IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2008-404-000297

DENNIS GIBSON OVERINGTON
Appellant

v

AUCKLAND CITY COUNCIL
Respondent

Hearing: 16 March 2009

Appearances: D G Overington in person
W J R Kiewik for Responsent

Judgment: 17 March 2009 at 4:00pm

JUDGMENT OF WYLIE J
[Appeal against conviction and sentence]

This judgment was delivered by Justice Wylie
on 17 March 2009 at 4:00pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitor:
Simpson Grierson, Private Bag 92 518, Auckland 1141

Copy to:
D G Overington, 22 Patey Street, Remuera

[1] Mr Overington appeals against a decision given by Justices of the Peace in the Auckland District Court on 21 August 2008. The appeal is against both conviction and sentence.

Background

[2] Mr Overington owns a number of trucks. He rents a unit in Industry Road, Penrose which he uses to service the trucks. For a number of years he was able to park two of the trucks on land at the rear of his unit. That area was leased by another tenant, but by an informal arrangement the tenant allowed him to park his vehicles on the land.

[3] Eventually the tenant of the adjoining land asked Mr Overington to remove his vehicles. Two of the trucks were immobile. As a result Mr Overington did not remove them to another property he leases. Rather he parked them on Industry Road. He also parked a third vehicle owned by him on the road. This third vehicle was mobile.

[4] A parking warden employed by the Council, a Mr Mabbut, found the vehicles parked on the road at 10.50pm on 10 April 2007. He was on patrol following a complaint which had been logged with the Council. Two of the vehicles had no current warrant of fitness. Nor did either of these vehicles have a certificate of fitness. All three vehicles were parked on the side of the road at night. None of them displayed a rear position lamp. Mr Mabbut issued infringement notices under the appropriate provisions in the Land Transport Act 1998 and the Transport Act 1962 and left them attached to the vehicles.

[5] The respondent – the Auckland City Council – wrote to Mr Overington on 10 August 2007 detailing the infringement notices, the date on which they were issued, the registered number of each vehicle, and the amount of the infringement fine in relation to each notice. It noted that the fines were payable by 7 September 2007.

[6] Mr Overington responded by letter dated 16 August 2007 requesting Court hearings for each offence. He suggested that the vehicles were not being "operated" and that two of the vehicles were parked touching each other so that the front one could not display a rear position lamp.

[7] The letter sent by Mr Overington did not admit liability in respect of any of the offences. Nor did it make any submissions as to penalty or otherwise that Mr Overington wished to be considered by the Court.

[8] The Auckland City Council as the informant proceeded to file a notice of hearing in the prescribed form in the Auckland District Court as required by s 21(8)(b) of the Summary Proceedings Act 1957. The notice was filed on 10 October 2007, and shortly thereafter, it was served on Mr Overington.

[9] The matter was initially allocated a hearing before Justices of the Peace on 31 January 2008. Because the Council's prosecutor was unavailable on that day, the matter was adjourned until 24 April 2008.

[10] The hearing commenced on that date. Mr Overington appeared in person. In the course of the hearing Mr Overington submitted that the matter was time barred. He also raised other legal issues. The Justices of the Peace requested written submissions on these matters, and adjourned the matter part heard to 21 August 2008.

[11] The Council's solicitors prepared written submissions in relation to the points raised by Mr Overington, and a copy was sent to the Court and to Mr Overington on 6 June 2008. The covering letter and the submissions incorrectly stated that the hearing was to resume on 28 August 2008. Shortly thereafter, the Court contacted the solicitors and advised them of the error. On 18 June 2008, the Council's solicitors sent a letter to Mr Overington confirming that the matter had been set down for further hearing on 21 August 2008. Mr Overington advised that he had received that letter. For whatever reason he did not appreciate its significance.

[12] In the event Mr Overington did not appear on 21 August 2008, and the hearing proceeding by way of formal proof. The Council called two witnesses – its parking warden, Mr Mabbut, and the leader of its infringement review services team, a Ms Milne.

