN, and that the said false evidence was material to a question then depending in the said proceedings.

(2) and that the grounds of his suspicion and belief are as follows:

There is evidence that the bundle of A4 pages was in the handwriting of the said Sir Terence LEWIS and consisted of approximately thirty to forty pages of comments on the evidence by the said Sir Terence LEWIS under specific headings and was in the possession of the said Dr. Joseph M. SIRACUSA on Friday, the 11th day of August, 1989 and was forwarded by the said Dr. Joseph M. SIRACUSA to the said Q.D. George, Hillhouse and Company, Solicitors, on that day. There is further evidence that the annotated transcript also consisted of approximately thirty to forty pages and was also in the possession of the said Dr. Joseph M. SIRACUSA on the 11th August, 1989 and that this was also forwarded by the said Dr. Joseph M. SIRACUSA on that same day to the said Q.D. George, Hillhouse and Company, Solicitors.

THEREUPON the said Michael Daniel ROCKETT prays that I, the said Justice, will proceed in the premises according to law.

Signature of Complainant

Sworn before me this 21st day of August, 1989 at Brisbane in the said State.

Signature of Stipendiary Magistrate"

The magistrate issued a **search warrant** which, having recited substantially the whole of the complaint except for par.(2), stated that it appeared to the magistrate that there were "reasonable grounds for so suspecting and so believing".

3. The **search warrant** was executed and certain documents were seized at the office of Lewis's solicitor who is the appellant in the present proceedings. The documents were sealed in an envelope without inspection by Rockett. Rockett and the solicitor attended before the magistrate and delivered the envelope to the magistrate for safekeeping. The solicitor, being a person against

whom the warrant was issued, obtained an order to review under s.209 of the Justices Act 1886-1989 (Q.) calling upon Rockett to show cause why the warrant should not be reviewed. The order to review was returned before the Full Court which ordered that the order to review be discharged.

4. This appeal from the order of the Full Court turns on the construction of s.679 of the Code. Section 10 of the Crimes Act 1914 (Cth) and s.711 of The Criminal Code of Western Australia are in substantially the same terms. In reference to the procedure for issuing a **search warrant** under s.10 of the Crimes Act, Mason J. said in Baker v. Campbell [1983] HCA 39; (1983) 153 CLR 52, at p 82:

> " For present purposes the important characteristics of the **search warrant** procedure are that its foundation is the making of an order by a judicial officer and that the warrant which issues by virtue of the order authorizes the search and seizure of documents in the possession of another for use in the investigation and in any subsequent trial arising out of the investigation."

A **search warrant** thus authorizes an invasion of premises without the consent of persons in lawful possession or occupation thereof. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. In prescribing conditions governing the issue of **search warrants**, the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. **Search warrants** facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law. In enacting s.679, the legislature has given primacy to the public interest in the effective administration of criminal justice over the private right of the individual to enjoy his privacy and property. The common law has long been jealous of the prima facie immunity from seizure of papers and possessions: see Holdsworth, A History of English Law, vol.10, (1938), pp 668-672. Except in the case of a warrant issued for the purpose of searching a place for stolen goods, the common law refused to countenance the issue of **search warrants** at all and refused to permit a constable or government official to enter private property without the permission of the occupier: Leach v. Money (1765) 19 State Tr.1001; Entick v. Carrington (1765) 19 State Tr.1029. Historically, the justification for these limitations on the power of entry and search was based on the rights of private property: Entick, at p 1066. In modern times, the justification has shifted increasingly to the protection of privacy: see Feldman, The Law Relating to Entry, Search and Seizure, (1986), pp 1-2.

5. State and Commonwealth statutes have made many exceptions to the common law position, and s.679 is a far-reaching one. Nevertheless, in construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a **search warrant** can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of **search warrants** is simply to give effect to the purpose of the legislation. It will be convenient to consider the relevant conditions prescribed by s.679 under three headings: the justice's function, the material to ground the issue of a warrant and the facts to be established.
1. The justice's function.

6. The opening words of s.679 - "If it appears to a justice" - impose on a justice to whom an application for a **search warrant** is made the duty of satisfying himself that the conditions for the issue of the warrant are fulfilled. In T.V.W. Ltd. v. Robinson (1964) WAR 33, Negus J. (at p 37) said:

> " It is the duty of a justice before issuing ... a warrant, to satisfy himself that there are grounds for suspecting and grounds for believing the respective matters mentioned in s. 711 of the Criminal Code and that those grounds are reasonable."

