IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.515/82

BETWEEN E.H. COCHRANE LIMITED

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing : 3rd September 1984

Counsel : R.A. Houston Q.C. and T.R. Ingram for Appellant
P.J. Morgan for Respondent

Judgment : 19 October 1984

JUDGMENT OF BARKER J

This is an appeal against conviction and sentence. The appellant was convicted in the District Court at Hamilton on 25th August 1981 on a charge which can broadly be described as carting goods in breach of the rail restriction then in force. The appellant was fined $1500, ordered to pay Crown Solicitor's costs $500, Crown Solicitor's travel and accommodation expenses $195, and witnesses' expenses $116.80 - a total of $2,311.80.

The notice of appeal appears to have been filed on 25th September 1981 in the District Court; the documents did not reach this Court for some time thereafter through some administrative oversight. Thereafter, there have been various delays in the appeal being heard. It is not helpful to recount these; the fact is that it is some 4½ years since the date of the alleged offence.

The hearing in the District Court extended over 3 sitting days. There was first a hearing on 7th October 1980 as to the

jurisdiction of the Court to hear the information; this resulted in the District Court Judge delivering a reserved decision on 9th December 1980 in which he rejected the appellant's arguments and held that he had jurisdiction to embark on a hearing of the information. Other than in an indirect way, none of the arguments canvassed before the District Court Judge at that preliminary hearing is now relevant to this appeal.

The hearing of the information proper took place in the District Court at Hamilton on 8th May 1981; it was continued on 29th May 1981 in the District Court at Wellington; the District Court Judge was then based in Wellington.

The information against the appellant alleged:

> "E.H. Cochrane Limited within the space of six months past namely, on or about the 8th and 9th days of February 1980 on a journey from Kawerau to Ngaruawahia by carrying goods, to wit timber in goods service vehicle registered number IG 2582/58 EIT, when there was available for their carriage a route that included not less than 150 kilometres of open Government rail between Kawerau and Ngaruawahia, did carry on a goods service (being deemed a goods service by virtue of Section 109 of the Transport Act 1962) otherwise than in conformity with the terms of a goods service licence granted under Part VII of the Transport Act 1962 in that E.H. Cochrane Limited failed to comply with the condition implied in continuous goods service licence number 10233 by Regulation 24(1) of the Transport Licensing Regulations 1963 being an offence punishable summarily Section 108(1), 109 and 193, Transport Act 1962 and Regulations 24(1), Transport Licensing Regulations 1963."

Several witnesses were called for the prosecution; no evidence was called for the defence. The nature of the prosecution evidence will emerge in the course of this judgment because of the principal submission of counsel for the appellant, that the appeal should be allowed because of alleged judicial misconduct by the District Court Judge. The appellant submitted:

1. That the District Court Judge participated in the presentation of the prosecution case to the prejudice of the appellant;

2. That he intervened excessively to the prejudice of the appellant;

3. That he displayed bias in favour of the prosecution by his interventions and by his rulings against the defence.

Counsel elaborated that the learned District Court Judge, being a recognised authority in the field of transport law, became "over-enthusiastic" in his hearing of the case which led to over-participation by him. Counsel submitted that the objective bystander would have the impression, from the totality of the case, that the defendant did not get a fair "crack of the judicial whip".

It is pertinent to note, when considering these submissions, that both parties were represented by counsel who were experienced both in general litigation and in the arcane jurisprudence of transport licensing. The record provided to this Court does not show the submissions of counsel. One would imagine that these were fairly numerous and pertinent. In my view, the record of proceedings in a District Court should show the submissions of counsel in order to give this Court a proper flavour of the lower Court hearing.

I must refer to such of the substance of the evidence as is necessary for a proper understanding both of the narrative and of the submissions of Mr Houston for the appellant.

