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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.399/84

1121

BETWEEN TRANSPORT (NORTH CANTERBURY) LIMITED

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 3 September 1984

Counsel: T.J. Allan for Appellant
D.J.L. Saunders for Crown

Judgment 12 SEP 1984

JUDGMENT OF HARDIE BOYS J.

This is an appeal against conviction, and the sentence of a fine of $750, on a charge under s 23(2)(a) of the Road User Charges Act 1977 of carrying a load exceeding the maximum gross weight specified in the relevant distance licence.

The vehicle concerned was a stock truck, consisting of a two-axled tractor unit towing a two-axled semi-trailer, the latter divided into four compartments each with three decks. A current distance licence was held for a gross weight of 12 tonnes on the tractor unit but it was weighed at 13.280 tonnes.

The appellant relied on the defence afforded by s 23(3) which states:

> " It shall be a defence in proceedings for an offence of operating a motor vehicle on a road without the appropriate distance licence or supplementary licence if the defendant proves that--
> (a) It was not possible to obtain the licence at any time during the period between the time when the need for the licence was reasonably foreseeable by the defendant or any employee or agent thereof, and the time when the alleged offence was committed; and
> (b) An appropriate licence covering the distance for which the motor vehicle was on a road in contravention of this Act was obtained for the motor vehicle forthwith after the commission of the alleged offence."

The driver had been instructed by radio from the appellant's despatch office to pick up 117 lambs from one property and 122 lambs from another, for delivery to Islington. On the way to the first property, the driver was advised by the despatch officer that he may have to collect two cattle beasts as well, but after he had taken on the first load of lambs this was changed and he was instructed to pick up a cow and take it to Belfast, and this he did after collecting the second lot of lambs. To accommodate the cow, the lambs were all loaded into the three front compartments and the top deck of the rear compartment, leaving the two lower decks of the rear compartment clear, and that was where the cow was carried. It was after the cow had been taken to Belfast, and while the lambs were being taken to Islington, still placed where they had first been loaded, that the vehicle was stopped by the traffic officer. It was apparently this distribution of the load that created the offence. The traffic officer noticed that the tractor unit was sagging in its springs near its rear axle and that it was bearing excessively on the tyres at that axle. The following day, the driver test-weighed a

heavier load of sheep and lambs, spread evenly across all axles and found that the tractor unit's weight was less than that ascertained the previous day. I therefore accept that no offence would have been committed on the day in question had the load been evenly spread.

It seems that although the driver was told at the time that an offence had been committed, he was not given an offence notice. Instead, it was posted to the appellant. The appellant's chief clerk gave evidence that he received it on 9 February, two days after the day of the offence. Between 3 and 4pm, he was instructed to obtain an additional licence to cover the period of the overloading, and did that on the morning of the following day, 10 February. "So in my opinion", he said, "having regard to our office procedures, I would say that the licence was obtained in the normal way that I execute my office proceedings to obtain these licences."

Even if that may properly be described as obtaining the further licence as soon as was reasonably practicable after the commission of the alleged offence (and I accept that is the meaning to be given to the word "forthwith" : cf Scott v Ministry of Transport [1983] NZLR 234) the defence can succeed only if it was not possible to obtain the further licence between the time when the need for it was reasonably foreseeable by the driver (for the section fixes the employer with responsibility for the employee's state of mind) and the time when the offence was committed.

As I understood him, it was Mr Allan's submission that the need for the further licence did not become apparent until the vehicle was weighed; but that even if the driver had

appreciated that the carrying of the cow would have caused the licensed weight to be exceeded, there was still no opportunity for the additional licence to be obtained before the offence was committed. The District Court Judge rejected that argument on the basis that this was a routine matter, and not an emergency situation, such as the statute contemplates, and that the appellant, through the driver and/or the despatch clerk, ought either to have refused to take the cow, or to have arranged the necessary licence before the cow was collected.

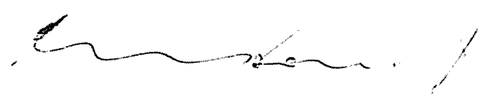
I had occasion to discuss the defence in Taieri Dynes Haulage Ltd v Ministry of Transport [1981] 2 NZLR 354 and it is from an observation I made there in describing the purpose of the statute that Mr Allan took the point that the defence is not limited to emergency situations. Whilst that is so, discharge of the onus of proving the absence of reasonable foreseeability, which rests on the defendant, will ordinarily, perhaps even necessarily, require him to show if not an emergency then at least some unexpected eventuality. As I pointed out, he is not entitled to take pot luck, to take on a load hoping that it will not be excessive.

The driver, who had had considerable experience in carting lambs and knew generally what they weigh, did not suggest that he could not have foreseen the result of adding in the cow. Rather, he seems to have regarded the advent of the cow as having an inevitability about it that absolved anyone from responsibility. I think it is clear that the need for the further licence was reasonably foreseeable as soon as the driver was instructed to collect the cow. If it was in fact not possible to obtain the licence between then and the time

the traffic officer stopped the truck (and I have the gravest reservations about that) then the reason why it was not possible is that the driver chose to collect the cow before obtaining the licence, thus taking the chance that the load would not be overweight or, more likely, that he would not be caught. A defence of justification such as that invoked here is not available where the situation relied upon is brought about by the defendant's own conscious choice. The appeal against conviction is therefore dismissed.

The maximum penalty for this offence is a fine of $15,000. Penalties imposed in individual cases vary greatly according to the circumstances. This company is by no means a first offender, although it has to be recognised that as the owner of a large fleet of vehicles it is very much at risk of offending if its employees are lax in their own care to ensure that the law is complied with. But that is really a management problem, not one for the Courts. The overloading of this truck was obvious so that it is not a case of inadvertence. I do not think it was to be treated as a trivial matter, warranting only a fine at the bottom end of the scale. I certainly see no basis for concluding - as I must conclude to allow the appeal - that the Judge took an incorrect view of it and imposed a fine that was manifestly excessive. The appeal against sentence is therefore also dismissed.

This appeal had little merit, and presents a proper occasion for an award of costs against the appellant, which I fix at $150.



Solicitors:

Fraser, Venning & Crerar, CHRISTCHURCH, for Appellant

Crown Solicitor, CHRISTCHURCH, for Respondent