

IN THE HIGH COURT OF NEW ZEALAND

M. 851/84

AUCKLAND REGISTRY

+ M. 852/84

**No Special
Consideration**

BETWEEN

ROBINSON

APPELLANT

A N D

THE POLICE

RESPONDENT

1300

- a n d -

M.852/84

BETWEEN

HORNE

APPELLANT

A N D

THE POLICE

RESPONDENT

23 OCT 1984

Judgment:

Hearing: 8 October 1984

Counsel: Boyack for Appellants
Miss Shine for Respondent

JUDGMENT OF CASEY J.

These appeals arise out of the actions of the yacht "Greenpeace III" during the protest on the Waitemata Harbour to the visit of the U.S Submarine "Phoenix" on 9th November 1983. After a defended hearing which lasted three days Mr Robinson was found guilty in the District Court at Auckland of obstructing a constable in the execution of his duty and of intentional damage to property (sections 23(a) and 11(1)(a) Summary Offences Act, 1981); of being the master of a yacht, failing to ensure that it did not impede the navigation of a vessel of 500 tons gross or more (Regulations

44 and 67(c) of the General Harbour (Nautical and Miscellaneous) Regulations, 1968); and finally of being the master of a vessel, propelling it in a manner which having regard to all the circumstances of the case might have been dangerous to another vessel (Regulation 46 (b) of the same Regulations). Miss Horne was also on the yacht at the time and was found guilty of obstructing the constable in the execution of his duty and of intentional damage to property.

Evidence was given by a number of police officers and others on board official vessels engaged in monitoring and controlling the protest fleet and ensuring the unimpeded passage of the submarine to its mooring. There was a rigorous cross-examination by Mr Boyack, whose endeavours to dissect in minute detail an episode lasting only a few minutes on the water occupied a large part of the three-day hearing. It is not surprising that there were variations in the recollection and accounts given by some of the witnesses of what was clearly to them a situation of some stress and urgency. Evidence was also given by the Appellants and another witness on board the yacht, but the Judge, who enjoyed the advantage of seeing and hearing all these witnesses at considerable length clearly preferred the evidence of the prosecution whenever there was any conflict. I am in no position to disagree with his assessment. He made a very careful review of the evidence and notwithstanding Mr Boyack's criticism of his findings, my reading of the transcript leaves me in full agreement with the conclusions of fact set out on page 8 of his decision as follows:-

"I am satisfied that he [Mr Robinson] deliberately embarked upon a converging course with the submarine in order to penetrate the 100 metre screen established by the official escorting vessels and that he succeeded in penetrating that screen so as to draw the attention of the police on "Orange 18", the various inflatable boats and the "Pelorus" to the activities of "Green Peace III". I further find that the defendant Robinson maintained this converging

course and attempted to maintain this converging course even after the intervention of "Orange 18" and during the intervention by "Pelorus". I accept the evidence of Constable Wagner that there was a deliberate manoeuvre to starboard by the yacht of a perceptible and quite sudden nature which resulted in the bow-sprit going through the cabin-window of "Pelorus". I find from the evidence of Constables Baines and Wagner that there was ample opportunity during the encounter with "Pelorus" for Mr Robinson to manoeuvre his vessel to port and avoid further contact with "Pelorus" and to assume a safe distance from the submarine "Phoenix", but that instead he persisted in attempting to maintain his converging course with the submarine in spite of warnings by the police and efforts by the police to move his vessel out of the way. In particular I find that, while he may have at various times moved his tiller to amidships or to port, basically he maintained a course of directing his tiller to a starboard course as Mr Baines testified."

Mr Boyack's first point on appeal related to the charge against Mr Robinson of obstruction, and really went to the root of the other charges. The prosecution called evidence to establish that the Harbour Master, pursuant to the General Harbour Regulations, had forbidden any vessel to come within 100 metres of the submarine as it was proceeding up harbour, and a cordon of naval and police vessels had been established to enforce this direction. Mr Boyack persuaded the Judge that it was legally ineffective and unenforceable because of technical defects; accordingly the constables concerned in the prosecution were not acting in the execution of their duty when they were only seeking to enforce this direction and keep "Greenpeace III" out of the 100 metre zone. Apparently this was the thrust of the prosecution case. After finding the constables' authority could not be derived from the Harbour Master's directions, the Judge turned his mind to the general duty on the police to protect life and property, and referred to Police v. Amos (1977) 2 NZLR 564, where Speight J. was confronted with a broadly similar situation. He concluded that during the episode leading to these charges, the police were acting in the

