NZCR

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

APPS 12/87

LOW PRIORITY

BETWEEN EVERETT

Appellant

A N D THE POLICE

Respondent

Hearing: 17 February 1987

Counsel: I.G. Mill for Appellant
Mrs Jenny Brinsley for Respondent

ORAL JUDGMENT OF WILLIAMSON J.

This is an appeal against a conviction which was entered in the District Court at Timaru on the 10th December 1986. The conviction was in respect of a charge that on the 19th February 1986 at Timaru the Appellant "did maintain a radio apparatus capable of receiving radio communications, namely a Hardic VHF/UHF scanning radio receiver, serial number 001058, otherwise than pursuant to a licence issued under the Post Office Act 1959." This charge was laid under the provisions of s.164(4) of the Post Office Act 1959.

The circumstances giving rise to the charge, which are described in the evidence, were that on a Wednesday, 19th February 1986, Police searched the premises of the Road Knights motorcycle club in High Street, Timaru. There, on top of a television set, they found a Hardic radio scanner which had the capability of hearing Police radio communications.

When this charge was heard on the 10th December 1986 evidence was given by Mark Levey, a Police Constable, concerning the circumstances in which the radio apparatus was located. He also said that on that day, while at the premises, he called the Timaru Police Station on his Police

portable radio and while doing so could hear his own voice over the radio scanner that was in the premises. Further there was evidence from Anthony McCoy, another Police Constable at Timaru, who was a member of the same search party on the 19th February. He said that the Appellant, Gary Everett, who resided at the address, signed a property sheet relating to the radio equipment in which the Appellant acknowledged receipt of a copy of an inventory describing this equipment as an item seized by the Police. The remaining witness, John McKenzie, a Post Office Radio Inspector, gave evidence concerning the nature of the equipment and the fact that he had been unable to find any record of a licence in the name of the Appellant for such equipment.

On behalf of the Appellant Mr Mill has argued a number of points on the appeal.

First, he argued that the prosecution failed to prove that the apparatus seized was capable of receiving radio communications within the terms of s.163 of the Post Office Act 1959. That definition states:

> "'Radiocommunication' means any transmission, emission, or reception of signs, signals, impulses, writing, images, sounds, or intelligence of any nature by the free radiation of electromagnetic waves of frequencies between 10 kilocycles per second and 3,000,000 megacycles per second."

Mr Mill argues that the evidence of Mr McKenzie concerning this apparatus was that it had a range of frequencies within the tuning ranges stated on the label of the equipment, that is of 68-88 megahertz, 108-130 megahertz, 138-174 megahertz and 384-470 megahertz. On this basis Mr Mill submitted that the evidence did not prove frequencies of the nature described in the definition in s.163 and nor did it establish the "free radiation of electromagnetic waves". It does not appear from the decision of the learned District Court Judge that this matter was canvassed by him during the course of the hearing on the 10th December. A reading of the total evidence given by Mr McKenzie indicates that he examined the apparatus which had been seized by

the Police and that he himself tuned it to a number of its ranges. He describes it as a scanning receiver which incorporates a microprocessor which enables any frequency within broad ranges to be entered into the equipment and for it to be tuned to the desired frequency. He also describes the nature of the conversations which could be received within the range of the equipment and comments upon how extensive those tuning ranges are.

In my view that evidence from Mr McKenzie, read as a whole, is sufficient to establish that this equipment was capable of receiving radio communications of the type described in s.163.

The matter, however, can be approached in a further way and that is by reference to the Radio Regulations made under the powers given in s.168 of the Post Office Act 1959. These Regulations were referred to in the evidence of Mr McKenzie. They describe frequencies in the new terminology of megahertz. It is apparent from them that that term has replaced the previous terminology of kilocycles and megacycles referred to in the Act. There is no requirement for any witness to speak of items only in the exact terminology used in a particular statute. The inquiry must always be whether or not it has been established to the standard required, that is beyond reasonable doubt, whether the elements of a particular offence are made out. In this case I am satisfied that when the evidence is read and considered as a whole it was established by the prosecution that the apparatus concerned was capable of receiving radio communications within the definition contained in s.163.

The second point raised for the Appellant is that the evidence was insufficient to establish that the Appellant was the occupier of the premises in which this radio apparatus was situated. Counsel argues that the signing of the property sheet was not an acknowledgment either of occupation of the premises or of any ownership or possession of the radio apparatus. He also argues that the evidence of the Police Constable to the effect that the Appellant resided at the address was opinion evidence.

