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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.331/84

1130

BETWEEN THE MINISTRY OF TRANSPORT at Christchurch

Appellant

A N D MT COOK FREIGHTLINES LIMITED

Respondent

Hearing: 23 August 1984

Counsel: B.M. Stanaway for Appellant
C.A. McVeigh for Respondent

Judgment: 3 SEP 1984

JUDGMENT OF O'REGAN J

The respondent was charged with the offence of carrying on - in the sense of conducting - a goods service otherwise than in conformity with the terms of the relevant goods service licence held by it. The particular allegation was that it carried a consignment of goods on a goods service vehicle as part of a carriage of such goods from Washdyke to Culverden when there was an available route of not less than 150 kilometres of open government rail upon which the consignment could have been transported - and that in so doing it was in breach of the terms of its licence.

It was the prosecution's case that the goods were consigned by W. & R. Clough Ltd., Washdyke to Mocketts Motors Limited, Culverden; and that the carriage of the goods was

effected by the respondent carrying them from Washdyke to the depot of North Canterbury Transport Limited at Carlyle Street, Christchurch and by the latter firm carrying them thence to Culverden. The evidence designed to establish these matters was given by Traffic Officer Doonan and one Pearce, a driver employed by the respondent. Traffic Officer Doonan stopped the respondent's vehicle in which the goods were being carried at Ealing, which I am informed from the bar is between Washdyke and Christchurch; later he saw the goods being brought to the Carlyle Street depot of North Canterbury Transport Limited in Christchurch and on the following day found the goods on a goods service vehicle belonging to the latter company on the highway between Christchurch and Culverden. The officer also deposed as to the terms of the waybill in respect of the goods which was produced to him at Ealing. I will return to that evidence later. And for completeness' sake, I record that the manager of Mocketts Motors Limited deposed as to the delivery and receipt of the goods at Culverden.

Mr Pearce was the driver of the respondent's vehicle stopped at Ealing. He said that he had picked up the goods not from Washdyke but from the respondent's depot at Geraldine. The learned Judge proceeded to dispose of the case on the basis that it has been proved that the point at which the carriage began was Geraldine, and that the evidence of road and rail distances were distances from Washdyke and not from Geraldine. In those circumstances he dismissed the information.

When Traffic Officer Doonan stopped the respondent's vehicle at Ealing he inspected the waybill in respect of the goods which was, pursuant to the requirements of Subs(1) of s.109A of the Transport Act 1962, being carried in the vehicle. And he deposed that it recorded that:

1. the consignor was W. & R. Clough & Sons Ltd., Washdyke;
2. the consignee was Mocketts Motors Limited, Culverden, C/o North Canterbury Transport, Carlyle Street, Christchurch;
3. the freight was payable by the consignee;
4. the description of the goods was 1 drum of ploughshares weighing 365 kilos.

It is against this background that the informant launched the present appeal pursuant to s.107 of the Transport Act. The questions of law posed for the opinion of this Court are:

1. Whether the prosecution can rely on s.109A(1C)(b) of the Transport Act 1962 as conclusive evidence that Washdyke was the point at which the goods were picked up by the defendant company when the driver gave evidence that his goods were uplifted in Geraldine?
2. Whether, having regard to the answer to Question 1. above, any determination that the information should be dismissed was a correct one?

The relevant parts of Subs. (1C) of s.109A of the Transport Act 1962 are:

"In proceedings for an offence against this Part of this Act relating to the carriage of goods by road on a heavy motor vehicle, evidence given by a traffic officer as to the contents of any waybill carried on the heavy motor vehicle at the time of the commission of the alleged offence, as seen and recorded by him at the time when it was produced to him ... shall be conclusive evidence --

(a) ...

(b) That goods being carried on the motor vehicle were being carried in accordance with the provisions of that waybill, until the defendant satisfies the Court to the contrary."

Section 109A(2) provides:

"In this section, the term "waybill", in relation to the carriage of goods on a heavy motor vehicle, means a document in the prescribed form specifying the goods and the owner of the goods, and specifying in sufficient detail to permit ready identification the points at which the goods were picked up or loaded and are to be set down or unloaded; and includes a consignment note specifying those matters."

The underscoring is mine.

Before dealing with the questions, I record that both Counsel informed me that each of them referred to the provisions of Subs. 1(C) of s.109A and made submissions upon them. Those provisions have not been referred to by the Judge and, accordingly, I have not the advantage of having his views on their applicability to the facts of this case.

Speaking in general terms, I think it is clear that in cases such as the present the prosecution is entitled to rely on the provisions of Subs. 1(C) of s.109A and that in the absence of evidence from the defendant to the contrary, the original loading point is the place recorded as such in the waybill - if there be a waybill - and the contents thereof are proved by a traffic officer pursuant to Subs. (1C)(b) of

s.109A. It seems to me that the fact that there was oral evidence that Pearce picked up the goods at his firm's depot at Geraldine was of little or no moment. That evidence did not touch upon the pick-up point of the goods, the subject of the Contract for Carriage referred to in the waybill.

In the subject case, the evidence of the traffic officer as to the contents of the waybill does not specify "in sufficient detail to permit ready identification" the point at which the goods were picked up or loaded. Indeed, it does not specify at all. Furthermore, because of the statutory definition of "waybill" and the absence in this case of that ingredient of a "waybill" it is a matter of some doubt as to whether the document inspected by the traffic officer meets the statutory prescription of a "waybill" at all. But I need not decide that in this case. However, because of the absence of that necessary and, for this case, vital particular, the bringing of a case stated has been a sleeveless exercise. Stated simply, s.109A(1C) cannot avail the informant because the point at which the goods were picked up has not been specified in what was said to be the waybill.

A sufficient answer to Question 1 has already emerged.

As to Question 2, the answer must be "yes" but for reasons reached after my having had regard to a matter other than that stipulated in the question, namely, the absence of a necessary particular in the waybill.

When the foregoing matter was being canvassed during the course of the argument, Mr Stanaway stated - and Mr McVeigh allowed - that the point had not been raised in the Court below and as I understood him, it was his submission that, in that circumstance, it should not now be taken cognisance of. I do not accept that submission. The point arose in Stirland v. Director of Public Prosecutions (1944) A.C. 315 in which Viscount Simon, L.C., at p.328, said:

> "The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and if there is a substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by Counsel at the trial is not necessarily conclusive."

That view of things has been consistently followed in New Zealand and I follow it here.

The case stated having been decided on the foregoing grounds, a decision is not now necessary on the points canvassed in the conflicting decisions of, on the one hand, Greig J in Ministry of Transport v. Duff (unreported - Hamilton Registry 80/81 of 14th August 1981) and, on the other, of Barker J in Trailways Transport Ltd v. Ministry of Transport (unreported - Napier Registry M.71/81, 16th December 1981) and of Prichard J in Rorison Mineral Developments Ltd. v. Ministry of Transport (unreported - Rotorua Registry M.116/81, 15th February 1982) and which were debated before me. That must await another day.

The matter is remitted to the District Court pursuant to s.112(b) of the Summary Proceedings Act.

Crown Solicitor, Christchurch for Appellant
C.A. McVeigh, Solicitor, P.O. Box 559, Christchurch for Respondent