execution of such a duty in attempting to take "Greenpeace III" under tow and divert it from its converging path on the submarine, and that Mr Robinson's persistence in endeavouring to maintain his course and in failing to move off to port - as was obviously required of him and as he was able to do - obstructed the constable in the execution of that duty. Mr Boyack recognised (as he had to, of course) the existence of this general common law duty but said it did not arise unless there was a situation of imminent danger, and its limits must be measured in relation to the degree of seriousness. He pointed out that Speight J. was dealing with a different situation in the Amos case, where the protest yacht had positioned itself virtually under the bows of a large surface vessel; whereas the movements of "Greenpeace III" were clearly in view of those navigating the submarine, and they could have taken appropriate action to avoid it without any danger to that vessel or the yacht.

With respect to Mr Boyack, I think he has stated the test too stringently; Speight J. at p. 569 of the Amos case spoke of the police officer apprehending on reasonable grounds danger to life or property and added that the limits of intervention will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended. From my perusal of the evidence and the Judge's findings in this case I am left in no doubt that by the time the attempts to divert "Greenpeace III" from the path of the U.S.S. "Phoenix" occurred, on any reasonable view of the matter there was an imminent risk of collision with attendant danger to those on board the yacht at least. I note Counsel's reference to an estimate of one witness that he thought the converging courses would lead to a collision 200 metres ahead of the submarine. However, the evidence from other witnesses describing the final melee placed them very much closer together and the Judge accepted it, quoting the comment from Sergeant Newton (the skipper of one of the police vessels involved) as "the tightest thing I have been

in"; he was a man with considerable small boat experience on the harbour.

The weight of the evidence accepted by the Judge supports the view that the police were acting to avert an imminent and serious danger caused by the navigation of "Greenpeace III" and Mr Robinson was rightly convicted. However, Mr Boyack contended that the Appellant had been prejudiced in his defence by the Judge's acceptance of this wider duty on the police as the basis for this conviction, after the prosecution had failed in its main argument that they derived their authority to interfere from the Harbour Master's invalid direction. I am satisfied that if the case had proceeded along these new lines nothing further would have emerged from the evidence or the cross-examination. There was a thorough investigation of everything which could have had the remotest bearing on safety and the understanding and reactions of the police concerned. Appellant's Counsel did not have the opportunity of putting his interpretation of the Amos decision to the Judge below, but he certainly presented it to me and was at no loss in pointing to evidence to support his claim that there was no imminent danger. There has been no injustice or prejudice calling for the conviction to be set aside on this ground.

I now turn to the charge of intentional damage against Mr Robinson. This relates to an incident when the bow-sprit of "Greenpeace III" went through the window of the "Pelorus" in the general confusion when the latter was endeavouring to move it out of the submarine's way and before it was boarded. Mr Boyack advanced a number of submissions based essentially on the proposition that the yacht had been manouvred into this situation by the actions of the police boats and the Appellant had no chance of avoiding the collision. "Pelorus" was manouvring after an abortive attempt to attach a tow-line to "Greenpeace III"; Constable Wagner described how he was holding a hand rail with his left foot on the yacht's bow-sprit while the submarine was closing

about 25 metres away, when "Greenpeace" made a heavy starboard turn and the bow-sprit went between his legs and through the cabin window. He was able to scramble on to the yacht in the wake of Constable Baines who took the helm and immediately steered that vessel to port and safety - a manouvre which the Judge accepted was open to Mr Robinson throughout the period leading up to this damage. The latter denied that he was steering hard to starboard towards the submarine and blamed "Pelorus" for backing into him and sending the bow-sprit through its window. It was not a case of his deliberately steering into that vessel at all.

