IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.411/84

BETWEEN CAR HAULAWAYS LIMITED
Appellant

A N D MINISTRY OF TRANSPORT
Respondent

Hearing: 3 December 1984

Counsel: T.R. Ingram for Appellant
P.J. Morgan for Respondent

Judgment: 7-11-84

JUDGMENT OF GALLEN J.

On 16 August 1984, the appellant was convicted in the District Court on an information contained in the following terms:-

"Raymond Eric Radford of Hamilton City, Traffic Officer, say on oath that I have just cause to suspect and do suspect that Car Haulaways Limited (within the space of six months last past, namely) on 21st March 1984 at Hopu Hopu did commit an offence against Sections 5 Para.C and 23 (2) Road User Charges Act 1977 and Reg.6 (5) Road User Charges Regs.1978 in that he was the owner of a motor vehicle registered number KH 5965 when the motor vehicle was operated on a road namely State Highway One when the motor vehicle was fitted weith a distance recorder that did not accurately record the distance travelled by the vehicle."

There was no appearance for the appellant when the matter came before the Court. Formal evidence was given by a Traffic Officer, Peter Henry Bowsher. The significant part of that evidence is in the following terms:-

> "On Wednesday, 21 March 1984 at approximately 1.10 p.m. I stopped a white truck, registered number KH 5965 on State Highway One, Hopu Hopu. On inspection of the vehicle, it was found that the hubodometer appeared to be in a jammed position. The reading of the hubodometer was 62,039.2 kms.. The vehicle was taken for a test run of 3.6 kms., the hubodometer showed an increase of only one kilometre. The vehicle was owned and operated by Car Haulaways Ltd."

The appellant was duly convicted and a list of previous convictions which had been served on the appellant company, was then produced. The learned District Court Judge indicated that he was extremely suspicious about the appellant company. He was concerned at the failure to appear and referred to what he described as "previous convictions for similar types of offences." He imposed a fine of $500 and ordered the appellant to pay costs of $20.

It now appears that the Managing Director of the appellant company was overseas at the time the prosecution was heard. He had forwarded to the company's solicitors the list of previous convictions and believed that he had also forwarded the summons, but this had not been done. The company's solicitors were accordingly not aware of the prosecution and no appearance was entered.

Mr Ingram submits firstly, that the information in the form before the Court does not disclose an offence; secondly, that it is in any event void for duplicity; thirdly, that it does not give sufficient particulars to satisfy the provisions of s.17 of the Summary Proceedings Act; that in any event, and regardless of the technical objections to the form of the information, the evidence before the Court was not sufficient to justify the conviction and finally, that if a conviction was justified, the penalty imposed was excessive having regard to the circumstances.

The information indicates that it is brought under the provisions of s.23 of the Road User Charges Act 1977. Reference is also made to the Road User Charges Regulations, but those Regs. although imposing obligations, do not contain any provision which establishes that a breach of those obligations constitutes of itself, an offence. The Reg. making power under which these Regs. were made is contained in s.24 of the Road User Charges Act. This clearly gives a power to create offences with a maximum penalty of $3,000, but this power has not been exercised in the Regs..

The information is in a form which has not previously come before the High Court, but has been considered, I was informed, on three occasions in the District Court. On the first occasion, Judge P.W. Graham considered a charge against South Waikato Transport Limited (CRN 3055004522). This was

heard on 2 March 1984 at Papakura and the learned District Court Judge gave an oral decision on the same day. In that case, counsel submitted that the information did not disclose an offence. The learned District Court Judge concluded that the Act envisaged two offences - firstly, under the provisions of s.5 (c) of the Act which made it an offence to operate a motor vehicle on the road unless it was fitted with a distance recorder in good working condition and secondly, an offence contemplated by the Regs. that a distance recorder was fitted in such a manner that although it might have been in good working condition, it did not accurately record the distance travelled by the vehicle. He concluded that the information in the form in which it was laid, did not accurately refer to either offence. He concluded it was therefore a nullity and having regard to the circumstances, was not prepared to grant an amendment. He therefore dismissed the information.