[13] The Justices of the Peace found Mr Overington guilty of the various offences detailed in the infringement notices, and imposed fines as follows:

a) In relation to a 1982 Fiat articulated truck, registration number KR8954:

   i) operating the vehicle without displaying current evidence of vehicle inspection – fined $300 and Court costs of $30;

   ii) operating the vehicle without displaying a current licence – fined $200, no costs;

   iii) parking the vehicle without displaying a rear position lamp at night – fined $150, no costs.

b) In relation to a 1985 Fiat truck, registration number CYH640:

   i) operating the vehicle without displaying current evidence of vehicle inspection – fined $300, plus Court costs of $30;

   ii) operating the vehicle without displaying a current licence – fined $200, no costs;

   iii) parking the vehicle without displaying a rear position lamp at night – fined $150, no costs.

c) In relation to a 1982 Fiat articulated truck, registration number KR8352:

i) parking the vehicle without displaying a rear position at night – fined $150, no costs.

[14] Mr Overington then filed an application for re-hearing. He did so on 28 August 2008, and supplemented that application with additional grounds on 29 August 2008.

[15] Mr Overington also filed a notice of appeal with this Court dated 18 September 2008. His grounds of appeal were stated as follows:

a) he did not receive notice from the Court to confirm the date of hearing;

b) he applied for a re-hearing on 28 and 29 August 2008, but he has received no response from the Court;

c) it is in the interests of justice that summary proceedings neither be filed nor heard *ex parte*;

d) the hearing (and application) in essence were an abuse of process.

Mr Overington filed submissions in writing. They raised two additional arguments, which can be summarised as follows:

e) a request for a hearing is an appeal from the Council's decision to impose a fine and therefore all available evidence should be before the Court even if liability is not admitted; and

f) the vehicles for which the infringement notices were issued were not being operated or used at the time.

Procedural points

[16] At the commencement of the hearing, I explained to Mr Overington that he could not seek a re-hearing and at the same time appeal to this Court. He advised that the Council had offered to consent to a re-hearing before the Justices of the Peace, but that he had declined that offer. However he confirmed that he had taken no steps to formally withdraw or discontinue his request for a re-hearing.

[17] Mr Overington elected to proceed with the appeal, and to withdraw the request for re-hearing. I have proceeded to consider the appeal accordingly. The District Court should be advised that the request for a re-hearing has been withdrawn.

[18] As noted above at [15], Mr Overington's submissions advanced two matters which were not raised in his formal notice of appeal. Mr Kiewik who appeared for the Council was happy to deal with the same. I am satisfied that there is no substantial prejudice to the respondent in allowing these additional grounds to be advanced, and under s 120 of the Summary Proceedings Act, I allow the notice of appeal to be amended by adding the two additional grounds. No order for costs in this regard was sought, and none is appropriate.

[19] Finally the Council filed an affidavit from a Ms Vanessa Olivier, who is a prosecutor employed by it. Mr Overington took issue with the filing of the affidavit in a written memorandum filed with the Court. Ms Olivier's affidavit contains evidence relating to a large number of traffic infringement notices going back to 2004 which have previously been issued to Mr Overington by the Council. That material could reasonably have been produced at the hearing (assuming it is relevant) – indeed part of it was put before the Justices of the Peace by Ms Milne. In the circumstances, I do not consider that the further evidence can properly be put before me for the purposes of this appeal – see s 119(3) of the Summary Proceedings Act. Accordingly I decline to consider paragraphs 2 to 5 in, and exhibits A to C attached to, Ms Olivier's affidavit. The balance of the information in the affidavit relates to the filing of the relevant papers with the District Court, the error made over the hearing date, the application lodged by Mr Overington in the District Court for a re-

hearing, and the appeal to this Court. These matters were only raised in Mr Overington's notice of appeal, and it is appropriate that I have accurate information before me if I am to deal with them fully. Accordingly these parts of the affidavit are admitted as additional evidence.

Submissions/analysis

[20] The onus is on Mr Overington to satisfy the Court that his grounds of appeal can be made – see *Toomey v Police* [1963] NZLR 699; *Page v Police* [1964] NZLR 974. I deal with each point raised by Mr Overington.