When the justice is so satisfied and a warrant is issued, the warrant should express the justice's satisfaction that there are reasonable grounds for the suspicion and belief: Morse v. Harlock (1977) WAR 65, at pp 76-77. In Parker v. Churchill (1985) 9 FCR 316; 63 ALR 326, Burchett J. said (at p 322; p 333):

> " The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs."

7. These observations accord with the language of the statute. Although it is implicit in s.679 that the applicant for the **search warrant** should entertain the suspicion and belief to which that section refers, it must "appear" to the issuing justice that there are reasonable grounds for entertaining the relevant suspicion and belief: see the phrase "that there are reasonable grounds for suspecting" and, in pars (b) and (c), the phrase "there are reasonable grounds for believing". In Hedges v. Grundmann; Ex parte Grundmann (1985) 2 Qd R.263 the Full Court of the Supreme Court of Queensland held that the justice must not only be satisfied that there are reasonable grounds for suspicion and belief but the justice must also entertain the relevant suspicion and belief. The latter requirement is excessive, for the language of s.679 does not import it.

8. When a statute prescribes that there must be "reasonable grounds" for a state of mind - including suspicion and belief - it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in Liversidge v. Anderson [1941] UKHL 1; (1942) AC 206: see Nakkuda Ali v. M.F. De S. Jayaratne (1951) AC 66, at pp 76-77; Reg. v. I.R.C.; Ex parte Rossminster [1979] UKHL 5; (1980) AC 952, at pp 1000,1011,1017-1018; Bradley v. The Commonwealth [1973] HCA 34; (1973) 128 CLR 557, at pp 574-575; W.A. Pines Pty. Ltd. v. Bannerman [1980] FCA 2; (1980) 41 FLR 169, at pp 180-181; [1980] FCA 79; 30 ALR 559, at pp 566-567. That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see, for example, Attorney-General v. Reynolds (1980) AC 637. Therefore it must appear to the issuing justice, not merely to the person seeking the **search warrant**, that reasonable grounds for the relevant suspicion and belief exist. The principle was stated by Fox J. in Reg. v. Tillett; Ex parte Newton (1969) 14 FLR 101, at p 106:

> " Section 10 requires that the justice himself be satisfied 'that there is reasonable ground for suspecting ...'. It is well established that on language such as this it is for the justice to come to his own conclusion on materials presented to him (Hope v. Evered ((1886) 17 QBD 338); Bridgeman v. Macalister ((1898) 8 QLJ 151); Feather v. Rogers ((1909) 9 SR(NSW) 192; 26 WN 27); Bowden v. Box ((1916) GLR(N.Z.)443); Mitchell v. New Plymouth Club (Incorporated) ((1958) NZLR 1070); T.V.W. Ltd. v. Robinson ((1964) WAR 33); Seven Seas Publishing Pty. Ltd. v. Sullivan ((1968) NZLR 663). In Bowden v. Box the statute provided that a justice, if satisfied by information on oath that there was reasonable ground for belief as to certain matters, could grant a warrant. At p 444 Edwards J. said: 'It is impossible to construe this enactment as an authority to a justice to issue a **search warrant** upon the oath alone of a constable or of any other person that "there is reasonable ground to believe that liquor is sold", etc. So to hold would be to hold that the justice may discharge the judicial duty cast upon him by acting, parrot-like, upon the bald assertion of the informant.' This expression of view was adopted by T.A. Gresson J. in Mitchell v New Plymouth Club (Incorporated)."

It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind.

2. The material to ground the issue of a warrant.

9. The matters which must be made to appear to a justice must appear, as s.679 prescribes, "on complaint made on oath". This requirement reflects the ancient view of the common law that a magistrate who issues a warrant otherwise than on an information on oath is liable to an action for false imprisonment or trespass: see, for example, Caudle v. Seymour (1841) 1 QB 889, at pp 893,894 [1841] EngR 777; (113 ER 1372, at pp 1373,1374). See Feldman, op cit, p 74. In T.V.W. Ltd. v. Robinson Negus J., in the paragraph following that earlier cited, said (at p 37):

> " (The justice) cannot satisfy himself about those matters in accordance with the requirements of the Criminal Code unless the grounds are stated on oath preferably in the complaint".