The first witness was Traffic Officer Miers. On 9th February 1980, he stopped the vehicle, owned by the appellant, bearing the registration number referred to in the information, at Tamahere, travelling north on State Highway 1. He interviewed the driver, a Mr Burns, who produced a vehicle authority in the name of the appellant which referred to a goods service licence in the same name. The driver produced to this witness a waybill for the load headed "E.H. Cochrane Limited" and the name of the customer, "Delta Timber, Ngaruawahia". The carried, according to the waybill, included 3 packets of

Freight Distributors, Anzac St, Cambridge, to Delta Timber Company, Ngaruawahia". Mr Burns also produced to the traffic officer a consignment note from Tasman Pulp and Paper Co. Ltd. Kawerau, dated 8th February 1980; this was made out to Delta Timber Company, Ngaruawahia. The traffic officer read into the record the details of the document which had been shown to him by the driver. The District Court Judge permitted him to do so against defence protests - in my view correctly. The traffic officer then produced photographs of the truck; the load included numbered packets of timber which bore the same numbers as some of those noted in the document carried in the truck.

There were some questions of this witness by the learned District Court Judge; in my view, they were completely unexceptionable.

The next witness was a Mr K.W. Moore, a timber transport controller employed by Tasman Pulp and Paper Co. Ltd. at Kawerau. He gave evidence that when timber is despatched by road from his employer's Kawerau mill, a document accompanies the load. One copy of the document is kept for the company records and another copy is kept for "security". He explained at considerable length the system followed at Kawerau for the checking out of loads which leave the mill and the numbering of packets of timber; he produced to the Court one of the copies of the document retained by his company in respect of a load of timber which was shown to have left on 8th February 1980 with the consignee shown as "Delta Timber Co. Ltd, Ngaruawahia". He was able, from notations on the document, to recognise three of the packets of timber on the appellant's vehicle when stopped by the traffic officer at Tamahere on 9th February 1980. The document he produced bore a signature; Mr Moore indicated that the system was that the document is signed by the carrier and not by members of Tasman's staff. He did not recognise the signature. He was then cross-examined at length by counsel concerning various persons who had an input into the document; he acknowledged that he had made no enquiry as to what persons had an input into the document.

He was then questioned by the District Court Judge at some length. Mr Houston complained about the questioning; all the

District Court Judge was going in my view was endeavouring to clear up in his own mind the system operated by the Tasman company to ensure that the document was properly admitted and that it correctly recorded the identification markings of the particular loads.

The next witness was Mr R.M. Burns, the appellant's driver who was described by the District Court Judge in his judgment as "a reluctant witness". He acknowledged that he was driving for the appellant on 9th February 1980 when he was stopped by Traffic Officer Miers; on that occasion, he was driving from Cambridge to Ngaruawahia. He was asked to recognise his signature on the document produced by Mr Moore. He said, in answer to counsel for the prosecution, "it looks like mine", at which point the District Court Judge intervened and the following exchange is recorded:

"TO THE COURT

Q. Is it your signature?

A. It could be.

Q. Every man knows his own signature, Mr Burns.

A. When you get down there to get this load of timber and you go up to get this docket you are getting a bit frustrated and just sign it quickly.

Q. Whose signature is that?

A. Mine I would say. Looking at that document I am able to say where I took that load of timber. I took it to Cambridge and from there it went on a couple of days later."

He was then cross-examined by counsel for the defence; the purpose of cross-examination being to show that on 9th February 1980, Mr Burns' particular duty was to take a load from Cambridge to Ngaruawahia. He was then re-examined by counsel for the prosecution to show that it sometimes happened that a load of timber brought from Kawerau to Cambridge, would then be loaded onto another truck and taken from the Cambridge depot to another destination.

There then occurred the passage of which Mr Houston makes his most substantial complaint. After a fairly lengthy re-examination by counsel for the prosecution, the District Court Judge then himself questioned Mr Burns for some 2½ pages of foolscap record. Mr Houston was then given a chance to ask questions arising out of the District Court Judge's questions; the District Court Judge then again examined Mr Burns for another whole page of the record after counsel had finished.

