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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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SET 3.

AP.9/90

[redacted] RM

BETWEEN ESTHER ST JOHN STYLES

Appellant

AND THE AUCKLAND CITY COUNCIL (now the MINISTRY OF TRANSPORT

Respondent

Styles v Auck CC BF/1121D

928

Hearing: 31 May 1990

Counsel: Mr C. J. Tennet for Appellant
Mr M. E. Goodwin for Respondent

Judgment: 31 May 1990

ORAL JUDGMENT OF WYLIE, J.

On 30 November 1989 Mrs Styles (whom I shall call "the appellant" notwithstanding the effect of this judgment) appeared before Justices of the Peace to answer an Infringement Offence Notice under Regs.(6) and (136)(f) of the Traffic Regulations 1976 in that she had failed to comply with lane usage arrows.

After a defended hearing in which the appellant appeared in person the Justices found that the charge against her was proved, but they took into account her good driving record for 45 years and, purporting to use s.19 of the Criminal Justice Act 1985 discharged her without conviction, but ordered her to pay $55 towards the cost of the prosecution. (The $55 was the

amount of the infringement fee which she would have had to pay had she not chosen to defend the matter.)

She now purports to appeal to this Court on a variety of grounds which I need not go into. Her counsel, who was assigned to represent her on this appeal on Legal Aid, filed a substantial memorandum of Points on Appeal with numerous references to authorities and also sought leave to call further evidence on the appeal. However, the first issue that arises is whether there is jurisdiction under s.115 of the Summary Proceedings Act 1957 to entertain the appeal. Subsection (1) of that section reads as follows:

> "Defendant's general right of appeal to High Court -
> (1) Except as expressly provided by this Act or by any other enactment, where on the determination by a District Court of any information or complaint any defendant is convicted or any order is made other than for the payment of costs on the dismissal of the information or complaint, or where any order for the estreat of a bond is made by any such Court, the person convicted or against whom any such order is made may appeal to the High Court."
> (Emphasis added.)

As will be seen in order for there to be a right of appeal there must (relevantly) be either a conviction or an order other than for the payment of costs on the dismissal of the information.

In the present instance, on the face of the proceedings there was no conviction because the Justices elected to act under s.19 of the Criminal Justice Act and to discharge

without conviction. Nor on the face of it is there an order other than for the payment of costs on the dismissal of the information. The Justices' comments on the imposition of that order making it perfectly clear that the order was imposed towards the cost of prosecution.

Counsel for the appellant has, however, submitted a strenuous argument that the Justices were not entitled to act under s.19 but should have acted under s.78A of the Summary Proceedings Act which provides for the method of dealing with infringement offences. Section 78A reads as follows:

> "Conviction not to be recorded for infringement offences -
> (1) Notwithstanding any other provision of this or any other Act, where in proceedings for an infringement offence (whether being an offence for which an infringement notice has been issued or not) the defendant is found guilty of, or pleads guilty to, the offence and the Court would, but for this subsection, convict the defendant, the Court shall not convict the defendant but may order the defendant to pay such fine and costs and may make such other rders as the Court would be authorised to order or make on convicting the defendant of the offence.
> (2) Every reference in this or any other Act or in any regulation or bylaw to a conviction for an offence shall, in relation to an infringement offence where -
>
> (a) An order has been made as referred to in subsection (1) of this section that the defendant pay a fine and costs; or
> (b) An order is deemed by virtue of section 21(5) of this Act to have been made that the defendant pay a fine and costs, -
>
> be deemed to be a reference to the making of that order."

Counsel has submitted that that section in effect displaces s.19 of the Criminal Justice Act in relation to infringement offences. I do not need to decide that issue but

at the moment I am not fully persuaded. The general purport of s.78A(1) is that where in any proceedings for an infringement offence the defendant is found guilty of the offence and the Court would, but for the subsection, convict, then the Court is not permitted to convict but may order the defendant to pay a fine and costs. It is at the least arguable that a condition precedent to subs.(1) coming into operation is that the Court would but for the subsection, have convicted the defendant. In the present instance the Court decided quite independently of this subsection to discharge the appellant under s.19. Thus it may be that s.78A(1) does not arise. However, on the basis that it is applicable, Mr Tennet, for the appellant, went on to argue that by virtue of s.78A(2) the order for payment of costs is deemed to be the equivalent of a conviction and as a consequence there would be a right of appeal under s.115, and also, to the concern of his client, demerit points under s.44 of the Transport Act would ensue. I will return to that latter point later in this judgment.

