13/12

X

NZLR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

NO. M.121/84

1519

BETWEEN ALISTER ROSS (1979) LIMITED

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 15 November 1984

Counsel: K.J. Phillips for Appellant
W.J. Wright for Respondent

Judgment: 28 NOV 1984

JUDGMENT OF COOK J.

Following a defended hearing, the appellant was convicted of two offences against Section 108(1) of the Transport Act 1962 (as in force prior to 1 November 1983). In each case the information charged that, on a journey between Gore and Green Island, the appellant committed an offence by carrying on a goods service otherwise than in conformity with the terms of its good service licence, by carrying bulk oats when there was available for their carriage a route that included not less than 150 kilometres of open Government rail between Gore and Green Island. That there were two charges arose from the fact that there was a load-carrying truck, the subject of one charge, and a trailer also loaded, which was the subject of the other, each qualifying as a goods service vehicle.

The principal point of appeal turns on the question whether or not a document carried by the driver constituted a waybill for the purposes of Section 109A; in particular,

whether evidence of the contents could be given by a traffic officer pursuant to Section 109A(1)(c), in order to provide conclusive evidence of the contents of that waybill. At the conclusion of the prosecution case, the learned District Court Judge was invited by counsel for the defendant (the appellant in this case) to rule that there was no case to answer. Various points were raised at that time of which the one now raised on this appeal was expressed by the District Court Judge to be as follows:-

> "Turning to Mr Phillips' first, third and fourth arguments, all are based on the submission that the document referred to as a waybill does not meet the requirements of a waybill and that accordingly the evidence given of its contents is inadmissible and that in the absence of that evidence there is insufficient evidence of the origin of the carriage to establish that what was done was a goods service or that it was in breach of the company's goods service licence."

After discussing certain aspects of the evidence, the Judge noted that, without the document that was challenged, there was no way in which he could find a prima facie case that the load seen by the traffic officer was the load that was dispatched from the Southland Farmers Co-op at Gore and that consequently the prosecution had to rely on the document. The Judge then ruled against the appellant, finding in the process that the document contains sufficient reference to a consignor and to a consignee; also, that there was sufficient specification of the places where the goods were picked up and set down. As to the first, he said:-

> "In terms of the judgment in Putaruru Deliveries case therefore this document specifies two persons other than the carrier, one of whom may reasonably be inferred to be the owner, or to put it another way specifies a person to whom it could reasonably be inferred is the owner, namely, either Harraway & Sons or Southland Farmers Co-op. The other evidence I have reinforces that view."

and, in relation to the latter, after discussing the evidence as

to the whereabouts in Gore of the pick-up point, he concluded that, in any event, a place is sufficiently identified if, with reasonable enquiry, it can be located (Ministry of Transport v Glyn Hamilton Rotorua, 21st March 1980, Davidson CJ). He had found no difficulty in deciding that the point of set down was identifiable from the document.

Section 109A(2) defines a waybill as follows:-

> " 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."

and the prescribed form is to be found in the Transport (Waybill) Regulations 1970. The form which is set out in the schedule requires the following information:-

Carrier:_____

Address:_____

Date	Owner Consignor	*Point of Pick Up	Owner Consignee	*Point of Set Down	Goods Carried

*To be shown in sufficient detail to permit ready identification

Use of the precise form is not obligatory, however, as Regulation (2)(a) provides that any consignment note specifying the matters included in the form shall be a waybill for the purposes of Section 109A.

In the present case the evidence as to the contents of the "waybill" was given by a traffic sergeant who, in answer to a question as to the information it contained and whether he

had a copy of it, replied:-

> "Yes, it was headed Alister Ross (1979) Limited, the number of it was 1185, the date was the 13th of the 7th 1983. There was the word 'charge' on it and alongside that was Harraway & Son, address Green Island. It was underneath that, account of oats ton kilo, it was from S.F. Co-operative, Gore. 20.405 of oats to Green Island. I gained the inference from that Sir, which S.F. Co-op was Southland Farmers Co-op which is the accepted or standard abbreviation for that company. And Harraway and Sons Green Island is known to me as a milling company and I am aware of both logos of these two firms, Sir."

Later in cross-examination he made certain things clear:-

> "The document that you say was produced by the driver of the truck, did it have on it the words, 'owner consignor'?....No, I said it had 'Charge Harraway & Son' which gave me the inference that Harraway & Son were the owners.
>
> But it didn't have it on it?....No, it didn't have those words.
>
> Did it have a point of pick-up?....It had from S.F. Co-op Gore.
>
> Did it say where - any further addresses in Gore?....No, not other than Gore.
>
> So it could have been East Gore?....Yes.
>
> Did it have owner, the words owner consignee anywhere?....No sir.
>
> Did it have a point of setdown mentioned specifically as such?....Again, under (2) was Green Island, or passage '2' was Green Island and again I took the inference as it was going to Harraway & Sons Ltd.
>
> You took the inference?....Yes Sir.
>
> I am asking whether the document that was produced which you read is a waybill had the words point of setdown?....Not in those words, no."

.....

The Court

It didn't have Harraway & Sons?....No, Sir, that was beside the charge, was Harraway & Son and then the address under that was Green Island.

.....

So it had charge Harraway & Son Green Island?....Yes and under the word charge was address, which had Green Island.

And then where did it have to, somewhere further down?....Further down when it had from S.F. Co-op Gore, and under that it had to Green Island."

