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IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR.52 & 58/84

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BETWEEN FREW'S TRANSPORT LIMITED

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 28 November 1984

Counsel: S.P. Rennie for Appellant
N.J. Scott for Respondent

Judgment: 29 November 1984

ORAL JUDGMENT OF HARDIE BOYS J

On 21 November 1982 - and one cannot but comment on the sorry state of affairs that results in such delays - a truck and trailer unit owned by the appellant and carrying about 540 lambs and ewes was stopped in East Street, Ashburton. The traffic officer directed the driver to a weighbridge nearby and there it was found that the weight of both the truck and the trailer exceeded that for which licences were carried. The appellant was accordingly prosecuted for two breaches, one in respect of each vehicle, of s 5(b) of the Road User Charges Act 1977 and a defended hearing took place on 20 June 1983. The traffic officer gave evidence. After describing the vehicles and their load he said "I inspected the load and decided that

the vehicles were overweight". He then went on to describe his direction to the driver to go to the weighbridge and the result of the weighing compared with the licences. He was not cross-examined and no evidence was called for the defence.

It is apparent from the District Court Judge's decision that the only defence raised related to the acceptability of the weighing device for the purposes of this Act, and that defence was rejected by the Judge, his view incidentally being endorsed by Roper J. in the case of Winstone (S.I.) Limited v Ministry of Transport (Timaru, GR.60/83, 9 September 1983), a case on which Mr Rennie relied in another respect in support of this appeal. And so the appellant was convicted and fined $200 on each charge.

On this appeal Mr Rennie raised quite a new ground, based on s 69A of the Transport Act, which gives a traffic officer authority to direct the driver to drive to a weighing device. That section relevantly states in subs 1(c)(ii) that the direction may be given where the traffic officer has good cause to suspect that the gross weight exceeds the licensed weight. In the Winstone case Roper J saw no reason to interpret the phrase "good cause to suspect" in s 69A differently from the wellknown way in which it is interpreted where it appears in s 58A, and so, as he said, it followed that the onus was upon the prosecution to establish circumstances from which a person could reasonably form a reasonable suspicion of excess weight: existence of the good cause to suspect being judged objectively. In that case Roper J held that there was nothing in the evidence to provide a foundation for good cause. The vehicle had been stopped for a routine

check. There was not even any evidence that the traffic officer had inspected the licence before reaching his conclusion that the trailer was overloaded. And no reasons were given for his belief that it was. The Judge observed that the officer may have had previous experience with similarly loaded trailers or that the particular trailer may have given signs of being overloaded, but nothing to that effect appeared in the evidence. There thus being no disclosed basis for finding good cause, the appeal was allowed. The Judge went on to consider and reject an argument on behalf of the Ministry that even if there had been no good cause the evidence of the resulting weighing of the vehicle should have been admitted because it would not have operated unfairly against the appellant to admit it. In that respect reliance was placed on Kuruma v R [1955] A.C. 197 (P.C.).

On this appeal, Mr Scott argued that there was the necessary evidence; but he also submitted that good cause to suspect in s 69A ought not to be interpreted in the same strict manner as in s 58A, for though the phraseology is the same the subject matter is very different; and he urged me if that were not accepted to express a conclusion contrary to that of Roper J. on the application of the Kuruma case. But first he challenged Mr Rennie's right to raise the point at all, inasmuch as it had not been raised in the Court of Appeal.

As I understand it, there is no hard and fast rule about this, but the Court must always deprecate any form of trial by ambush, of which the present case may be seen to be an example. To change the metaphor, it is not consistent with justice in the round or with the true role of an appellate

Court for a party to keep the joker up his sleeve to be produced in triumph only if he cannot take the hand with his other cards. However, because the appeal raises a point of some importance, I propose to deal with it. But because I think I can deal with it on the facts and because of the exigencies of time and not out of any disrespect for Mr Scott's careful argument, I do not find it necessary to go into the more difficult legal questions he has raised.

The words "has good cause to suspect" must be given meaning, and I am content to accept Roper J's view that they should be given the same meaning as is given to them where used in s 58A. It is thus incumbent on the prosecution to show that the traffic officer did have good cause. But it would be fallacious to require an identical application of the phrase to the kind of factual situation that s 69A is dealing with, for while the indicia of the intake of alcohol or of alcohol-affected driving are objectively ascertainable by sight or smell and can be described in terms of what is seen or smelt, the same is not necessarily true of the indicia of carrying a weight beyond that which is licensed. The charge is not one of overloading as such but of exceeding a licensed weight, so there will not necessarily be any sign of excessive weight such as a pronounced depression of the springs or the tyres. It must essentially be a matter of impression. Anything more precise than that can be obtained only by the weighing process itself. So what is required to satisfy the statute? Clearly the traffic officer must know the licensed weight, for otherwise he cannot have any idea whether it is exceeded, so he must look at the licence. Once he has done that it seems to me

that in most cases he must then rely on visual inspection and his own judgment and experience, otherwise he would be powerless.

In this case the traffic officer inspected the load and on the basis of that made his decision. It is in my view implicit in what he said that he had first looked at the licence to see what the permitted weight was. I can conceive of nothing more than an inspection of the load that he could have done in order to fulfil the statutory requirement. Thus I consider the charges to have been proved. The facts of the Winstone case are slightly different. Rather than try to distinguish it, however, I find myself in the position of having to say that if my views are different from those of Roper J, with respect I have to differ from him. The statute must be made to work.

The notices of appeal were expressed to be against sentence as well as against conviction but Mr Rennie addressed no submissions on sentence. The fines were well within the permitted range and very low compared to the maximum. Accordingly the appeals both against conviction and sentence are dismissed with costs to the respondent of $150.

Solicitors:

Blake, Kennedy, Mee & Co, ASHBURTON, for Appellant
Crown Solicitor, TIMARU, for Relspondent.