IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 94/85

[redacted]

393

THE QUEEN

v.

J DOE

[illegible] 1 CRNZ 506

Coram: Cooke J. (presiding)
Richardson J.
Sir Thaddeus McCarthy

Hearing: 22 May 1985

Counsel: D.R. Brown for Appellant
J.R.F. Fardell for Crown

Judgment: 23 May 1985

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

This is an application by the accused for leave to appeal from a pre-trial order as to the admissibility of evidence, the order being made under s.344A of the Crimes Act 1961, a section inserted in 1980.

The case raises points regarding interception warrants and renewals under the Misuse of Drugs Amendment Act 1978, Part II. The initial warrant granted by a High Court Judge on 20 August 1984 gave authorisations in three paragraphs:

> (a) To use a listening device to intercept private communications on telephone number at 111 Avenue, Parnell made by G SOMMERVILLE [and 17 other named persons] and other persons whose names and addresses are not known and who are not suspected as at the date hereof, but who may use the said telephone number for any drug dealing offences.
> (b) To use an audible device to intercept the private communications at 111 Avenue, Parnell, of G : SOMMERVILLE [and 17 other named persons]

whose names and addresses are not known and who are not suspected as at the date hereof, but who may be at 111 Avenue, Parnell, being premises believed to be used for any purposes by any person involved in a drug dealing offence.

(c) To enter with force where necessary the premises situated at 111 Parnell, and occupied by G SOMMERVILLE, for the purpose of placing, servicing or retrieving the listening devices.

A renewal of that warrant for 30 days was granted by another High Court Judge on 18 September 1984 and there was a second renewal a few days later, on 21 September 1984, again for 30 days. The reason for this procedure was evidently the discovery of certain errors, which in our view can fairly be described as clerical or literal and to which we will refer again shortly. In the first renewal it was recited that application had been made to renew a warrant to:

(a) Use listening devices to intercept the private communications [of the 18 named person and 14 additional named persons including the present applicant] and other persons whose names and addresses are not known and who are not suspected as at the date hereof, but who may use the telephone number which is the telephone number at 111, Avenue, Parnell, for any drug dealing offence and also to intercept the private communications of the aforesaid persons and other persons whose names and addresses are not known and who are not suspected as at the date hereof, but who may be at 111, Avenue, Parnell being premises believed to be used for any purposes by any person involved in a drug dealing offence.

(b) To enter with force where necessary the said premises situated at 111, Avenue, Parnell and occupied by G SOMMERVILLE and S FOLEY for the purpose of placing, servicing or retrieving the listening devices.

The second renewal contained identical recitals except that the telephone number was given as There is no doubt that this was the correct telephone number for 111 Avenue, Parnell, which was the correct address of G Sommerville. It is also clear that listening devices, including a telephone tapping device, were in fact placed in those premises and used to intercept communications there, under the warrant and its renewals.

For the accused Mr Brown argues, as he had argued before Tompkins J., that the wrong telephone numbers in the warrant and the first renewal and the use of the word 'audible' in the warrant amounted to substantive defects and so could not be in effect excused under s.25(2) of the 1978 Amendment Act.

It is to be noted that by s.16(1)(b) every interception warrant is to state the name and address of the suspect if known, or the premises or place if his name and address are not known; but there is no reference to a telephone number in that section, nor in the form of warrant set out in the Schedule. Further, 'listening device' is one of the terms defined in s.10(1), but the form of warrant in the Schedule does not provide for specifying the particular type of

listening device. However, by s.14(2)(a) the application has to set out a description of the manner in which it is proposed to intercept private communications. Where, as in this case, authority for more than one kind of listening device is being sought - for instance one to tap a telephone and another to intercept conversation - we think that it is appropriate that any warrant granted should make it clear, at least in general terms, what listening devices are authorised.

That was done in the present case, but the inaccurate word 'audible' was used to describe the device to intercept non-telephonic private communications.

In modern usage 'audible' means able to be heard. The argument for the applicant is that it should be taken to have that meaning in the warrant. On which interpretation the warrant would authorise, as regards private communications such as face-to-face conversation, only a device emitting noise - such as a bell or whistle. It need hardly be said that such an interpretation is absurd in relation to a device which is, as the warrant went on to say, 'to intercept private communications'.

The only reasonable interpretation is that the warrant was intended to authorise and did authorise the use of a listening device by which the private communications referred to could be made audible to the interceptors. Possibly 'audio' would have been a more accurate word.

Probably that was the word intended. At all events the meaning is plain. The case is within the spirit of the old maxim, falsa demonstratio non nocet. There is nothing in the 'audible' point. If there was any defect, it was in form only and well able to be in effect excused under s.25(2).

The telephone numbers point is a little more difficult. But again we do not think that there was any real ambiguity or uncertainty. It is permissible to interpret the warrant in the light of the surrounding circumstances. In particular the address 111 Avenue, Parnell, is specified four times in the warrant. There is the correct name of the occupant G Sommerville. And the mistaken numbers and are very close to the correct number . In these circumstances it is obvious, though regrettable, that in the warrant and the first renewal these were small and different numerical errors. No one could reasonably doubt, however, that the authority intended to be given by the warrant and the renewals was in relation to telephone number . Insofar as there was a defect it was in form only and able to be excused under s.25(2).

It is implicit in what has already been said that, despite an argument by Mr Brown to the contrary, we hold that on its true reading s.25(2)(b) applies inter alia to 'a defect of form ... in ... the granting of the warrant ...' A

defect in the wording of the warrant itself may fall within those words. The inaccuracies in the present case may be placed in that category. The decision on admission of evidence despite defects in form is ultimately for the trial Judge, but we are satisfied that this is a case in which he could properly exercise his discretion in favour of admission. We say this, of course, with reference only to the defects which have been the subject of objection before Tompkins J. and in this Court.

With regard to a further argument by Mr Brown, the warrant and the two renewals were all, in our view, to substantially the same effect. There was no difference sufficiently material to deprive the purported renewals of the quality of renewals. It is common ground that the specification of further names in a renewal is in order: R. v. Owen (1984) 1 C.R.N.Z. 256. Apart from that and in contrast with the present case, a significant difference in terms may well necessitate a fresh warrant rather than a renewal; but we need say no more on that point.

Nor are we called on to discuss a case where there has been more than obvious minor mistakes in a telephone number or some other detail. In Canadian and American cases cited by Mr Fardell it appears that mistakes of rather greater dimensions than those in the present case have at times been treated as immaterial. Meticulous compliance with the New Zealand statute is important, because of the exceptional

invasion of privacy which it enables. We deliberately say nothing which could encourage any impression that the Courts will look lightly on failures to comply carefully with the New Zealand Act.

While no reason whatever appears to cause us to suspect that the applicant has suffered any injustice in this case, we think that the apparent departures from the standard just mentioned, minor though they were, made it reasonable to seek to test the matter on appeal. The application for leave is dismissed but the applicant is awarded costs against the Crown in the sum of $1000 together with the reasonable travelling and (if necessary) accommodation expenses of counsel, to be settled by the Registrar.

RB Cooke J.

Solicitors:
Penney Edwards Patel & Elliott, Auckland, for Appellant
Crown Solicitor, Auckland, for Crown