



HIGH COURT OF AUSTRALIA

15 April 2020

SMETHURST & ANOR v COMMISSIONER OF POLICE & ANOR
[2020] HCA 14

Today the High Court unanimously held, in answer to questions stated in a special case, that the warrant relied upon by officers of the Australian Federal Police ("the AFP") to authorise the search of the residence of the first plaintiff, Ms Annika Smethurst, was invalid and should be quashed.

On 29 April 2018 the second plaintiff, Nationwide News Pty Ltd, published articles authored by Ms Smethurst in its newspaper, the *Sunday Telegraph*, and on its website. On 4 June 2019 the AFP searched Ms Smethurst's residence in the course of an investigation it was conducting in relation to those articles. The AFP purported to rely upon a warrant issued on 3 June 2019, which in turn relied upon there being "reasonable grounds for suspecting" that the things mentioned in it would afford evidence as to the commission of a Commonwealth indictable offence. In particular, the warrant stated that Ms Smethurst and the *Sunday Telegraph* "communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to section 79(3) of the *Crimes Act 1914*, Official Secrets". Relying on the warrant, the AFP copied data from Ms Smethurst's mobile phone onto the AFP's laptop. Documents that were identified as falling within the terms of the warrant were copied onto a USB stick belonging to the AFP. The material was then deleted from the laptop, Ms Smethurst's phone was returned to her and the USB stick was taken from the premises.

Ms Smethurst and Nationwide News ("the plaintiffs") commenced proceedings in the original jurisdiction of the High Court seeking, among other things, to have the warrant quashed, and to obtain a mandatory injunction requiring the delivery up or destruction of the material copied from Ms Smethurst's mobile phone. The plaintiffs' principal argument for injunctive relief was that an injunction should issue to reverse the consequences of the trespass said to have been committed by the AFP as a result of its reliance on an invalid warrant, namely the retention of the copied material. Arguments were also made that statute or s 75(v) of the *Constitution* could provide a juridical basis for an injunction. The plaintiffs expressly eschewed the argument that the law should recognise a cause of action of invasion of privacy and that an injunction should be issued to protect a right to privacy.

The High Court unanimously held that the warrant relied upon by the AFP was invalid on the ground that it misstated the substance of s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, and failed to state the offence to which the warrant related with sufficient precision. The entry, search and seizure which occurred on 4 June 2019 were therefore unlawful. Having made this finding, it was not necessary for the Court to consider whether the warrant was invalid on the ground that s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, infringed the implied freedom of political communication. Nor was it necessary to consider the validity of the order that had been made under s 3LA of the *Crimes Act* requiring Ms Smethurst to give assistance to enable a constable to access, copy or convert data on a computer or data storage device. The Court unanimously ordered that the warrant be quashed. A majority of the Court declined to grant the injunctive relief sought by the plaintiffs, pointing to the plaintiffs' inability to identify a sufficient right or interest that required protection by way of a mandatory injunction.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*