Without going into the District Court Judge's questions in detail, it would be fair to say that the District Court Judge extracted from Mr Burns a statement to the effect that it was likely that the appellant on this occasion had transported the timber to Cambridge from Kawerau on 8th February 1980 and had then carted it in another vehicle from Cambridge to Ngaruawahia on 9th February 1980; in other words, cumulatively from Mr Burns' answers in cross-examination, his re-examination and the lengthy questioning from the District Court Judge, there was a basis for the finding that the appellant was operatin a "linked up" service under Section 111 of the Act.

The remaining witnesses were formal and technical, being an officer of the Lands and Survey Department and a Transport Licensing Officer for the Railways. The latter was questioned by the District Court Judge but no real objection can be taken to that line of questioning.

Mr Houston relied on such well-known cases as Jones v. National Coal Board, (1957) 2 Q.B. 55 and Yuill v. Yuill, (1954) 1 All E.R. 183, which are authorities on the undue intervention by a Judge in the conduct of proceedings and its consequence. Counsel submitted that, in the oft-quoted words of Yuill v. Yuill the learned District Court Judge "descended into the arena and had his vision clouded by the dust of conflict". Counsel also referred to the judgment of Thorp, J. in Wilson v. Collector of Customs (Judgment 28th June 1979, M.604/79, Auckland Registry) where the learned Judge allowed an appeal where a Magistrate had unduly interfered with the conduct of the defence on a prosecution under the Customs Act where there was a clear conflict of evidence. Thorp, J. noted, inter alia, that general principles

against judicial over-intervention were applied very strictly in criminal jury cases and that the overall effect of the participation by the District Court Judge is the critical matter rather than the significance of individual questions or interventions.

By contrast, in the present case, there was no conflict of evidence; rather, there was a dearth of evidence; what was given was accepted.

Also, a significant point of difference from the Wilson case: the appellant there gave evidence and was subjected to a series of pointed questions described by Thorp, J. as careful and systematic cross-examination. Thorp, J. described the questions put by the Magistrate as entirely unexceptionable if they had been put by prosecuting counsel, but they could not be described otherwise than as an intelligent and systematic cross-examination on matters which the Magistrate believed were critical to determination of the matters before him.

Mr Houston also relied on the overall effect of the interventions which would give rise to a suspicion of bias; he referred to the well-known judgment of Mahon, J. in Police v. Pereira (1977) 1 NZLR 547, 555, and to an article in (1982) Criminal Law Review, 221, by A. Samuels entitled "Judicial Misconduct in the Criminal Trial" where the learned author stated:

> "Intervention
>
> Excessive and inappropriate intervention by the judge has been a constant source of complaint. Questioning, especially severe questioning, of a witness or the accused, especially during examination-in-chief, is very undesirable. Counsel is there in due course to conduct any necessary cross-examination. Intervention or interruption by the judge during cross-examination ought normally to be confined to clearing up any ambiguity and ensuring the accuracy of any note being taken. Witnesses, and especially an accused, should never be "badgered" and interrupted by the judge in a "hostile" way. The judge should not take over examination, cross-examination or re-examination. He should not participate in the presentation of a case, especially the prosecution case. Being

questioned by the judge may render a witness overawed or frightened or confused or distressed. The judge may become, or appear to become, sarcastic or ironic or hostile. The impression may be formed that the judge is not holding the scales of justice evenly."

