2019

N.Z.L.R. X

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M. No. 154/84

1142

BETWEEN DESMOND JOHN MILLER

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 31 August 1984

Counsel: M.J. Quirke for Appellant
D.J. McDonald for Respondent

Judgment: Delivered 18 SEP 1984

C.W. ENTWISTLE
Deputy Registrar

JUDGMENT OF QUILLIAM J

This is an appeal against conviction on a charge under ss 108, 109 and 111 of the Transport Act 1962 of carrying on a linked-up goods service in breach of the rail restriction.

The prosecution evidence was mainly that of Traffic Officer Chubbin-Moore. He said that on 9 August 1983 he saw the appellant driving a truck and trailer between Kawerau and Rotorua. There was other evidence which established that the appellant had picked up a load of packets of timber from the premises of the Tasman Lumber Co. at Kawerau. The invoices for that load showed that it was for delivery to the Rotorua depot of Whitecliffs Sawmilling Co. Ltd (Whitecliffs) which is at Vaughans Road, Rotorua. The order had been placed by Whitecliffs from Auckland and the invoice was to be sent to that company at New Lynn. The

traffic officer gave details of the truck and trailer and the identity of the appellant as the driver and he was later able to identify the load. He saw that the appellant drove to the premises at Vaughans Road which, although described as a depot, were found by the District Judge to be simply a paddock containing a tin shed. The traffic officer watched as the appellant unloaded the packets of timber and covered them over with a tarpaulin. The appellant then drove away. Later that day the traffic officer inspected the packets of timber and made an identifying mark on them as well as noting the marks which they already carried.

Next day, 10 August, having kept the load of timber under constant surveillance, the traffic officer saw it loaded on to another truck and trailer by one Ingliss. He then followed as Ingliss' driver, Keen, drove his truck and trailer north and he eventually stopped Keen on the road before reaching Cambridge. He there identified the load as being the same as had been carried from Kawerau to Rotorua by the appellant. He warned Keen that if he carried the load past Cambridge he would be committing a breach of the rail regulations in respect of the second leg of the journey. Keen nevertheless continued on through Cambridge and the surveillance was there passed on to Traffic Officer Paton. He followed the truck and observed it go to the Hamilton depot of Whitecliffs.

It was common ground that if this was a case of a linked-up service from Kawerau to Hamilton then there had been a breach of the rail restriction provisions.

The appellant gave evidence and acknowledged that he had collected the load at Kawerau and delivered it to Rotorua where he had unloaded it and covered it with a tarpaulin. He said he was unaware what happened to it after that. There was no question of any breach of the rail restriction so far as that journey alone was concerned.

Section 111 (1) of the Transport Act, as it was then in force, provided:

> " 111. (1) Where -
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> (a) In the course of the carriage of goods the goods are carried in stages from one place to another by 1 or more persons; and
>
> (b) The total carriage of those goods between those places by any one of those persons would have been unlawful by reason of section 109 of this Act or of any regulations made or continuing and having effect under this Act (being regulations relating to the carriage of goods by road where there is an available route for the carriage of goods that includes not less than a specified length of open Government railway), -
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> every person who carries the goods over any one of those stages or is a party to that carriage shall, subject to the provisions of this section, be deemed to have carried on a goods service over the whole of the route over which the goods are carried. "

The prosecution case was that the appellant was a person who had carried the timber over one stage of the total journey and was therefore deemed to have carried on the goods service over the whole route. The question for determination on the appeal is whether it was necessary for the prosecution to prove mens rea on the part of the appellant and, if so, whether that had been established. It was accepted for the respondent that proof of mens rea was a necessary ingredient in the offence. This has been decided in two previous judgments of this Court, namely, Freightways Road (Otago) Ltd v Ministry of Transport [1980] 1 NZLR 330 and Scott Transport Ltd v Ministry of Transport (unreported, Rotorua, 11 February 1982, No. M. 4/81). There remained

then the question of whether in this case the finding of the District Judge that mens rea had been established could be supported on the evidence. For this purpose it is necessary to refer to some of the evidence in more detail.

There seems no doubt at all that this was a linked-up service and that does not appear to have been contested. As was observed by the District Judge, the real culprit would seem to have been Whitecliffs and the appellant was at no stage any more than a cog in the machine. However, he would be liable so long as he knew that he was taking part in a linked-up service.

