IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

AP 2/87

BETWEEN FRAZER

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 19 February 1987

Counsel: N.M. Mackie for Appellant
M. Sullivan for Respondent

Judgment: 19 February 1987

(ORAL) JUDGMENT OF BARKER J

This is in form an appeal against conviction and sentence. The appellant was charged in the District Court at Gisborne with careless driving. After a defended hearing, two Justices of the Peace stated that they had found the case against the appellant proven; they proceeded then to fine him $100 with Court costs $35 and witnesses expenses $32.

They gave their ruling on penalty without giving counsel for the appellant the chance to be heard in mitigation of sentence. Mr Mackie who then as now appears for the appellant, then addressed the Justices with submissions of relevance as to penalty; i.e., that the appellant at the age of 69 had been a professional driver for over 50 years. He had no previous Court appearances. He had a good record over a lengthy period.

Counsel submitted that a discharge without conviction was appropriate. After Mr Mackie had made his submissions

the presiding Justice said:

> "You didn't hear Mr Mackie. Mr Frazer was not convicted. He was fined $100.00, $35.00 Court costs and I mention to Mr Frazer the penalty was very nominal - $100.00. There was certainly no conviction."

It seems to me that there are two basic things wrong with the approach of the Justices.

First, if their intention was not to convict, even though the charge was proved, they should have said that they were discharging the appellant under S.19 of the Criminal Justice Act 1985. They should not have purported to have imposed a fine: there is no power to impose a fine, as distinct from costs, without a conviction.

Secondly, even although they were not proposing to impose a conviction but to discharge under S.19 counsel for the appellant should have been given an opportunity of making submissions on any order under S.19(3) of the Act before that order was made. It is axiomatic that counsel for a convicted person should have the opportunity to make submissions on sentence before sentence is imposed.

I have read the notes of evidence: it seems to me that the Justices were entitled to hold that the charge had been proved. Putting the facts very briefly, the other motorist involved was driving along State Highway 2, some miles south of Gisborne. The appellant was driving a school bus out of a side road going straight across the State Highway into another side road. The exit from the side road on which the bus was travelling had once been controlled by a "give way" sign: the evidence of the traffic officer established that the "give way" sign had fallen down: the accompanying markings on the road were not visible. Consequently, in theory, the bus had the right of way: the motorist on the State Highway should have given way to the bus which was proceeding across the intersection on his right. However one takes judicial notice that it is almost invariable in country areas such as

this that all side roads onto major highways such as State Highway 2 are protected by "give way" or "stop" signs. The ordinary motorist would not expect to find an unprotected country road without at least some warning sign erected on the main highway.

The appellant stated in evidence that he had not seen the other car. The Justices held that he should have seen the other car. I think that view was open to them, having seen and heard the witnesses. The fact that the appellant technically had the right of way was not a sufficient defence to the charge of careless use: the Justices were entitled to find the offence proved.

However, in view of the appellant's creditable record over 50 years as a driver of public transport without any blemish on his record, he was entitled to favourable consideration. The Justices were entitled to order a discharge under S.19 of the Criminal Justice Act 1985.

Because they did not give effect to their intention properly, it is the duty of this Court to give effect to what is clearly a proper exercise of the discretion under that section.

Accordingly, if there is a conviction recorded, that conviction is vacated. The appellant is discharged under S.19 of the Criminal Justice Act 1985 on condition that he pays Court costs of $35.

I note that S.19(3) does not refer expressely to witnesses expenses. Under the predecessor to S.19 (i.e. S.42 of the Criminal Justice Act 1954) witnesses expenses were commonly imposed as a condition of a discharge order. However I am unsure whether there is jurisdiction to require payment of witnesses expenses. I do not regard this as a proper occasion for a test case. It is not possible, as I understand the Costs in Criminal Cases Act, to make an order for legal

costs in situations where the prosecution was not represented by a solicitor or counsel at the District Court hearing.

R.D. Barker, J.

Solicitors: Chrisp, Caley& Co, Gisborne for Appellant
Crown Solicitor, Gisborne for Respondent