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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

LR 446

IN THE MATTER of the Judicature Amendment Act 1972

A N D

IN THE MATTER of an application for review

BETWEEN NORRIS ARTHUR EAST of Auckland, Driver

First Plaintiff

A N D BARBARA JEAN EAST of Auckland, married woman

Second Plaintiff

A N D JOHN WILLIAM IMRIE of Auckland District Court Judge

First Defendant

A N D THE ATTORNEY GENERAL for and on behalf of the Minstry of Transport

Second Defendant

A N D ALISTAIR PACEY DUGDALE of Auckland Traffic Officer

Third Defendant

Hearing: 2 September 1987

Counsel: Winger for Plaintiffs
Ruffin for Defendants

Judgment: 21 September 1987

JUDGMENT OF SINCLAIR, J.

This is an application for review following a decision by the First Defendant to order a rehearing on certain

informations which had been laid against the Plaintiffs under the provisions of s.5 of the Road User Charges Act 1972. For the purposes of these proceedings I record that the First Defendant abides the decision of this Court.

The Statement of Claim reveals that on 26 February 1987 the Plaintiffs appeared on two charges alleging that two separate motor vehicles, namely a truck and a trailer, had been operated on a road when the gross weight of the motor vehicle in question was more than the maximum gross weight specified in the distance licence displayed on that motor vehicle. Somewhat as a corollary to those charges, one single charge was laid against the Plaintiffs alleging that on 29 August 1986 they had been the users of the motor vehicles referred to in the above two charges and having been served with an overloading infringement notice, had failed to pay the overloading infringement fee. That particular charge was laid under s.69B(9) of the Transport Act 1962.

In respect of the first two charges, the hearing commenced and the prosecution called a traffic officer to give evidence as to the weights of the truck and trailer which formed the subject matter of the two charges under the Road User Charges Act 1972. The traffic officer, Mr Bateman, stated that the vehicles were weighed at the Jellicoe Weighbridge and he then proceeded to give evidence as to their respective weights. Under

cross-examination he was queried as to which weighbridge had been used and he replied that it was the weighbridge on the lefthand side as one approached the bridge and on the seaward side of the weighing hut. The cross-examination proceeded as to whether or not that was on the northern side and the traffic officer replied in the affirmative. He was then cross-examined on the basis that an Inspector of Weights and Measurements would give evidence that that particular bridge in August 1986 had failed to satisfy the requirements of the Inspector. Mr Bateman stated that he could not dispute that evidence. There was little else of moment in the evidence for the prosecution and at the conclusion of its evidence, counsel for the Plaintiffs submitted that there was no case to answer as there had been an omission by the prosecution to prove the weight of the vehicles in accordance with the provisions of the Road User Charges Act 1972. That particular Statute, by subsection(2), defines the term "weight" as follows:-

> ""Weight", in relation to an axle, a group of axles, or a motor vehicle, means the weight or (as the case may be), the sum of the weights, recorded on a weighing device of a type approved by the Minister of Transport for the purposes of the definition of the term 'weight' in the Transport Act 1962, and used in a manner prescribed by the Minister of Transport by notice in the Gazette for the purposes of that term under that Act."

That particular definition imports the provisions of the

Transport (Measurement of Weight) Notice 1974, Serial No.1974/222 which provides the various procedures which are to be followed when a vehicle is weighed, whether at a weighbridge, a pit containing portable wheel weighers or on a flat surface with portable wheel weighers. It was, and still is, the Plaintiffs' contention that as the prosecution had failed to give evidence as to the manner in which the weighing process was carried out, there was a gap in the evidence which entitled them to succeed on the submission of no case to answer. It was conceded however that had evidence been given that the weighing had been carried out in accordance with the 1974 Notice, that would have been sufficient to satisfy the requirements as to the weighing procedure, until the contrary was proved. However, the Court rejected the submission of no case to answer and the matter proceeded.

The defence then called a Mr Milburn, Inspector of Weights and Measures in Auckland. He gave evidence as to tests carried out by him on the two weighbridges on Jellicoe Wharf. He conceded that the bridge on the seaward side had been found to weigh correctly within the tolerances allowed. However, Mr Milburn classified the two bridges as being the eastern and western bridges stating that the eastern bridge was found to weigh correctly but that the western one was not within the tolerances and had been rejected. At that point, the District Court Judge stood Mr Milburn down and recalled the traffic officer to