The most recent statement of principle is found in the judgment of the Court of Appeal (Criminal Division) in R v. Matthews (1983), 78 Cr.App.R. 23. The headnote states:

"In considering the propriety relating to the questioning by a judge of witnesses during a criminal trial the following principles should be considered - (1) while a large number of interruptions must put the Court of Appeal on notice of the possibility of a denial of justice, mere statistics were not of themselves decisive; (2) the critical aspect of the investigation was the quality of the interventions as they related to the attitude of the judge as might be observed by the jury and the effect that the interventions had either on the orderly, proper and lucid deployment of the defendant's case by his advocate or on the efficacy of the attack to be made on the defendant's behalf on vital prosecution witnesses by cross-examination administered by his advocate on his behalf; (3) in analysing the overall effect of the interventions, quantity and quality could not be considered in isolation but would react the one on the other. The question which the Court on appeal must ultimately ask itself was - might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing-up of the judge, be such that the jury's verdict might be unsafe? If that was so and there was a possibility of a denial of justice, then the Court of Appeal ought to interfere.

Jones v. National Coal Board (1957) 2 Q.B. 55; Clewer (1953) 37 Cr.App.R. 37; Hulusi and Purvis (1973) 58 Cr.App.R.378; Hamilton (1969) Crim.L.R. 486 and Gunning (unrep.) July 7, 1980 considered.

The applicants were charged with conspiring with others to commit drug offences. The trial lasted over three months and the conspiracy involved numerous combinations of various persons named either as defendants or as co-conspirators in the indictment. The evidence produced by the prosecution consisted of evidence of overt acts and also the direct evidence of two of the conspirators. In some 148 pages of the transcript of the evidence there was no page without some interventions by the trial judge and on many pages

there were more than one intervention, involving a prosecution witness and the two applicants. The applicants were convicted and applied for leave to appeal on the ground, inter alia, that the trial judge excessively interrupted in the cross-examination of Crown witnesses and the applicants' own evidence, and that those interruptions had a prejudicial effect to render the convictions unsafe.

Held, that the high proportion of interventions by the trial judge would seem to have been far more than ought to have been necessary to enable him to fulfil his functions in supervising the conduct of the trial in order to ensure (a) that he had a full note in what was clearly a complicated and convoluted case; (b) that in its proper chronological context each topic was fully developed in evidence; and (c) that the answers given by the witnesses could be followed by the jury both in their immediate context and by way of cross-reference to other relevant portions of the evidence which had already been given. However, it appeared that he had not committed the cardinal offence of diverting counsel from the line of the topic of his questions into other channels; thus, in spite of the exceptional number of interventions, the Court had been unable to detect any ground for thinking that the convictions of the applicants were not safe; accordingly, the applications would be refused.

(For the power of the judge to question witnesses, see Archbold (41st ed.), para. 4-382.)"

I have considered the record of evidence in the District Court in the light of these authorities. Unfortunately, the transcript does not give any detail of the exchanges between counsel and the Bench. The first day of the hearing was taken up with the submission that the Court had no jurisdiction; this resulted in the first reserved decision, as to which there is now no contest. One could expect from counsel of known ability such as Mr Jamieson (as he then was) for the prosecution and Mr Houston for the defendant, vigorous submissions made to the District Court Judge. It is pertinent to again note in this context the desirability of the record in the District Court including not only the evidence, but also details of counsel's submissions and of any exchanges between Bench and Bar. Without the notes of evidence, one cannot obtain the entire flavour of the hearing.

In my view, in considering the interventions of a Judge

sitting in the summary jurisdiction, there has to be more latitude allowed than when a Judge is sitting with a jury. After all, such a Judge wants to be certain of the facts before coming to a decision on guilt or otherwise.

I consider that the learned District Court Judge's questioning of the witness Burns was excessive, allowing that the Judge's aim was merely to elucidate evidence given in the course of cross-examination and re-examination. It would have been better if he had contented himself with leaving it to the prosecution to prove its case rather than himself obtaining details of the alleged linked up service. Having said that, I am unable to hold that this case comes within the category of those where the Judge acted so unfairly as to render the conviction invalid. Unlike the situation in the Wilson case, he made no attempt directly to influence the defence case. His questions were not concerned with damaging a defendant's credibility, but were aimed at extracting further information from two other witnesses, viz. Mr Moore from Tasman and Mr Nixon from the Railways. However, although he may have asked too many questions than was desirable, I cannot see that the questioning of those witnesses was such as to deny a fair trial. Nor, reviewing his rulings as a whole which were mainly adverse to the appellant, can one say, on the Pereira principles, that there was a real likelihood of bias by the learned District Court Judge.