A more stringent requirement was stated in Bridgeman v. Macalister (1898) 8 QLJ 151, where a **search warrant** was issued in purported pursuance of the Towns Police Act (19 Vict. No.24), which contained provisions similar in relevant respects to those in s.679(1). Griffith C.J., speaking for the Full Court of the Supreme Court, held that "the information must state the ground, the reasonable ground, for suspicion" and, finding that the information "merely contains a statement that the deponent suspects they are concealed, for which suspicion he gives no relevant foundation", he declared that there was no ground for the exercise of the magistrate's power to issue the warrant. This view has been followed in other jurisdictions (see Feather v. Rogers (1909) 9 SR(NSW) 192 and Mitchell v. New Plymouth Club (Inc.) (1958) NZLR 1070) and should now be accepted as correct.

10. The requirement that a sworn complaint must ground the issue of a **search warrant** carries the implication that the grounds for the issue of the warrant cannot be made to appear to

the issuing justice from statements made by an applicant otherwise than by complaint on oath. In Feather v. Rogers, at p 196, Simpson A.C.J. said in reference to a requirement that the facts be shown "on oath before a Justice":

> "The statements made before the information was sworn were apparently not made on oath. They were therefore immaterial."

That is not to say that a justice before whom a complaint is sworn should abstain from questioning the complainant if the justice wishes to obtain some confirmation of what appears in the complaint. The requirement is that the sworn complaint should contain sufficient facts to found the reasonable suspicion and the reasonable belief respectively mentioned in s.679. If that requirement is not satisfied, the information otherwise conveyed to the issuing justice is immaterial but, if that requirement is satisfied, the justice may seek confirmation by inquiry of the complainant.

11. In this case, the only material laid before the magistrate which answered the description of a sworn complaint was the document headed "COMPLAINT TO GROUND **SEARCH WARRANT**". The other material placed before the magistrate was neither in affidavit form nor verified by oath or affirmation. The statutory declaration was not sworn: cf. the Oaths Act 1867-1988 (Q.), ss.6,8. If the sworn complaint did not contain sufficient information to satisfy the magistrate that there were reasonable grounds for suspicion and belief, the magistrate exceeded his power in issuing the warrant. In the circumstances of this case, therefore, it is unnecessary to decide whether the complaint on oath required by the section must be in writing, although, as Fox J. observed in Reg. v. Tillett; Ex parte Newton, at p 109, and as Lockhart J. observed in Crowley v. Murphy [1981] FCA 31; (1981) 52 FLR 123, at pp 142-143; [1981] FCA 31; 34 ALR 496, at p 515, there is much to be said for the view that a written complaint is desirable. If the validity of a warrant is challenged and the court is ascertaining whether the complaint shows reasonable grounds for suspicion and belief, a written complaint is less open to controversy than an oral complaint. Bridgeman v. Macalister, Montague v. Ah Shen [1907] VicLawRp 82; (1907) VLR 458 and Palethorpe v. Nebbia (1937) QWN 33 are consistent with the view that a written complaint is needed, but the question does not have to be decided in this case and it is better to leave it for decision on another day.

12. The sufficiency of the sworn complaint by itself to satisfy the magistrate that there were reasonable grounds for suspicion and belief was not challenged in the Full Court. However, the question was raised in this Court in the course of argument. In the Full Court, the case proceeded on the footing that the magistrate was entitled to have regard to all the material that was put before him or, at all events, to the complaint and to the statutory declaration. But, if the warrant is invalid by reason of the insufficiency of the sworn complaint, no evidence or argument which might have been proffered to the Full Court can save it. It will therefore be necessary to consider whether, on the material contained in the sworn complaint, the magistrate could have been satisfied that there were reasonable grounds for Rockett's suspicion and belief. If, on the material contained in the sworn complaint, the magistrate could not have been so satisfied, it is immaterial that he might have been satisfied on the material contained in the statutory declaration or in the answers which Rockett gave to his questioning.

3. The facts to be established.

13. In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s.679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind (Homes v. Thorpe (1925) SASR 286, at p 291; Seven Seas Publishing Pty. Ltd. v. Sullivan (1968) NZLR 663, at p 666) and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The justice must be satisfied that

there there are reasonable grounds for suspecting that "there is in any house, vessel, vehicle, aircraft, or place - Anything" and that there are reasonable grounds for believing that the thing "will ... afford evidence as to the commission of any offence".