In relation to this aspect, I agree with the conclusions which were formed by the learned District Court Judge, namely that the Appellant's status as an occupier was established by the combined effect of, first the fact that he was at these premises in High Street when the Police were present on the day when the radio apparatus was seized; secondly, that the sworn testimony was that he resided there; and thirdly, that he signed the property sheet. As to the latter item, it is correct that in its terms this sheet does no more than acknowledge receipt of a copy of the inventory, but the only inference that can reasonably be drawn from his signing it on that particular day is that the Appellant was acknowledging some responsibility, control or type of dominion over the item concerned.

The third matter argued on the Appellant's behalf was that it had not been established satisfactorily that the Appellant should not have the benefit of any licence which may have been issued in relation to this radio apparatus. Counsel argued that a mere statement by the witness that the Appellant did not have a licence was insufficient. Clearly the witness did state on oath that he had searched his records and that there was no evidence of any licence being held by the Appellant. He also said in answer to a question in cross-examination that he was unable to state from his records that there was a licence in any other person's name but from his own personal knowledge he was unaware of any licence for this particular class of equipment in the area.

In dealing with this matter the learned District Court Judge relied upon the provisions of s.67(8) of the Summary Proceedings Act 1957. These provisions superseded the former provisions in the common law concerning negative averments. The charge in this case specifically refers to the element of being without a licence and the section provides for there to be no proof in relation to a matter of this nature on the part of the informant.

Whether or not it was appropriate to draw the inference of possession in this case is irrelevant because

the Post Office Act 1959 itself provides for a presumption. It provides that the occupier of any premises on which a radio apparatus is situated and which is capable of receiving radio communications is presumed to be in possession of that apparatus unless and until the contrary is proved. That presumption, of course, applies in relation to possession of apparatus following a finding of occupation rather than to the question of a licence. It is a matter that I omitted to mention when dealing with the second ground relied upon by Counsel for the Appellant.

Returning to the question of licence, Mr Mill referred in his submissions to the question of the circumstances in which a Court is entitled to take into account the failure of an accused person to testify. He referred to the case of Purdie v Maxwell [1960] NZLR 599. That case has been the subject of a recent Court of Appeal decision in Trompert v Police 1 CRNZ 324. The Court specifically confirmed the principles in the case of Purdie v Maxwell and said that in summary proceedings the failure of a defendant to give evidence may properly be explicitly taken into account in determining whether a charge had been proved beyond reasonable doubt.

On the basis of that principle I am satisfied that in this case the learned District Court Judge would have been entitled, upon Mr McKenzie's evidence being given that the Appellant had no licence for this radio apparatus, to take into account the failure of the Appellant to give any evidence to the contrary.

This charge appears to have been dealt with by the learned District Court Judge and indeed argued before me today upon the basis that it is in effect a charge of possession of radio apparatus under s.164(4) of the Post Office Act 1959. The wording of the charge itself uses the word "maintain" which is appropriate only under s.164(3) of the Post Office Act 1959. Under the provisions of the Summary Proceedings Act 1957 s.123(2)(c) this Court has power to amend the conviction. I am satisfied that that is a proper course to take in this case because on the way

the matter has been dealt with there can hardly be any prejudice to the Appellant.

Accordingly, I amend the charge against the Appellant to one that on the 19th February 1986 he was in possession of a radio apparatus, namely a Hardic scanning radio receiver which was capable of receiving radio communications otherwise than pursuant to and in conformity with the terms and conditions of a licence issued under s.164 of the Post Office Act 1959. On that amended charge the Appellant is formally convicted.

So far as the penalty is concerned, a fine of $100 was imposed together with witnesses' expenses. An order for forfeiture of the equipment was also made. I am unsure from reading the decision of the basis upon which the fine was set, that is whether it was under s.164(3) or s.164(4). Under s.164(4) the general penalty in the Act applies. That general penalty is contained in s.236 and is a penalty of a fine not exceeding $100. On the basis that the maximum should be reserved for the worst type of case contemplated, it is in my view appropriate to allow the appeal in relation to the fine and reduce it to one of $75.

The power of forfeiture in this case is a power which has been exercised under s.199 of the Summary Proceedings Act 1957. It is not a case in which any person has made a claim to the item and consequently the District Court Judge was obliged under the provisions of ss. (3) of that Section to consider the appropriate way to dispose of the item. In those circumstances, since at that time there was no other claimant, there was no evidence of any licence or application of licence for such equipment and the equipment was capable of receiving communications from or between Police and other Government agencies, the order for forfeiture was in my view justified. Accordingly the appeal in respect of it is dismissed.

J

Solicitors:
Clark & Mill, Timaru, for Appellant
Crown Solicitor, Timaru, for Respondent