IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. 617/80

BETWEEN JOHN LESLIE CUDBY
Appellant

A N D MINISTRY OF TRANSPORT
Respondent

Hearing: 4 February 1981
Counsel: R.J. Fowler for Appellant
J.H.C. Larsen for Respondent
Judgment: 13th February 1981

RESERVED JUDGMENT OF WHITE J

This is an appeal against a fine of $750 on a charge of operating a vehicle when the gross weight was more than the permitted maximum.

There was no record of the Judge's reasons for sentence in the District Court apart from a memorandum prepared by him to assist this Court. Unfortunately there are errors in the memorandum. In particular the increase in the penalty to a maximum of $15,000 did not apply to an individual operator of a vehicle but to the owner of a vehicle. There were other points in the memorandum which were challenged, but it is sufficient to say that, in my view, I must consider the sentence on the basis that the Judge misdirected himself. On the other hand, there is no doubt that the amending legislation was passed to authorise the Courts to increase the penalties in such cases. In considering the matter I must also have regard to decisions of this Court given in December 1980 on appeal in similar cases.

In Cassin v Ministry of Transport (High Court, Wellington, M 552/80, 3 December 1980, Hardie Boys J) the distance licence was for 16 tonnes. Soil was being carried and it appears that if it had been dry it would

not have exceeded 16 tonnes. In fact it was wet and the load when weighed was found to be 1 tonne over weight. Hardie Boys J commented, in giving judgment, that he was considering another case where moisture had led to an error in estimating the weight. There the fine had been $200. He came to the conclusion in Cassin's case that the fine in the District Court of $750 was excessive and substituted a fine of $200.

In Haines v Ministry of Transport (High Court, Wellington, M 551/80, 4 December 1980, Ongley J) this was another appeal against a fine of $750. Ongley J commented that the appellant was charged as an operator, not as an owner. Again there was a memorandum on sentence in similar terms to the memorandum in the present case. Ongley J pointed out that the increased penalty to which reference should have been made was from $1000 to $3000, being the increase in respect of an individual operator. He also referred to the decision of the learned Chief Justice in Ministry of Transport v O'Flaherty (High Court, Wellington, M 27/78, 26 July 1979, Davison CJ). In that case, at a time when the maximum penalty was $1000 the fine was increased on appeal to $500, but the Chief Justice pointed out that the offence in that case was a deliberate and calculated attempt to evade payment of revenue. In Haines' case Ongley J came to the conclusion that the fine in the District Court had been imposed in error and a fine of $200 was substituted.

Comparing the cases, Mr Fowler submitted that there was no suggestion in the present case that the incorrect assessment was "deliberate or calculated". In his submission the fine should be reduced as was done in the Cassin and Haines cases (supra).

Mr Larsen pointed out that, while there were errors in the memorandum prepared by the Judge in the Court below, the serious view taken by the legislature of breaches of the provisions was clearly indicated by the increase in the penalties. He submitted that the

Court was entitled also to take into account that incorrect estimates meant that a profit was made by operators if the offence was not detected.

As an example of a warning by this Court I refer to W. Binning Concrete Pumping Services Ltd and Others v Ministry of Transport (Wanganui, M 36-38/80, 2 December 1980, Savage J). In that case Savage J said it would be "appropriate in the future for District Courts to impose substantial penalties for this kind of offence."

As I have pointed out elsewhere it is difficult to make comparisons when the facts are but briefly stated. Nevertheless, in the present case where it is agreed that the appellant must be treated as an individual operator who made a mistake in assessing the weight before warnings had been issued by the Courts the proper course, in my opinion, is to reduce the fine as other Judges have done.

Accordingly, the sentence is quashed and a fine of $250 is substituted. The order for costs in the lower Court stands but there will be no order for costs in this Court.

Solicitors for Appellant: Phillips Shayle-George & Co. (Wellington)

Solicitors for Respondent: Crown Solicitor (Wellington)