14. Suspicion, as Lord Devlin said in Hussien v. Chong Fook Kam (1970) AC 942, at p 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In Queensland Bacon Pty. Ltd. v. Rees [1966] HCA 21; (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay (its) debts as they became due" as that phrase was used in s.95(4) of the Bankruptcy Act 1924 (Cth). Kitto J. said (at p 303):

> "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s.(4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

15. It is necessary to identify the subject matter of suspicion and the subject matter of belief. At first reading, it may appear that the subject matter of suspicion is merely the location of the thing to which par.(b) relates, while par.(b) prescribes the subject matter of belief to be the nature of the thing ("will ... afford evidence"). So to read the section is to omit the existence of the thing from the subject matter of either suspicion or belief. It is arguable that the requirement of reasonable grounds for believing that a thing "will afford evidence" imports a belief that a thing exists which has that capacity. Construed in isolation, that phrase does not suggest that the requirement is satisfied by reasonable grounds for believing that a thing will have that capacity if it exists. These considerations favour construing s.679 so that the existence of the thing is the subject not of suspicion but of belief. The protection of property and privacy would be advanced by a construction of s.679 that makes the existence of the thing the subject of belief rather than the subject of suspicion. On the other hand, the subject of suspicion as stated in the text is "that there is in any house, vessel, vehicle, aircraft or place - Anything" answering the description contained in one or other of the lettered paragraphs. If one substitutes "exists" for "is" in this clause - a substitution which seems legitimate - it is clear that the existence of the thing is the subject of

suspicion. Moreover, it is unlikely that the legislature would have intended to require as a condition of a **search warrant** for a thing described in par.(c) - that is, a thing which might be intended to be used for the purpose of committing an arrestable offence - reasonable grounds for more than mere suspicion of the existence of such a thing. Thus it seems that the better construction of s.679 is that the existence of the thing is the subject of suspicion.

16. So to hold does not deprive the requirement of "reasonable grounds for believing" in par.(b) of significance. That significance depends on the manner in which a complaint which grounds a **search warrant** and the warrant itself identify the object of the search. A thing must be identified either as a specific object or as an object which answers a particular description. It is by reference to the means of identification of the object of the search that the sufficiency of both reasonable grounds for suspecting and reasonable grounds for believing must be judged. Where a specific object is identified, the question whether there are reasonable grounds for believing that, if it exists and is found, it will afford evidence as to the commission of an offence is a discrete question to be answered according to the facts set out in the complaint. Where the object is identified by description, the broader and less specific the description, the more difficult it is likely to be to satisfy the requirement of reasonable grounds for believing that a thing answering the description will afford evidence of the commission of an offence. Conversely, the narrower and more specific the description, the more difficult it may be to satisfy the requirement of reasonable grounds for suspecting that the designated object is in the particular location. The point is probably best made by illustration.

17. Suppose that a person has been killed by a revolver bullet and that A, who is believed on reasonable grounds to be the killer, was seen burying an object wrapped in cloth in the backyard of his house. If application were made to a justice for a warrant to search for "an object wrapped in cloth" in A's backyard, the fact that A had been seen burying something wrapped in cloth would obviously provide compelling grounds for suspecting that an object of that description was in that place. On the other hand, there may, depending on the circumstances, be difficulty in sustaining a conclusion that there were reasonable grounds for believing that any object which answered that general description (i.e. "an object wrapped in cloth") "will", if found, afford evidence as to the commission of an offence. Conversely, if the object of the proposed search was described as a revolver, the grounds for suspecting that it was hidden in A's backyard would be much less compelling. There would, however, be little difficulty in satisfying the requirement of reasonable grounds for believing that the object so described would, if it was found in that place, afford evidence as to the commission of the particular offence.

18. It may be suggested that this emphasis upon description of the object of the search proposed to be conducted pursuant to a **search warrant** constitutes little more than a play on words. But that is not the case. The warrant, if issued, authorizes entry to search for the described object and authorizes the seizure of any object which comes within the particular description. In other words, the description of the object of the search is a reference point for delimiting the scope of the warrant. The wider and less specific the description of the object, the wider will be the powers of seizure which the warrant confers. On the other hand, as has been seen, the wider and less specific the description of the designated object, the more difficult will be the task of persuading the justice that there are reasonable grounds for belief that the object so described will, if found, afford evidence of the commission of the particular offence. Thus, the requirement of "reasonable grounds for believing" in par.(b) performs the important function of preventing the authority to search and seize which a warrant confers from being worded in unjustifiably wide terms. Again, the point is best made by illustration.

