IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.38/91

BETWEEN ALAN TERRENCE WALSH

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 11 April 1991

Counsel: K. Ryan for Appellant
Y. V. Yelavich for Respondent

Judgment: 11 April 1991

ORAL JUDGMENT OF WYLIE, J.

The appellant was convicted in the District Court at Otahuhu on 3 September 1990 of a number of driving offences including one of careless use of a vehicle causing death. On that charge he was sentenced to 12 months' periodic detention and disqualified for a period of two years. It is against that conviction that the appellant now appeals on the grounds that the evidence did not support the conviction and that the Judge had misdirected herself on issues relating to carelessness.

The circumstances were that the appellant was towing a vehicle which had no engine and was being steered by a young man called Nathan Craig on the motorway into Auckland

travelling in a north bound direction. At a point, probably close to half a mile north of the Ramarama entrance to the motorway the towed vehicle veered to the left, rolled over two or three times down into a ditch alongside the motorway. The vehicle was extensively damaged and unfortunately Mr Craig was so seriously injured that he later died from the injuries.

The evidence of the appellant was that he was travelling at between 40 and 50 kilometres an hour, he was travelling on what is described as the shoulder of the motorway which is a sealed area adjacent to the two north bound traffic lanes and if the plan produced in evidence is correct, of a width approximately similar to each lane. To the left again of this sealed shoulder is what is described on the plan as a gravel shoulder - in appearance about half the width of each traffic lane or the sealed shoulder. Then there is the ditch. The appellant explained his driving on this shoulder because he was travelling slowly and did not want to impede traffic coming from behind at much faster speeds.

Mr Craig did not, as the District Court Judge found, hold a driver's licence. Whether or not the appellant was aware of that was a matter of some dispute in the course of the hearing in the District Court. I do not need to go into the evidence relating to that point in the view I take of the case. The Judge found that the appellant either knew or ought to have known that Mr Craig did not hold a licence.

The Judge found the charge of careless use causing death proved and relied on four principal factors. Unfortunately the first factor that she considered and made a finding on was that the appellant was driving and thus towing the following vehicle at a speed in excess of the statutory limit for towing which the Judge understood to be 40 kilometres per hour. That, counsel for the respondent accepts, was an error of both fact and law in that the permitted speed for towing in those circumstances is 80 kilometres per hour: see Reg.21(5) of the Traffic Regulations 1975 or Reg.9(2A) of the Heavy Motor Vehicle Regulations 1974 as the case may be. The second factor that she placed much weight on was that the towed vehicle was being steered by Mr Craig when he did not hold a licence and that it was a careless use of that vehicle for the appellant to have permitted him to do so taken in conjunction with the other factors that she relied on. The third matter that she mentioned was that the vehicles were being driven on the shoulder of the road. One infers that she considered that by reason of the closer proximity to the ditch a greater risk was thereby incurred. The fourth matter upon which she relied was that the vehicle was being towed on a motorway and that it would have been more prudent to have used other routes. Taking all those factors into account she found that the appellant fell below the standard of a reasonable and prudent user of the towed vehicle. For that reason she found that the charge of careless use causing death was proved.

The learned Judge may well have been influenced in her thinking in the consideration of this charge by her error in relation to the permissible speed for towing vehicles. Her attitude to the other factors may well have been coloured by the impression that the appellant was driving too fast in terms of the Regulations. Whether that be so or not I am of the opinion that the learned Judge erred in thinking that any of those factors or all of them in combination were capable of proving beyond reasonable doubt the offence charged. The missing link is that of causation. The factors that she took into account may well, and indeed probably do, constitute sufficient proof of a charge of careless use against the appellant in respect of the towed vehicle bearing in mind the extended definition of "use" in s.2 of the Transport Act. But what has to be proved here is that that careless use caused the death of Mr Craig.

There is, as I read the notes of evidence, nothing that would show to the necessary standard of proof that any one of those factors or any combination of them caused the vehicle to go off the shoulder, turn over several times down into the ditch and in the end result cause the death of Mr Craig. There is a report from an automative surveyor that he found nothing in the condition of the vehicle which would have explained the incident, but that does not exclude the possibility that some steering defect, not observable as a result of the very damaged condition of the vehicle after the accident, may have caused the sudden veering to the left which

was described by the appellant from his view of the towed vehicle in his rear vision mirror. That is one possibility. Another possibility is simply an independent act of carelessness on the part of the deceased himself. The learned Judge accepted that the appellant had given the driver of the towed vehicle instructions as to how to operate the vehicle under tow. Indeed at one point earlier in the journey he had stopped on the roadway before entering on to the motorway to talk to Mr Craig to ensure that he was having no problems. In those respects the appellant took reasonable steps. That is not to say that the deceased faithfully carried out the instructions that were given to him. There must be a reasonable possibility that his veering to the left was the result of his own carelessness rather than the simple fact of his being an unlicensed driver. The mere fact of his not holding a licence does not mean that that was a cause of the incident. Equally if it can be said that it was a careless use of the vehicle by the appellant to permit an unlicensed driver to steer it, it cannot be said that it necessarily follows that that act of carelessness caused the death of Mr Craig. This was a tragic accident which may have been caused by any one of a number of factors.

I am satisfied that the evidence did not justify the learned District Court Judge in excluding other possibilities and deciding as a matter beyond reasonable doubt that the use made by the appellant of the vehicle was both careless and causative of Mr Craig's death.

On those grounds I am satisfied that the appeal must be allowed and the conviction and penalty are quashed accordingly.

Keith J.

Solicitors: K. Ryan, Auckland for Appellant
Crown Solicitor, Auckland for Respondent