Although it is quite true, as the learned author stated in the article, that questions from the Bench should normally await the conclusion of re-examination; counsel should have the opportunity to ask questions arising out of questions from the Bench; that should not normally be taken as a licence for the judicial officer to indulge in detailed cross-examination.

The decision by this Court is essentially one of impression. My impression is that in the circumstances of this case, which involved a number of technical and detailed matters in which the District Court Judge had a certain legal expertise and knowledge, the questioning, whilst in my view excessive, was not such as to render the appellant's conviction void under the Jones v. National Coal Board principle.

Accordingly, the first ground of appeal fails.

The District Court Judge made the following findings of fact:

"1. On 8 February 1980 a consignment of timber was despatched from Tasman Pulp and Paper Company Limited, Kawerau, to Delta Timber Company Limited Ngaruawahia, that consignment included package numbers GS 56939, AS 41174 and AS 41176.

2. The consignment of timber was collected from the premises of Tasman Pulp and Paper Company Limited at Kawerau by a truck and trailer combination, driven by the witness, Burns, and owned by the defendant.

3. At Cambridge the load of timber picked up from Kawerau was unloaded at the premises of the defendant.

4. Sometime on the 8th February or on the 9th February a load of timber was made up at the premises of the defendant at Cambridge for despatch to Delta Timber Company Limited at Ngaruawahia. That load of timber included packages GS 56939, AS 41174 and AS 41176, picked up by the defendant company from Kawerau on the 8th February.

5. Apart from the packages which were numbered and referred to in the preceding paragraph, the balance of the load on the 9th February may or may not have been the other packets of timber picked up for Delta Timber Company from Kawerau by the defendant on 8th February.

6. The driver, when stopped on 9 February at Hamilton, carried with him the waybill indicating that the timber was being carried from Cambridge to the premises of Delta Timber Company Limited at Ngaruawahia.

7. The timber was in fact carried on 9 February from Cambridge to Delta Timber Company Limited at Ngaruawahia as evidenced by the evidence of Traffic Officer Miers and Mr Burns, the driver.

8. The distance by road from Tasman Pulp and Paper Company Limited Kawerau premises to Delta Timber Company Limited at Ngaruawahia, by the shortest route is 180.9 kilometres.

9. The distance by combined road and rail, namely from Kawerau rail to Ngaruawahia rail, then by road to the Delta Timber Company premises, is 200.86 kilometres.

10. The rail was open and available for carriage on both 8 February 1980 and 9 February 1980."

The District Court Judge considered that the waybill was admissible in terms of Section 26A of the Evidence Act 1908; he held that there was a "linked up service" as defined by Section 111 of the Act. Mr Houston and Mr Ingram submitted that even if I found against the appellant on the substantive submission relating to the Judge's interruptions, there were other grounds for allowing the appeal, namely:

(a) That the information did not refer to Section 111 of the Act; and that the appellant was convicted of a case based on the linked up provision when it had been alerted by the information to fight a case based on one continuous carriage;

(b) That the document, allegedly signed by Mr Burns, was inadmissible.

Before dealing with these matters, I briefly note one further point which was raised by me in the course of argument which had not been raised by counsel in the points of appeal, namely, that the driver, Mr Burns, was an accomplice and that, therefore, on the principles enunciated by McArthur, J. in Forgie v. Police, (1969) NZLR 1101, the learned District Court Judge should have warned himself of the dangers of convicting on the uncorroborated evidence of an accomplice. He should have stated what, if any, matters were capable of providing corroboration. I am satisfied that there is no validity in this point. I am not satisfied that there was evidence that Mr Burns was an accomplice. On his own evidence, he did not know that there was a linking up; he was driving a perfectly legitimate load from Cambridge to Ngaruawahia. In any event, even if he were properly to be regarded as an accomplice, he could only have been an accomplice to offences under the Transport Act; the time for prosecuting him in relation to those offences had passed by the date of hearing his evidence.