clarify which bridge had been used. The traffic officer stated that it was the bridge closest to the sea. When Mr Milburn returned to the witness box, he confirmed that that was the bridge which had been found to weigh correctly. It is to be noted that nowhere in the record was there any request by either the prosecutor or the defence for the traffic officer to be recalled - the recalling was purely at the behest of the District Court Judge. The Plaintiff, Mr East, then gave evidence stating that the bridge the vehicles were weighed on was not the one closest to the sea but that on the opposite side of the hut, namely the bridge on the western side which Mr Milburn had stated in evidence did not weigh correctly. He also went on to say that there was a slight slope which would have had an adverse effect on the results obtained. At the conclusion of Mr East's examination-in-chief, the Court then intervened and the record shows that the District Court Judge then stated he had decided that the two charges would have to be heard afresh before another Judge. At the hearing before me, there were submissions as to the words which had been used by the District Court Judge in directing a rehearing but I am of the view that the totality of the words recorded at the time show that the District Court Judge had come to the conclusion that he would order a rehearing on 4 June 1987 before another Judge. There was then some discussion in relation to the charge which had been laid under the Transport Act 1962 and eventually the hearing of that information was also

adjourned to 4 June, without any ruling being given by the District Court Judge as to whether or not the defence claim that the information was bad for duplicity ought to be sustained.

The basis of the application for review is that the procedure adopted in the District Court was irregular for a number of reasons. Firstly it was submitted that the traffic officer ought never to have been recalled at the point when he was - if indeed he ought to have been recalled at all. Secondly, even although the Plaintiff Mr East had given evidence on matters which had not been put to the traffic officer, that was not sufficient ground for the District Court Judge to then decide to order a rehearing and that the hearing ought to have proceeded with Mr East being cross-examined and the Court then coming to a decision in respect of the two defended charges before it. In coming to a decision, the Court could, if it felt so inclined, disregard Mr East's evidence on matters which had not been put to the traffic officer, they having related to matters of substance, so far as the prosecution was concerned. On the other hand, it was submitted by counsel for the Plaintiffs in this action that the Court may have preferred the evidence of Mr East to that of the traffic officer and could have acted upon it - but that was purely a matter within the discretion of the District Court Judge depending upon his view as to the real reliability of the respective

witnesses. In other words, it was the submission of counsel for the Plaintiffs that in all the circumstances, the Court ought to have completed the hearing and resolved any conflict of evidence which existed by the application of the appropriate rules.

On behalf of the Second and Third Defendants, it was pleaded in paragraph 9 of the Statement of Defence that the procedure at the hearing of the above informations was governed by the Summary Proceedings Act 1957 and any inherent or implied powers, including a power to make and enforce rules of practice in order to ensure that the Court's process was used fairly and conveniently by both sides. This also included the power to prevent an abuse of its own process. Additionally at the hearing, it was submitted that the present situation could be dealt with by this Court accepting that the Plaintiffs did not want a rehearing and that in those circumstances an order could be made quashing the order for a rehearing and directing the District Court to complete the matter which would, in effect, be precisely that which the Plaintiffs are seeking. However, it seems to me that there are matters raised by the Plaintiffs which require consideration.

I accept that in relation to the criminal jurisdiction of the District Court, it has only that jurisdiction conferred upon it by the Summary Proceedings Act 1957 or such other criminal jurisdiction as is conferred upon it

by other Statutes which specifically provide for this. I have had to consider on a previous occasion the jurisdiction in the District Court in relation to criminal matters, that being in the case of King v. Blackwood & Weyman, Auckland Registry, A.663/85, judgment 26 August 1985. I pointed out in that decision that the District Court was a creature of Statute and had no inherent jurisdiction of the nature which is vested in this Court. I did, however, emphasise that the District Court had a power to prevent abuses of its own process but that that was a power within its jurisdiction and not an extension of it. There have been decisions subsequent to mine but a perusal of the various cases which have since been decided do not persuade me to modify or depart from the view I have already expressed. Indeed in McMenemin v. Attorney-General (1985) 2 NZLR 274, there is a statement from Somers, J. at p.276 which, at least, confirms that the powers of an inferior Court are those conferred on it by Statute. Somers, J. had this to say:-

> "An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by Statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process."

What then were the powers of the District Court in relation to the hearing of this particular matter? The Summary Proceedings Act 1957 itself lays down the

procedure to be followed by the Court once a plea of not guilty has been entered. Section 67(1) of the Statute provides that before any charge is gone into, the substance of the charge "shall be stated to the defendant if he appears and he shall be asked how he pleads". It is to be noted that those words are mandatory in form and subs.(3) provides as follows:-

> "If he does not plead guilty, the hearing shall be conducted in accordance with the succeeding provisions of this section."

Once again the provisions in that subsection are mandatory. Subsections (4), (5) & (6) read as follows:-

> "(4) The Court shall first hear the informant and such evidence as he may adduce, and shall then hear the defendant and such evidence as he may adduce. It shall then hear such evidence as the informant may adduce in rebuttal of any evidence given by or on behalf of the defendant.
>
> (5) Where the defendant refrains from giving evidence, or from calling his wife or her husband, as the case may be, as a witness, no comment adverse to the defendant shall be made thereon by the informant.
>
> (6) The parties may examine, cross-examine, and re-examine witnesses."

