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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

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M.19/84

BETWEEN MERVYN LINDSAY BARTLETT

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 18 July 1984

Counsel: G.A. Paine for Appellant
W.J. Wright for Respondent

Judgment: 20 JUL 1984

JUDGMENT OF HARDIE BOYS J.

The appellant was charged in the District Court under the now repealed s 109A(1A)(b) of the Transport Act 1962 with the offence of carrying a waybill containing a false statement. At the conclusion of the prosecution evidence Mr Paine who represented him in that Court too submitted that there was no case to answer, primarily on the ground that the document in question was not in fact a waybill. That submission was clearly right: see my judgment in Bartlett v Ministry of Transport (Dunedin Registry, M.192/83, 20 December, 1983). The Judge therefore amended the information so that it alleged an offence against s 109A(1), which requires every person using a heavy motor vehicle for the carriage of goods to carry a waybill. Mr Bartlett was convicted on the charge as amended and it is against that conviction that this appeal is brought.

It is conceded that the ingredients of the offence, under s 109A(1), so far as they were required to be proved by the prosecution, were established. The sole question on the appeal is whether the defendant had discharged the onus, which Mr Paine accepts rested upon him, of proving on the balance of probabilities that the vehicle was exempt from the requirement of subs (1): see s 67(8) Summary Proceedings Act 1957 and Stewart v Police [1961] NZLR 680. As Richmond J pointed out in the Stewart case, it is not necessary for a defendant relying on a matter of justification or excuse to call evidence, for the prosecution case may itself point to the existence of the excusing element. And so in this case the question is whether or not on the whole of the evidence the appellant had shown that the reasonable probability was that the vehicle was exempt.

The prosecution evidence established that the appellant drove a Clinton Transport Ltd truck and trailer unit from Clinton to Waimumu, where both components were loaded with coal. The appellant then drove to Clinton Transport Limited's depot in Clinton. There, he emptied the contents of the trailer unit into a loading bay, which already contained a small quantity of coal, and then reloaded the trailer with coal from the adjoining bay. He then tipped the contents of the truck into that bay and reloaded it from the bay into which the contents of the trailer had been tipped. The truck's capacity was smaller than that of the trailer, so that there was more coal left in the last mentioned bay after the truck ha been loaded than before the trailer had been emptied into it.

The unit was then driven to Dunedin, where the trailer was unloaded at tannery premises at Sawyers Bay. The truck was then driven to the Ross Home where its contents were discharged.

On being stopped by a traffic officer, the appellant produced a document headed "waybill", in which he had described the load on the truck as "from Clinton Dept to Ross Home (10.200). P. Coal". (The figures referred to the weight in tonnes). The traffic officer asked the appellant who was the owner of the coal, and was told that the owner was the Ross Home. However, in evidenc the appellant gave these replies to questions asked by Mr Paine:

"Q. Do you know who owns the coal you transported?

A. I suppose Clinton Transport does.

Q. Why do you suppose that?

A. I don't know it comes out of the shed.

Q. Does Clinton Transport sell coal?

A. That's right yes."

Then in cross-examination he said that most of the arrangements for the delivery of coal to Dunedin were undertaken by the proprietor of Clinton Transport Ltd, who quite often arranged for coal to be supplied to the tannery and the Ross Home. At other times, the appellant said he would himself take a forward order on effecting a delivery. Payment was never made in cash, always by credit. Then the Judge asked him some questions:

"Do you take coal up to them and go in and say, 'Do you want some coal, I have got some here today', or do you go up when an order is placed?.....Sometimes yes. Sometimes I get caught out.

> If you have extra coal you want to get rid of?....Yes.
>
> What was the situation on this occasion? Had you been told to go up with it?....Yes."

Exemption from the requirements of s 109A(1) could be granted by Gazette notice and there was applicable at the relevant time The Transport (Waybill Exemption) Notice 1979. It provided inter alia for the exemption of heavy motor vehicles carrying goods of this description:

> "Goods carried by the owner, in his own motor vehicle, that are intended for commercial sale from that vehicle, provided the carriage of such goods does not infringe the provisions of sections 108 and 109 of the Transport Act 1962, or the Transport Licensing Regulations 1963."

The submission to the District Court Judge appears to have been primarily that the exemption applied because prior to delivery at the Ross Home the coal belonged to Clinton Transport Ltd. The Judge rejected that submission. On the basis that the coal was being carried in response to an order, he held that it belonged to the Ross Home. Mr Paine contended that that conclusion was wrong, and he referred to s 18 and Rule 3 of s 20 of the Sale of Goods Act 1908. I do not find it necessary to decide this question, for I accept Mr Wright's submission that even if the coal did belong to Clinton Transport Ltd, there is no evidence that it was "intended for commercial sale from the vehicle". Indeed the evidence was quite the opposite. The words quoted clearly carry the connotation of hawking. The

vehicle is the base from which the sale is made. Although, as the appellant said, that may occur from time to time with coal intended for delivery to the Ross Home, it was not the case with this particular consignment. The evidence is clear that this consignment was intended for delivery to the Ross Home. The "waybill" prepared by the appellant said so, and the delivery itself proved it. There was no evidence that there was any intention to effect a commercial sale of any part of the load from the vehicle. Mr Paine suggested that the Ross Home would have had the right to reject the load for lack of quality and that then the appellant would have had to hawk it, but in my opinion that possibility (which did not of course eventuate), is not sufficient. That was not the intention with which the coal was carried to the Ross Home.

There is a further point. The exemption does not apply where there is an infringement of ss 108 and 109 of the Transport Act. Part of the onus resting on a defendant who wishes to rely on the exemption is to show that there was no such infringement. No attempt was made by this appellant to establish that. This was no doubt for the very good reason that he would have been in some difficulty had he attempted to do so. For this was a clear and blatant attempt to circumvent the law.

I therefore conclude that the Judge was correct in holding that the appellant had not shown that on the occasion in question the vehicle was exempted from the requirement to carry a waybill. The appeal is accordingly dismissed, and the appellant is ordered to pay $150 on account of the respondent's costs.

Solicitors:

Sinclair, Horder, O'Malley & Co, BALCLUTHA, for Appellant.
Crown Solicitor, DUNEDIN, for Respondent.