The "linked up service" submission was based on an unreported decision of Cooke, J. in Ministry of Transport v. Thames Freightlines Limited (16th September 1974, M.769/74,

Auckland Registry). In that case, the information had alleged a carriage contrary to the rail restriction from Penrose to Thames. In opening before the Magistrate, counsel for the informant had alleged a "linked up service" from Penrose to Waitakaruru and from there to Thames. Cooke, J. held that, if the prosecution wished to invoke Section 111, it should fairly have informed the defendant of that fact by reference in the summons. He detailed a list of other deficiencies in the information under consideration and held on the particular facts of that case that the information charged an offence different from that which the prosecution had tried to prove. He therefore dismissed an appeal against the Magistrates dismissal of the information.

In my view, the decision of Cooke, J. covers a different situation from the present. As Mr Morgan submitted, the prosecution set out to prove one carriage from Kawerau to Ngaruawahia. It sought to prove this by saying that the timber was loaded on a vehicle of the appellant at Kawerau on 8th February and that it was discovered on the appellant's truck en route from Cambridge to Ngaruawahia on 9th February. The suggestion that this was a "linked up service" came from the evidence of the employee of the defendant; Section 111 applied to deem the second leg of the linked up service part of the whole carriage. Section 111 itself does not create an offence but it merely deems a "linked up service" to be an offence under Section 108. If the prosecution here, as in the Thames Freightlines case, sought originally to prove a linked up service and it had given warning that such was its case, by reference to Section 111 in the information, then the position would have been different. However, that was not the way in which the prosecution wished to bring its case; in my view, the Thames Freightlines case does not help the appellant.

As to the admission of the document, the District Court Judge had this to say:

"His next submission is that Tasman Pulp and Paper Mill's consignment note, number 1771, dated 8th February 1981 is not admissible. It appears to be the sixth copy, it is not the official copy retained by the maker of the document. He referred to the evidence of Mr Moore who described the number of copies and pointed out that the yellow copy is the official copy and the blue copy, which was produced, is the backup copy. He referred me to the specific provision for the admission of a copy contained in the Evidence Act 1908 Section 25A as inserted by the Evidence Amendment Act 1966. I have no difficulty in finding that the blue copy of the invoice forms part of a record relating to the business of Tasman Pulp and Paper Mill Limited at Kawerau and has been compiled in the course of that business from information supplied by persons who have, or may reasonably be supposed by the Court to have, personal knowledge of the matters dealt with in the information they supply; and that by reason of the complex nature of the business, the number of persons involved and the manner in which orders are received and processed, that the persons who supplied the information cannot, with reasonable diligence, be identified or cannot reasonably be expected (having regard to the time which has elapsed since he, she or they supplied the information and to all the circumstances) to recollect the matters dealt with in the information supplied. Mr Houston also referred me to subsection 2 which provides for the admissibility of such a document in criminal proceedings if a copy is produced certified to be a true copy in such manner as the Court may approve. Mr Houston suggested there was no certificate. Again I cannot accept this submission. The document was produced by a senior member of the staff of Tasman Pulp and Paper Company Limited, Kawerau, who described the mode of preparation of these documents and by his evidence given in Court, identified the document as being a true copy of the original. I can think of no better method of certification. If I were to accept Mr Houston's submission I would have to accept that if Mr Moore certified the document and it was produced by the Traffic Officer, it was admissible, but if Mr Moore produced the document and swore to its accuracy as far as he was able to it is not admissible. I am not prepared to stretch my imagination to this extent."