19. Suppose the sworn complaint placed before a justice establishes reasonable grounds for suspecting that the books and records of a listed public company in respect of a particular financial year contain an entry which will afford evidence that an executive of the company has

appropriated a sum of money to the credit of his personal account with a particular bank and the complaint shows that there is evidence that the executive had no authority so to apply the money. In such a case, the complaint would establish reasonable grounds for suspecting that the particular entry existed and reasonable grounds for believing that, if it did exist, it would (i.e. "will") afford evidence of the commission of an offence. The complaint before the justice would, in those circumstances, be adequate to justify the issue of a warrant to search for and seize any written entry to the designated effect in the company's books and records for the relevant year. It would, of course, be necessary that the suspected entry be identified with sufficient precision. On the other hand, the material before the justice could not justify the issue of a warrant authorizing search for or seizure of all the books and records of the company for the particular year. First, if the object of the authorized search and seizure were described in terms of "all those books and records", the material before the justice would not establish that the object so described would afford evidence of the commission of an offence. That material would only have established reasonable grounds for suspecting that the object (i.e. the books and records for the relevant year) contained an entry that would afford such evidence. Secondly, even if the material before the magistrate had gone so far as to establish reasonable grounds for believing that such an entry existed somewhere in those books and records, the description of the object of the authorized search and seizure would be unjustifiably wide. It would extend to authorizing search for, and seizure of, records which were unrelated to the particular entry and which were not suggested to afford evidence of the relevant kind.

20. In the present case, Rockett identified the things for which he was seeking a **search warrant** as a bundle of A4 pages in Lewis's writing and part of the transcript of the Commission hearings bearing Lewis's handwritten annotations. It was not disputed that the sworn complaint contained sufficient material to satisfy the magistrate that there were reasonable grounds for suspecting that such documents were in the solicitor's office. The critical question is whether there was sufficient material in the sworn complaint to satisfy the magistrate that there were reasonable grounds for believing that those documents "will ... afford evidence as to the commission of" the two offences set out in the sworn complaint with which Lewis had been charged.

21. The phrase "will afford evidence as to the commission of (an) offence" appearing in s.10 of the Crimes Act was considered in Baker v. Campbell. In that case, the plaintiff sought an order directed to a member of the Australian Federal Police, to whom a **search warrant** had been issued pursuant to s.10 of the Crimes Act, to restrain him from seizing documents which were the subject of legal professional privilege. The question in that case was not the general scope of the power to search and seize but whether there was a category of exemption of documents for which privilege might be claimed and maintained. Although the Court divided on the availability of the privilege where there were no judicial or quasi-judicial proceedings in or by reference to which the admissibility of privileged documents might be tested, the case does not suggest that the only things for which a **search warrant** might be issued are things which are or will become admissible in evidence. The power to issue a **search warrant** is in aid of criminal investigation as well as in aid of proof at the trial, though it is necessary that the investigation should have reached the stage where reasonable grounds for the statutory suspicion and belief can be sworn to. An object will answer the description in par.(b) if there are reasonable grounds for believing that it will assist directly or indirectly in disclosing that an offence has been committed or in establishing or revealing the details of the offence, the circumstances in which it was committed, the identity of the person or persons who committed it or any other information material to the investigation of those matters.

22. If, in the present case, the first of the two objects of the **search warrant** had been identified in the complaint as a bundle of A4 pages in the handwriting of Sir Terence Lewis containing either a statement or statements about the meaning of the notations in Sir Terence

Lewis's 1980-1981 notebooks or a statement or statements to the effect that Sir Terence Lewis had met the person called Jack Rooklyn at the Crest Hotel, a question would have arisen as to whether a warrant to search for the whole bundle of A4 pages, as distinct from a page or pages containing the relevant statement or statements, was wider than could be justified. The answer to that question would, no doubt, depend upon whether the complaint justified a conclusion that the bundle of pages should, in the circumstances, be seen as a single thing or upon whether pages in the bundle other than those containing relevant statements should be seen as part of the evidentiary context within which the relevant statements should be read.