Clearly the document was not in the form in the schedule to the regulations; the question must be whether it nevertheless specified the matters included in the form. For the appellant it was submitted that there is no evidence as to the consignor or the consignee, nor evidence of contractual relationship between the appellant and "S.F. Co-op Gore" (from which the goods were to be carried) and therefore the document could not be described as a consignment note; also that inferences could not be drawn from other evidence. For these reasons the Judge's finding that the document complied with the legal requirements of a waybill was erroneous and, in those circumstances, the provisions of Section 109A(1)(b) and (1)(c) could not be invoked. Further, that without the use of the document or, more correctly, the officer's evidence as to what it contained, there was no prima facie case against the appellant.

The relevant provisions of the section were considered at some length by the Court of Appeal in Putaruru Deliveries (1958) Ltd v Ministry of Transport [1981] 1 N.Z.L.R. In the joint judgment of Cooke and Vautier JJ, there is the following at 92:-

" In the present case there was a consignment note. It did not in terms specify an owner, but it specified New Zealand Forest Products, Kinleith, as the consignor and Clement & Davis Ltd, Opunake, as the consignee. The consignee is a company carrying

> on business as timber and building supply merchants. In our opinion a document which does not specify all the matters required by the subsection is not a waybill within the meaning of the section. Failure to carry a waybill, however, will amount to an offence under s 109A(1) and s 193; the kind of mens rea required for that offence is not now in issue. We think that in this particular case it is a reasonable inference that either the consignor or the consignee was the owner; and that it is enough if the consignment note specifies two persons other than the carrier, one of whom may reasonably be inferred to be the owner. Parliament cannot have intended the carrier to have to grapple with possibly difficult questions of law as to ownership. But there may be cases where it would not be reasonable to infer that either the consignor or the consignee is the owner. Section 109A(2) therefore appears to be defective in its drafting and some amendment may be found desirable."

The judgment of Somers J contains a lengthier discussion on the point at 98:-

> " The waybill must either be a document in the prescribed form - the definition of prescribed in s 4 of the Acts Interpretation Act 1924 and the provision of s 199 of the Act combine to mean a form prescribed by regulations made by Order in Council - which specifies the matters mentioned; or it may be a consignment note specifying those matters. The words 'consignment note' have no precise legal meaning. In the context of s 109A(2) they refer to a writing which has mention at least of consignor and consignee and the goods carried, and has contractual effect between the carrier and either the consignor or consignee. No particular form is stipulated or necessary.
>
> In the present case the issue was whether the consignment note relevantly specified the owner. The word owner is not a term of art. Its dictionary meaning is a proprietor or one who has a rightful claim or title to the thing in question. But that meaning will succumb to the context - an example, influenced as well by usage or custom, is The Master Pilots and Seamen of Newcastle-upon-Tyne v Hammond [1849] 4 Exch 285; 154 ER 1219.
>
> The carriage of goods to which s 109A is related may be a carriage by the person having title to the same, a carriage by another at his direction, or a carriage from consignor or consignee where neither is

> the owner. It is unlikely that the legislature intended the carrier, or for that matter consignor or consignee, to have to come to a decision as to where title lay at the time the carriage began. The answer to such a question may depend upon contractual provisions and even financing arrangements not within the knowledge of the parties to the carriage. Accordingly I consider that in the context of s 109A an owner is specified where in the waybill or consignment note a person is named whom it can reasonably be inferred is the owner. Where that inference cannot be drawn the requirements of s 109A(2) are not fulfilled unless a person is named as owner. In the present case the proper inference is that either consignor or consignee was the owner."

In the present case it is not a true waybill as contemplated by the Act, but it seems that it is a consignment note. There is reference to the goods to be carried and, while the expressions consignor and consignee are not used, it is a fair inference from the wording of the document itself that the goods are being carried from "S.F. Co-op Gore" to Harraways in Green Island. As to contractual effect, the note or direction "Charge Harraways & Son" indicates that that exists between the carrier and the latter company.

As to other requirements, there is the name of the carrier, the date and the goods carried. To determine the other information which is necessary in order to meet the requirements of the regulations - owner, consignor, consignee, point of pick-up and set down - one must rely on what may be inferred from the statement in the document that the carriage is from S.F. Co-op Gore and that the address of Harraways, who are to be charged, is Green Island.

It would appear to be a proper inference that S.F. Co-op is the consignor and Harraways the consignee and one or other the owner, probably the latter as that is the company to be charged. The name S.F. Co-op may not convey very much to some people, but I see no reason why evidence should not have been accepted in the District Court to the effect that it is a common, well-known abbreviation for Southland Farmers Co-op.

As to the precise point of pick-up and set down, the requirement is that it is to be shown in sufficient detail to permit ready identification. I note what Greig J has said in McNeil v Ministry of Transport (M.37/80 Rotorua 8 March 1982) and, with respect, agree with him that the question is an objective one, whether there is sufficient to permit ready identification, and that this may require evidence to demonstrate whether either point can be so determined from the information in the document. It seems to me that this could be done and that the District Court Judge was justified in his conclusions in this respect.

For these reasons I consider that the document did amount to a waybill for the purposes of the section; that the informant was entitled to give evidence of the contents in the manner permitted by Subsection (1c) and the District Court Judge to rely upon that evidence in the absence of proof to the contrary.

The appellant raised a further ground of appeal; that the reference in the informations is to "open Government railway" not "open New Zealand Railways Corporation railway" which would be correct since the New Zealand Railways Corporation Act 1981 came into force. I see no merit in this, however. Clearly the appellant was in no way misled and, had the matter been raised in the District Court, there is no reason why an amendment should not have been made.

The appeal against conviction is dismissed. I record that the appeal against sentence is abandoned.

Solicitors:
Bannerman, Brydone, Folster, Wills, Phillips & Co., Gore, for Appellant
Tonkinson, Wood & Adams Bros., Dunedin, for Respondent.