In my view, the District Court Judge was quite at liberty to admit this document in evidence; it was crucial to the success of the prosecution case. I think the simplest justification for its admission is found in the principle laid

down by the Court of Appeal in R v. Naidanovici, (1962) NZLR 334:

> "Where a document such as an invoice is used to refresh the memory of a witness who actually prepared the document but who had no independent recollection of the transaction recorded in it and the witness in giving oral evidence relies on and adopts the record made by him in the document, his evidence being co-extensive with the contents of the document, the document itself is admissible in evidence. It must not however be treated as independent confirmatory evidence of what the witness has said orally."

Accordingly, the appeal against conviction must fail. I note that there was a number of other highly technical points taken before the District Court Judge which were not advanced on appeal and I therefore do not need to consider them.

Counsel for the appellant are on much stronger ground in their final point; indeed, on this one, Mr Morgan did not seek to support the District Court Judge. In his reserved decision, the District Court Judge stated:

> "I do not think I need to hear the parties on the question of penalty. I believe that this offence is a serious offence. The evidence before me demonstrates clearly, not an attempt to get around the provisions of Section 111 of the Transport Act 1962, but a carefully designed system whereby goods are carried from one point to a depot at Cambridge, unloaded and reloaded and forwarded on with, in this case, a waybill that was patently false. It is the type of offence which should attract the maximum penalty provided by law, however, although it is difficult to conceive of a more systematic attempt to defeat the provisions of the Transport Licensing Laws, there may be more serious offences. For that reason I do not impose the maximum penalty of $2000 but I impose a fine of $1500, together with costs which I fix at $500 to include the $100 allowed to the Crown on my interim decision. In addition, the Crown is entitled to witnesses expenses, travelling and accommodation for witnesses, Mr Jamieson's return air fare of $140 for the hearing at Wellington, together with Mr Jamieson's accommodation overnight at $55. If the parties cannot agree on the actual amount of the witnesses expenses or other disbursements the matter may be referred back to me.

In refusing to hear the parties on penalty, the District Court Judge was quite wrong. Every convicted person has a right to be heard before penalty is imposed. This is elementary.

Mr Houston asked that I deal with the question of penalty de novo rather than remit the matter to the District Court after this lapse of time. Mr Morgan concurred in this sensible suggestion. Mr Houston made to me the submissions that would have been made to the District Court Judge had he been given the opportunity, namely:

(a) That the appellant had no previous convictions for breach of the rail restriction and indeed no previous convictions of any gravity at all;

(b) That the appellant, when convicted, would have to pay, by virtue of Section 112 of the Act, the amount of freight to the Railways applicable to this particular carriage.

Having regard to those matters, and in particular the appellant's good record, I think that an appropriate fine is $500.

With regard to the witnesses' expenses, I think it unreasonable for the District Court Judge to have required the appellant to pay the costs of the informant's counsel's accommodation and travelling expenses. The hearing should have been continued in Hamilton where the information had been filed. The appellant agreed to the extra cost of its counsel travelling to Wellington to suit the schedule of the District Court Judge. The appellant did not agree to this course on the basis that, if convicted, it would have to pay the informant's counsel's expenses. Mr Morgan could not support the allowance in favour of counsel for the informant.

The amount of costs awarded to the informant should comply with the Costs in Criminal Causes Rules 1970; in the absence of any extraordinary circumstances, the solicitors' costs must be fixed in accordance with those rules by the Registrar of the District Court. The witnesses' expenses are to be paid by the appellant and are to be fixed by the Registrar of the District Court in accordance with the Regulations in force at the date

of conviction.

The appeal against conviction is dismissed.

The appeal against sentence is allowed as indicated.

R.D. Barker J.

SOLICITORS:
Evans, Bailey & Co., Hamilton, for Appellant.
Crown Solicitor, Hamilton, for Respondent.