On 1 February 1984, an information following the same form, against Kevey's Transport Otahuhu Limited, (CRN 3085037887, judgment delivered 7 June 1984) came before District Court Judge Robertson at Wellington. He was informed of the earlier decision of Judge Graham which was available to him and received preliminary submissions in law on the question of whether or not the information was to be regarded as a nullity. After analysing the relevant sections and Regs., he concluded that the information in the form in which it was laid, referred to a failure to comply with the provisions of Reg.6 (5) of the Road User Charges Regulations, although it did

not make it clear that it was the manner of fitting rather than the condition of the equipment which was alleged to be at fault. He considered that following the decision of the Court of Appeal in Police v. Wyatt 1966 N.Z.L.R. 1118, the provisions of s.17 of the Summary Proceedings Act had been complied with. He was not prepared to hold that the information was a nullity and allowed the charge to proceed.

An information in similar terms then came before Judge Graham again and on 15 October 1984, he delivered a reserved decision in which he considered the matter again, referring both to his own earlier decision and the decision of Judge Robertson already referred to. Judge Graham considered in this decision that there was only one substantive offence contemplated by the Act, that set out in the section that while the Regs. imposed obligations, a breach of these did not constitute an offence. The only offence contemplated was that under the Act and he indicated that he was prepared to allow an amendment to the informations concerned so that they disclosed an offence against the Act as such.

A form of information which has caused such difficulty to experienced District Court Judges, can hardly be considered a satisfactory one. An information ought to disclose fairly and clearly to the persons to whom it is directed, the nature of the offence which is charged.

S.23 of the Act indicates that an offence is committed when a person operates a motor vehicle on a road in contravention of s.5 of the Act. S.5 imposes various obligations. S.5 (c) imposes two obligations - the first, that the motor vehicle is to be fitted in accordance with the Regs. with a distance recorder and the second, that that distance recorder is to be in good working condition. The Regs. impose a number of obligations in connection with the fitting of distance recorders. Reg.6 (5) indicates the manner of fitting and requires it to be carried out in such a manner that:-

"(a) It accurately records the distance travelled by the vehicle; and

(b) It is easily visible from outside the vehicle; and

(c) Its axis of rotation is central and parallel to the axis of rotation of the axle or wheel to which it is affixed."

The purpose of the Act and Regs. is to ensure that the distance travelled is accurately recorded. The legislation and the Regs. recognise that this result will not be achieved if the device affixed is itself incapable of producing an accurate record, or if it is fitted in such a manner that it cannot achieve this. It is therefore practical and sensible that both possibilities should be, as far as possible, discouraged by the imposition of penalties. The Act also contemplates that the situation could arise where a device was satisfactorily and properly fitted but subsequently ceased to operate

satisfactorily. The Legislature accepted that such a situation might involve an element of unfairness and accordingly, a specific defence subject to certain conditions, is provided by subs.(4) of s.23.

This information uses the precise words of Reg.6 (5). I agree with Judge Robertson that it therefore seems to allege an offence arising from a failure to fit the device in such a manner that it accurately records the distance travelled by the vehicle. I agree with his conclusion therefore, that the information does disclose an offence and is not a nullity.

Mr Ingram submitted that its form was such that it contravened the provisions of s.16 of the Summary Proceedings Act and was to be regarded as void for duplicity. It follows from the conclusion I have already expressed, that I cannot accept this submission. The information does not allege more than one offence. S.23 contemplates that offences are committed when various obligations are not complied with. The information in this case charges a breach of only one of those obligations. It is not, in my view, contrary to the provisions of s.16.

Mr Ingram also submits however, that it does not fairly inform the appellant of the offence with which he is charged and therefore does not comply with the provisions of s.17 of the Summary Proceedings Act.