Sections 68(1) & (2) provide as follows:-

> "68(1) The Court, having heard what each party has to say and the evidence adduced by each, shall consider the matter and may convict the defendant or dismiss the information, either on the merits or without prejudice to its again being laid, or deal with the defendant in any

> other manner authorised by law.
>
> (2) The Court may, if it thinks fit, reserve its decision, and in that case may give it at any adjourned or subsequent sitting of the Court or, except where a sentence of imprisonment is being imposed, may draw up the decision in writing, sign it, and send it to the Registrar."

Thus, it will be seen that so far as hearing the evidence is concerned, the requirements of s.67 above referred to are mandatory as is the requirement of subs.(1) of s.68 in relation to consideration of the matter by the Court. Nowhere up to that point is there any provision for the Court to order a rehearing, and it is to be noted that if any rebuttal evidence is to be given, it is to be given after the defence evidence has been called. The provisions as to rehearings are contained in s.75(1) which reads as follows:-

> ".75(1) Where on the hearing of any information or complaint the defendant has been convicted or, as the case may be, an order has been made against him, the District Court Judge or Justice or Justices who presided over the Court before which the information or complaint was heard may, in his or their discretion, grant a rehearing of the information or complaint, either as to the whole matter or only as to the sentence or order, as the case may be, upon such terms as he or they think fit: ...."

Thus, the jurisdiction to consider an application for rehearing arises only where a defendant has been convicted or where an order has been made against him. In this particular case of course, the rehearing was ordered

before the Court had even embarked upon a consideration of the matters in issue.

The above procedure for dealing with matters within the criminal jurisdiction of the District Court is specific and yet simple. It is orderly and designed to deal with prosecutions coming within the ambit of the Summary Proceddings Act 1957 speedily, and untrammelled by complex considerations.

But what happened in the instant case has a passing similarity to that which occurred in the unreported decision of Davison, C.J. in Auckland City Council v. McManus, Auckland Registry, M.754/82, judgment 24 August 1982. In that particular case the respondent had been charged with driving a motor vehicle while the proportion of alcohol in her blood exceeded 80 milligrams of alcohol per 100 millilitres of blood. The District Court Judge, after hearing the evidence, referred to the fact that the traffic officer had given evidence as to the respondent having driven the motor vehicle in question, while the respondent had stated she had not been the driver. Instead of resolving the conflict, the Judge simply said; "It is not for me to determine which side has given the correct version. The matter will be determined elsewhere", and went on to dismiss the charge. The matter came before this Court by way of Case Stated and in the course of his judgment, the Chief Justice, after referring

to ss.67&68 of the Summary Proceedings Act 1957, had this to say:-

> "In acting in that manner the Judge has failed to perform the duty imposed upon him by s.68 of the Act. Further, apart from the requirement of the Statute, the Judge has failed to perform his judicial function. By merely stating in relation to his decision "the charge is dismissed" without having performed the essential prerequisite to enable him to arrive at that conclusion, the Judge has committed an error of law. His duty as Judge in law is to hear the case, consider and weigh the evidence, apply any relevant legal principles and give a decision with reasons....."

In the instant case, the District Court Judge did not permit the hearing to get to the stage where he had to make a final decision, he having brought the hearing to an end before the evidence was completed. He was therefore not carrying out his duty in accordance with the Statute. He had to, and ought to have, followed the procedure laid down in s.67 and having followed that procedure, he ought to have arrived at his decision in accordance with the provisions of s.68 of the Statute. The Judge did, at the point when he brought the hearing to an end, comment on certain aspects of Mr East's evidence stating that it would have been competent to have again recalled the traffic officer. That, of course, could only have been done for rebuttal purposes in accordance with the express provisions in the Statute. But surely there was nothing to have prevented the hearing being completed and for the Court then to have resolved the conflict - in all

probability without the necessity of allowing rebuttal evidence to be called.

There ought not to have been the recalling of the traffic officer during the course of Mr Milburn's evidence and it would have been quite competent for Mr Milburn to have given evidence as to his findings in relation to both weighbridges and for those findings then to have been applied by the Court in relation to the particular weighbridge it found, as a fact, had been used for the weighing process.

In consequence, I have come to the conclusion that in relation to the informations laid under the Road User Charges Act, there has been an irregularity and the order directing a rehearing is quashed and the matter is remitted back to the District Court for it to complete the hearing and then come to a decision. In making that direction, I also order that the District Court Judge must first reconsider the submission of no case to answer and consider whether, on the evidence up to the time that that submission was made, there had been established to the criminal standard of proof, the weight of the vehicles in accordance with the provisions of the Road User Charges Act 1972. In relation to the remaining charge which was simply adjourned, it will be necessary for the Court to decide whether or not the charge as laid is bad for duplicity and once it has come to a decision on that

aspect, to then deal with that particular information according to law. In case there are any other matters which may require to be dealt with arising out of this judgment, leave is reserved to either party to apply further. In the meantime, the question of costs is reserved.

Solicitors:
Holmden Horrocks & Co, Auckland, for Plaintiffs;
Crown Law Office, Auckland, for Defendants.