IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

M.73/83

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BETWEEN ASC FLOWERS TRANSPORT LIMITED

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing 1 March 1984

Counsel J. Porter for Appellant
Mrs J. J. MacKinnon for Respondent

Judgment 12 March 1984

JUDGMENT OF ONGLEY J

This appeal raises a short point the resolution of which depends on the meaning of the word "container" where that term was used in Regulation 24(1) of the Transport Licencing Regulations 1963 (since repealed) and in the Continuous Goods Service Licence issued to the Appellant under Part VII of the Transport Act 1962.

The appellant was convicted in the District Court at Wanganui on a charge of carrying on a goods service otherwise than in conformity with the terms of a goods service licence granted under Part VII of the Transport Act 1962. A condition was implied in the appellant's Goods Service Licence No. 19706 by Regulation 24(1) of the Transport Licencing Regulations 1963 prohibiting the carriage of all but specifically described classes of goods in competition with the rail for distances greater than those stipulated in the regulation.

Classes of goods exempt from that restriction were described in Regulation 24(3), sub paragraph n (iii) of which provided that Regulation 24 should not apply to the carriage of plastic products of the following types:

(i) Pipes, tubes, hose and guttering in a rigid or semi-rigid form; and related fittings:

(ii) Foam:

(iii) Containers that are not capable of being stacked substantially within other containers of a similar type being carried on the same vehicle; and related stoppers, lids and covers.

The effect of the exemption was carried into the appellant's Continuous Goods Service Licence by the positive provision contained in certain of the Vehicle Authorities issued therewith that such goods were permitted to be carried. The relevant facts giving rise to the charge of which the appellant was convicted are set out in the District Court Judge's decision as follows:

> "a truck and two trailers belonging to the defendant company was stopped by Traffic Officer Browning on 23 February this year. One of the trailers, 47 HEH, was found to be carrying a number of pallets of cable reels. The trailer itself was some 6000 kilogrammes tare weight, and the waybill showed that the load came from Ngaio Gorge in Wellington and was headed for Canzac in Bell Block, New Plymouth. The load was 17 pallets of cable reels.
>
> A copy of the similar type cable reel has been shown to me today and it is really on that, that the decision rests. Supporting

> evidence was given by Mr Edwards the Operations Officer of the New Zealand Railways who confirmed, and I think it is generally accepted, that the shortest road distance as confirmed by the Department of Lands and Survey is 301 kilometres; and that distance plus 1/3 exceeds the road/rail distance between the two points; and that on the day in question the rail was available."

The Judge found that the cable reels being carried by the appellant at the time of the alleged offence, a specimen of which he had examined, were not containers. He described the cable reel as "a power reel ... used so that cable wire can be would around it (which) enables the wire or cable to be handled more efficiently." I will not attempt to describe the reels any more graphically than that. Anyone concerned with the impact of this decision will know what they look like. The appellant's case in the District Court was, and still is, that these objects are containers. Mr Porter relied on a definition of the word "container" taken from the Concise Oxford Dictionary which was as follows:

> "a vessel or box etc. designed to contain some particular thing(s), esp. large box like receptacle of standard design for transport of goods".

I do not think that this definition supports the appellant's case. These reels were certainly not vessels, boxes or anything like vessels or boxes. They were not designed in my view to "contain" the cable wound around them. The word "contain" in this context conveys the idea of enclosure. The reels do not enclose anything; rather they act as a core which makes for stability of the cable and for ease of handling. The analogy on a smaller scale to the function of a cotton reel offered by Counsel for the respondent is apt.

The Judge found that he was unable to regard the reels as containers and I find myself to be of the same view.

It is not the function of this Court to investigate the reasons why, if the reels could not lawfully be carried, that should have been so. They seem to be within the category of goods of high volume and low density which Counsel informed me was the general description applied to plastic containers of the sort which were entitled to exemption from the rail restriction. On the short acquaintance which I have had with this problem I would think it not unreasonable for these reels to have been included amongst the goods which were exempt but I have to assume that if those responsible for drafting the regulations used the word "containers" they meant containers and nothing else and had good reason for making the distinction which involved the appellant in offending against S.108(1) of the Transport Act 1962.

The appeal against conviction must be dismissed. There is also an appeal against sentence, although no penalty was imposed. The appellant submits that the appropriate course for the Judge to have adopted was to discharge the appellant under Section 42 of the Criminal Justice Act 1954. There is no reference to the question in the learned Judge's notes made at the time of sentencing but I am informed by Counsel that the same submission

was made in the District Court and was rejected. On appeal Mr Porter advanced a number of reasons which in his submission would have justified the District Court Judge in discharging the appellant under Section 42. The most cogent of them in my view was the fact that the appellant's manager appeared to have been informed by the Secretary of the Transport Licencing Authority for the Wellington District that there was no need to obtain a temporary licence to carry the reels as had been done prior to the amendment of the Regulations because, in the Secretary's opinion, the amendment extended the categories of exempt goods so as to include the reels. The District Court Judge accepted the appellant's evidence to that effect and in the circumstances was quite justified in discharging the appellant without penalty. There is nothing in the appellant's submissions before me, however, that would lead me to conclude that the District Court Judge exercised his discretion upon any wrong principle or reached a conclusion that was clearly wrong. Accordingly an appeal against sentence could not succeed. In the circumstances of the case however there is another reason why the appeal against sentence must be dismissed. Section 115 of the Summary Proceedings Act 1956 provides as follows:

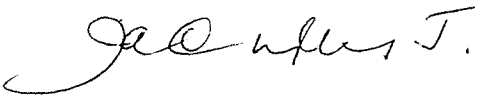
> "(1) Except as expressly provided by this Act or by any other enactment, where on the determination by a Magistrate's Court of any information or complaint any defendant is convicted or any order is made other than for the payment of costs on the

dismissal of the information or complaint, or where any order for the estreat of a bond is made by any such Court, the person convicted or against whom any such order is made may appeal to the Supreme Court.

(2) In the case of a conviction, the appeal may be against the conviction and the sentence passed on the conviction, or against the conviction only, or against the sentence only; and, in the case of an order for the payment of money, the appeal may be against the order and the amount of the sum ordered to be paid, or only against the amount of the sum ordered to be paid."

In this case no sentence was passed and no order was made against the appellant. No appeal lies, therefore, against the decision to discharge the appellant without penalty.

The appeals against both conviction and sentence are dismissed.



Solicitors:

Sievwright & Sievwright, Wellington, for the Appellant
Crown Solicitor's Office, Wanganui, for the Respondent