Judge Robertson considered that the specific reference to the Reg. made it clear that it was the charge under the Reg. and not the section of the Act itself which was laid and that following the decision in Police v. Wyatt, the informant was sufficiently informed for the provisions of s.17 to be complied with.

Mr Ingram drew attention to the relevance of the defence contained in subs.(4) of s.23. In my view, that defence does not apply to an offence related to fitting. It could not do so in terms, since it contemplates a situation where a correctly fitted and operating device has ceased to operate effectively because of malfunction. Mr Ingram submitted that by formulating the information in the terms in which it was, the appellant was deprived of the opportunity to rely upon that defence. That I think is so and it reinforces the view that the information deals with a different obligation, but it is important that the defendant knew whether the defence is open to him and if the information is confusing in this respect, s.17 would not have been complied with.

For completeness I should say that Mr Morgan for the respondent submitted that it was not open to the appellant to rely upon the provisions of s.17 because it had not chosen to appear at the hearing and was therefore not prejudiced by the information in the form in which it appeared.

I agree with Mr Ingram that this submission could not succeed. The information is either adequate or it is not. The response of the appellant does not change that situation.

S.17 of the Summary Proceedings Act requires an information to give sufficient particulars to fairly inform the defendant of the substance of the offence with which he is charged. It was considered by the Court of Appeal in Police v. Wyatt where it was emphasised that the section did not add greatly to the common law practice; that it was the substance, the essence or pith, of the charge which was required to be revealed by the particulars and not the details relied upon to establish the charge. Clearly the section is not to be interpreted in any very technical fashion, but in this case two experienced District Court Judges have disagreed as to whether or not a charge is contained in the information at all and if so, to what it relates. Added to this, is the fact that in this case the evidence which was given at the hearing related to a charge under the Act, not to the charge under the Regulations to which I have held the information refers.

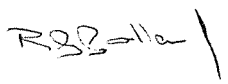
Under those circumstances, I do not see how it could reasonably be argued that the information in the terms in which it has been couched, does adequately indicate to any person, let alone a lay person, the substance of the charge to which it refers and I believe Mr Ingram is correct in respect of this submission.

Mr Ingram submitted that even if the information was satisfactory, the respondent had not proved the offence on the evidence before the Court. He based this submission on a contention that there was no evidence to indicate that the method of testing the hubodometer concerned was accurate. He based this submission on analogies to situations where the accuracy of speed testing equipment is demonstrated to the satisfaction of the Court. This is not such a case. The evidence discloses that the vehicle was taken for a test run over a particular specified distance and the hubodometer did not record the full distance. No indication is given in the evidence as to the way in which the distance was measured, but I do not think this was fatal. I think there would have been in fact adequate evidence for the learned District Court Judge to conclude that the device was defective.

However, there is another aspect of the matter which is I think unsatisfactory. Having already concluded that the information charges an offence in relation to the obligations which were imposed in respect of fitting the device, I am of the view that the evidence should have been directed towards establishing the particular charge. In fact it was not. It is directed entirely towards establishing the charge contemplated by the Act, but if the information is to be acceptable, it relates to the fitting obligations contemplated by the Regulations. The evidence to support this charge would have been different and should have referred to the way in which it

is alleged the device was so improperly fitted that it did not disclose the distance travelled. The evidence does not do this and in my view was inadequate to support a conviction. This point was not taken before the learned District Court Judge who was not presented with any submissions. Indeed, there was no appearance on behalf of the appellant. He could hardly, in the circumstances, have been expected to take such a point, although I note that this provides further support for Mr Ingram's contention that a person reading the information in the terms in which it was presented, would not necessarily appreciate the nature of the charge and the evidence required to support it.

The conviction must be quashed and I order accordingly. There is no need therefore for me to consider the submissions made by Mr Ingram in mitigation. Having regard to the circumstances, there will be no order for costs.



Solicitors for Appellant: Messrs Evans, Bailey and Company, Hamilton

Solicitor for Respondent: Crown Solicitor, Hamilton