The District Judge concluded that the appellant knew well the purpose of the carriage of the timber by him to the depot at Rotorua, namely, that it would later disappear to parts north. He has, however, given his reasons for this conclusion in somewhat abbreviated form. This is not a matter involving credibility and I am therefore able to draw my own inference from the evidence. In the absence of detailed reasons I think that is the better course.

The evidence was that the Tasman Lumber Co. was well aware of the use of linked-up services and that if it suspected that an order received by it involved such a practice it would decline to accept the order. This being the case it may be accepted that there was nothing to alert the Tasman Lumber Co. to an intended breach of the Transport Act. Nor does the invoice produced suggest that this may have been involved. It shows no more than that the invoice was to be sent to Whitecliffs at New Lynn and that the consignment was to be sent to that company's depot at Rotorua. What may be significant about the invoice is that it identifies the consignment as comprising eight packets of timber, each packet containing differing types and

quantities of timber. It is clear that this was not a bulk supply of timber but that the individual packets must have been made up for a particular purpose.

There is nothing of significance in the trip itself made by the appellant from Kawerau to Rotorua. Attention does, however, focus on the depot at Rotorua. This was described as a paddock on which there was a large tin shed. It is the status of this depot which was evidently relied on mainly by the District Judge. There were photographs of it produced in evidence. The tin shed was a substantial one but there was no evidence as to the use to which it was put. What is clear is that the consignment of timber in question was not put in that shed but was unloaded on to the ground and covered with a tarpaulin.

It is very difficult to accept that the appellant can have believed that the timber was to remain where he left it for any length of time. There was no evidence from any representative of Whitecliffs and so nothing to suggest that the depot was a place from which goods were sold. The appellant was asked whether, if a person in Rotorua wished to purchase timber, he could go to the depot and purchase it or whether he would have to order it prior to purchasing and he said, "I would say it would have to be ordered prior." He was later asked if he had any personal knowledge of timber being sold from Whitecliffs at Rotorua and he said he had but this was not pursued and so one is left without any more information than that.

It does not, however, appear reasonable to accept that the appellant could have believed that he was delivering this load to the depot so that it could be sold from there. As I have said, this was not a bulk supply such as one might expect if the purpose was resale. It was a

number of individual packets obviously made up to a particular order. In view of that, and in view of the fact that the depot had none of the appearances of a retail outlet, the only sensible inference one can draw is that the consignment was to be sent on to some other destination.

This raises the question of whether perhaps it could have been intended for a destination which would not have taken it beyond the 150 kilometre rail restriction limit. There is no evidence to show that the appellant could have had any knowledge at all of the actual ultimate destination, but there seems no reason to entertain the possibility that the destination may have been within those limits. If it had been then the appellant would have been entitled to carry it the full distance and there would have been no purpose in the journey being carried out in two stages. I therefore conclude that the appellant must have been aware that he was carrying a consignment which was to be picked up at Rotorua and carried on for a total distance which exceeded the rail restriction limit.

There remains one further matter raised for the appellant. In the course of his evidence-in-chief he was asked, "Before you delivered that timber did you know whether it was going to some ultimate or further destination than Whitecliffs Rotorua?" And his answer was, "Not that I was aware of." He was not directly cross-examined on this statement and it was argued that there was therefore no real challenge to his assertion of innocence. I do not think any such conclusion is to be drawn. The appellant had already pleaded not guilty to the charge and his assertion that he was unaware of the ultimate destination was simply in keeping with that plea. There was, I think, no obligation to cross-examine him on it in order to get the inevitable denial he would have given. The matter needed to be looked at on the basis of whether there was a necessary inference

from the evidence which excluded any reasonable hypothesis than one of guilt and which therefore overcame the assertion of innocence. In my view there was.

Although I have arrived there by a somewhat different route I find myself in agreement with the conclusion reached by the District Judge and I therefore hold that he was entitled to draw the inference which he did.

The appeal must be dismissed. The respondent is entitled to costs which I fix at $120.

Solicitors: M.J. Quirke, ROTORUA, for Appellant

Crown Solicitor, ROTORUA, for Respondent