23. In fact, neither of the objects of search (that is, the bundle of A4 pages and the part of the transcript of evidence) was identified in the complaint or the purported **search warrant** by a description which required that it contain some statement or statements relevant to the commission of one or other of the alleged offences. The sworn complaint was inadequate to found a conclusion that the identified bundle of documents would, if found, actually contain such a statement or statements. Consequently, the complaint was inadequate to found the magistrate's conclusion that there were reasonable grounds for "believing" that the designated objects of the search would, if found, afford evidence as to the commission of an offence. It follows that the terms of the **search warrant** were not supported by the sworn material placed before the magistrate.

24. In this Court, counsel for the appellant attacked the reasoning of the Full Court on the footing that the Court held that it would be sufficient if there were reasonable grounds for believing that the documents in question contained only exculpatory observations. The point would be well taken if the Full Court had held that the magistrate could not have been satisfied that there were reasonable grounds for believing that the documents mentioned in the complaint and **search warrant** contained anything more than exculpatory observations. Things which tend to show merely that no offence was committed are not things which will afford evidence as to the commission of an offence. But things may have a dual character, tending at once to establish an element of an offence and tending to exculpate one or more persons from criminal liability. Things which afford evidence of an element of an offence and which also tend to exculpate a person from criminal liability may nonetheless be things which "will ... afford evidence as to the commission of any offence". Connolly J. (with whom Ambrose J. agreed) appears to have approached the matter on the footing that the documents covered by the **search warrant** might ultimately prove to be capable of affording both inculpatory and exculpatory evidence:

> "If, on examination, they contained any observations, whether inculpatory or exculpatory, touching (Lewis's) notations in his own handwriting in his 1980 and 1981 pocket notebooks or touching a meeting at the Crest Hotel with a person who might, possibly by other evidence, be demonstrated to be the same person as the man named in the second charge, such notations were capable of affording evidence 'as to the commission of the offences' in the sense of being relevant to the proofs to be adduced by the prosecution as well the proofs which might be adduced by the defence."

His Honour did not analyse the material placed before the magistrate, but stated the opinion that "the material before him amply warranted the conclusion to which he came", that is, "the requisite conclusion" under s.679. The material to which his Honour was referring was either all the material laid before the magistrate or at least the statutory declaration as well as the sworn complaint. Had it been open to the Full Court to look at all the material, it would be necessary now for this Court to consider whether it revealed reasonable grounds for believing that the documents in respect of which the warrant was sought, or such of them as contained statements

relevant to the two offences mentioned in the complaint, would afford evidence of the commission by Lewis of either of those offences. It would have been necessary to consider the nature of the evidence given before the Commission of Inquiry to which the charges of perjury related, the passages in the transcript of evidence on which Lewis's handwritten notes had been made and the possibility that inculpatory inferences could be drawn from notes relating to events which had been said by Lewis to be unremembered. Had it appeared that there were no reasonable grounds for believing that those documents or any of them would afford anything more than exculpatory evidence, the warrant would have had to be set aside; but, had that material revealed reasonable grounds for believing that the documents would afford evidence of the commission by Lewis of either of the offences with which he had been charged, the order to review would have had to be discharged. However, the sworn complaint itself must be sufficient to satisfy the court on the return of an order to review that the warrant was properly issued. The sworn complaint in this case contains no facts which might have satisfied the magistrate that there were reasonable grounds for believing that the documents for which the **search warrant** was sought would afford evidence as to the commission of the offences set out in the complaint. It contains nothing save the assertion by Rockett that there are reasonable grounds for his own belief.

25. In the absence of information in the sworn complaint which might have satisfied the magistrate as to the existence of reasonable grounds for Rockett's belief, the magistrate had no power to issue the warrant. The warrant was invalid. It follows that the appeal must be allowed, the order of the Full Court set aside and in lieu thereof the order to review should be made absolute. Having regard to the way in which the matter was argued in the Full Court, it does not seem appropriate to make any order as to costs in that Court. However, the appellant should be at liberty to apply for an order for the costs of the order to review and of the hearing in the Full Court within fourteen days. The application and the respondent's answer should be in writing.

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

ORDER

Appeal allowed with costs.

Set aside the order of the Full Court of the Supreme Court and in lieu thereof order that the order to review be made absolute.

The appellant be at liberty to apply for an order for costs of the order to review and of the hearing in the Full Court within fourteen days. Unless otherwise ordered, no order as to the costs of those proceedings.