It is apparent from the extract I have quoted, that the Judge accepted Constable Wagner's evidence of a deliberate and sudden manouvre to starboard which sent the bow-sprit through the window. He found it was carried out recklessly and without lawful justification or excuse nor under any colour of right, constituting intentional damage within the meaning of the section. Once again he was entitled to reach this conclusion which is entirely consistent with the description of the "Greenpeace's" activities at that time from those witnesses he believed. Nor can I see any basis for the suggestion that "Greenpeace III" was "not under command" at the time within the meaning of the Collision Regulations Order, 1976; the Judge found and the evidence he accepted points quite clearly to the ability to move immediately to port and out of danger at all relevant times. Mr Boyack also submitted that the police did not prove and the Judge did not find that the window on the "Pelorus" was the property of the Royal New Zealand Navy. There was evidence from an Air Force photographer on the "Hawea" that it was a Navy vessel, supported by the fact that the helmsman was described as a Naval rating. None of this was challenged in cross-examination and I reject this point. The appeal against this conviction must also be dismissed.

It also follows that the appeal against the

charge of failing to ensure "Greenpeace III" did not impede the submarine's navigation must be dismissed as well. Mr Boyack tried to make something of the fact that the original allegation gave the weight of that vessel as 6,000 tons whereas the evidence only suggested 4,000. He promptly accepted that such a point was not only without merit but also without logic, when all that had to be proved was that it was over 500 tons. The evidence accepted by the Judge clearly established that this was nothing like the situation of a yachtsman going about his lawful occasions and enjoying a normal harbour cruise; it was a deliberate attempt to reinforce an otherwise legitimate protest by impeding the right of the "Phoenix" to sail up the Waitemata.

The final charge against Mr Robinson was of propelling the yacht in a manner which, having regard to all the circumstances of the case, might have been dangerous to the "Phoenix". I agree with Mr Boyack that there was no specific evidence of what the possible consequences to it would have been had a collision had occurred. The Judge pointed out that "Greenpeace III" was a 14 ton sea-going yacht with a full length keel drawing five foot six inches, and had no hesitation in inferring that a collision between such a vessel and the submarine would have constituted a danger to the latter. He mentioned the obvious possibility of puncturing the hull below the water line, notwithstanding that he knew nothing about its strength. Both vessels were travelling slowly at the critical time, and in the circumstances the more obvious risk of danger was to the yacht and those on board her, not to the submarine. Common sense suggests that it would have been designed to withstand far greater forces. This view of the matter seems to have been shared by prosecuting Counsel during the course of the trial, when she applied unsuccessfully to amend the charge to one of danger to the yacht instead of to the submarine. With respect to the Judge, I think the finding of likely danger to the latter depended mainly on speculation and this charge was not established beyond reasonable doubt. I

therefore allow the appeal against that conviction.

The charges against Ms Horne arose out of her action in cutting a tow-line which had been attached by "Pelorus" to the bob-stay of "Greenpeace III" in an attempt to tow it out of the submarine's path. In view of my finding that the police were acting in the exercise of their general duty in attempting this manouvre, she is unable to have her action regarded as a reasonable and justifiable means of releasing the yacht from unlawful constraint. However, she maintained that her motive in cutting the tow-line was the safety of the yacht because use of that stay as a towing point would endanger the main mast rigging. Any suggestion of such danger was rejected by the Judge, and after discussing the case against her he found that her action amounted to a deliberate obstruction of Constable Baines in carrying out his duty. It is true, as Mr Boyack says, that he did not appear to turn his mind to whether Ms Horne might have genuinely believed that the tow-line was endangering the yacht. I think it implicit that he rejected such a proposition. I have no hesitation in doing so from my perusal of the evidence accepted by the Judge.

There is no doubt in my mind that Ms Horne, along with Mr Robinson and other members of the "Greenpeace" crew, were resolved on maintaining a course into the submarine's path. The way the earlier tow-lines were dealt with is entirely in keeping with her own actions, demonstrating a common intention to repel any effort by the police to interfere with their progress. It is entirely consistent with the description of her actions, after the police took command, when she moved the gear lever a number of times to frustrate their efforts to take the yacht away from the submarine. Against this background her explanation can be seen as nothing more than a plausible attempt to produce a motive which could justify her action. It was also suggested that there was no evidence the damaged tow-line belonged to the Navy, but in the light of my earlier

finding about the "Pelorus", this can be inferred if it is in fact a necessary element of such a charge. The appeals against her conviction are also dismissed. Costs reserved. Counsel may make written submissions if the Respondent wishes to seek them.

M.G. Casey

Solicitors:

J.E. Boyack, Auckland, for Appellant,

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