Whether or not the Justices should have proceeded under s.78A rather than under s.19, the end result has been that there is no conviction. Nothing that Mr Tennet has urged upon me has persuaded me that he can possibly show that there is a conviction to bring himself within the first prerequisit to appeal under s.115. He did submit that the finding of guilt by the Justices was the equivalent of a conviction but I think that is clearly not so. The very fact that a conviction may

be avoided notwithstanding the finding of guilt whether pursuant to s.19 or to s.78A, is sufficient to establish that, unless in terms of s.78A it can be deemed to be a conviction by virtue of subs.(2) thereof. The plain fact is that at the end of the day this appellant has had no conviction recorded against her. The only order that has been recorded against her, and it is not one under s.78A(1), is an order for payment of $55 towards the cost of the prosecution. The Justices having purported to act under s.19 it must be assumed that they imposed that award of costs pursuant to subs.(3) of that section.

Then counsel submitted that an order for payment of costs on a discharge without conviction was not an order for payment of costs on the dismissal of an information in terms of s.115(1). Therefore it was an order which gave grounds for appeal. Again I reject that submission. Under s.19 a discharge without conviction is deemed to be an acquittal. An acquittal can only follow from the dismissal of an information. Giving s.115(1) a fair large and liberal interpretation I am satisfied that a discharge without conviction is the same as the dismissal of an information and consequently that an order for costs following on such a discharge is not an order which will found jurisdiction for an appeal. Accordingly for those reasons I am satisfied that there is no right of appeal in this case the prerequisites for such not being present.

It appeared to me during the course of argument that one of the main concerns of the appellant and her counsel was that by virtue of s.78A(2), taken in conjunction with s.44 of the Transport Act 1962 there would, notwithstanding the discharge without conviction, be an entry of demerit points against her record. While that is not a matter that is directly before me and it would be inappropriate for me to determine the issue as a matter of law, I think it appropriate that I should record my very clear view that demerit points do not follow the outcome of the hearing against this appellant. The reference to an order for costs being deemed to be the equivalent of a conviction in subs.(2) of s.78A only arises where an order has been made pursuant to subs.(1) of that section or pursuant to s.21(5) of the Summary Proceedings Act. I can ignore the latter provision as having no relevance to these proceedings. So far as the first matter is concerned, however, it is abundantly clear that the order for payment of costs in this case was not made under subs.(1) of s.78A. It was made pursuant to s.19. Consequently the deeming consequence of subs.(2) does not apply. One is then left with s.44 of the Transport Act which makes provision for demerit points to be entered only on conviction. Here there was no conviction, Thus demerit points should not be entered. I discussed this point with counsel for the respondent who accepted that view to be correct and has undertaken to advise the Transport Department accordingly.

The only other matter is the question of costs. Counsel for the respondent sought an order for costs and in a substantial amount. He drew attention to the numerous points of appeal raised, the copious citation of authority and the research which that made necessary, all of which had to be done notwithstanding that the jurisdiction point had to be decided first. As it has turned out, that is resolved favourably to the respondent, so that much of that time spent in research and preparation has been wasted. I accept that a substantial amount of time has been incurred in this appeal. The appellant, however, is legally aided and any order for costs would simply be on the Legal Aid Fund. That in itself is perhaps only a factor to be taken into account. I am concerned however as to whether there is any jurisdiction for me to award costs. Under the Costs in Criminal Cases Act 1967 it appears that the only provision for an award of costs on an appeal is that contained in s.8 which arises "where any appeal is made pursuant to any provision of the Summary Proceedings Act..." Then the Court which determines the appeal may order such costs as it thinks fit. Here it is of the essence of the respondent's case that there is no right of appeal, with which I agree. There is no appeal under the Summary Proceedings Act to determine. It follows that the Court will not be determining the appeal. Those two matters seem to me to deprive the Court of any jurisdiction under that section to award costs. (Section 9 has no application, that being a provision where notice of appeal is given, but the appeal is dismissed for non prosecution, which is not this case.) It

was not suggested that I should award costs under any inherent jurisdiction and I am by no means sure that any such inherent jurisdiction exists in criminal cases. If the matter were one which was going to affect directly the pocket of the appellant to the benefit of the respondent it may be that it is a matter which should merit further research and consideration. As it is, notwithstanding the separate identities of the Legal Aid Fund and the Ministry of Transport the ultimate result is that it is the taxpayer who will foot the bill. In those circumstances I think it appropriate to make no award. The appropriate order I think is simply to strike out the appeal for want of jurisdiction and I order accordingly.

Solicitors: Smith & Partners, Waitakere City for Appellant
Crown Solicitor, Auckland for Respondent

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