Notice of hearing date

[21] It is clear from Ms Olivier's affidavit, and from the Court file, that the notice requesting a hearing was filed by the Council with the District Court on 10 October 2007. The notice was filed in Court under s 21(8)(b) of the Summary Proceedings Act. It was filed (just) inside the six month period from the time when the offences were committed – s 21(8)(d). A short time thereafter the appropriate notice of hearing was sent out to Mr Overington – again as required by s 21(8)(b). It advised him that he had not admitted liability, and that the hearing requested by him was to proceed on 31 January 2008. It was recorded under the heading, "Notes to the Defendant" as follows:

> Failure to attend will result in the case being dealt with in your absence.

[22] In the event, and as noted above, the matter was adjourned until 24 April 2008. The matter was then adjourned part heard to 21 August 2008. Ms Olivier's affidavit confirmed that Mr Overington was present in Court when the adjournment to 21 August 2008 was directed, and Mr Overington accepted that he was present.

[23] The Council subsequently incorrectly stated that the hearing would resume on 28 August 2008 when it sent a covering letter, and a copy of its submissions, to Mr Overington. However the Council promptly became aware of its error, and it sent a letter to Mr Overington on 18 June 2008 informing him that the hearing was to

be resumed on 21 August 2008. It is not in dispute that Mr Overington received that letter.

[24] Despite being informed of the correct hearing date, on two occasions, once by the Justices of the Peace hearing the matter, and once by the Council, Mr Overington did not appear in Court when the hearing resumed on 21 August 2008.

[25] The Justices of the Peace who heard the matter proceeded to hear the matter by way of formal proof.

[26] They were clearly entitled to do so. A notice served on a defendant pursuant to s 21(8)(b) is to be treated as if it were a summons under the Act – s 21(8)(d)(ii) – and pursuant to s 61(b)(ii), where a summons has been served on a defendant, and only the informant appears at the hearing, the Court can proceed with the hearing.

[27] Mr Overington was concerned that he had not been given a hearing, and that he had not had the opportunity to present his case.

[28] Section 25 of the New Zealand Bill of Rights Act 1990 sets out minimum standards of criminal procedure. Everyone who is charged with an offence has, in relation to the determination of the charge, *inter alia*, the right to be present at the trial and to present a defence. However the rights affirmed in the New Zealand Bill of Rights Act are not absolutes. I refer to the discussion by the Court of Appeal in *Dowey v MAF* [1992] 1 HRNZ 593 at pp 598 to 599 per Hardie-Boys J. It is clear from s 4 of the Act that no Court is to hold any provision to be in any way invalid or ineffective because of inconsistencies with the New Zealand Bill of Rights Act.

[29] The power contained in s 61(b)(ii) of the Summary Proceedings Act to proceed in the absence of a defendant is exercisable only where the defendant has had reasonable notice of the hearing, and where the offence charged is not one in respect of which the defendant is entitled to elect trial by a jury. Further, any Judge or Justice of the Peace faced with a situation where the informant only appears, has an overriding discretion to adjourn.

[30] Here Mr Overington was not entitled to elect trial by jury. He had been advised of the hearing date, on two separate occasions. He had had reasonable notice of the hearing. He failed to appear. It was Mr Overington's failure to appear, in the face of the direction given by the Justices of the Peace on 24 April 2008, that meant that the case proceeded in his absence. The Justices of the Peace were entitled to hear the case in Mr Overington's absence, and in my judgment they cannot be criticised for doing so.

Failure by the District Court to respond to the application for re-hearing

[31] As noted, Mr Overington filed an application for re-hearing on 28/29 August 2008. I am advised that there was no response to this application by the District Court.

[32] As I have explained above, Mr Overington has subsequently elected to withdraw this application. In any event, any failure to respond by the District Court to the application for re-hearing does not constitute a valid ground of appeal. This issue does not need to be taken any further.

[33] I do note that the Council did offer to consent to a re-hearing in the District Court to avoid unnecessary argument and delay in this Court. On 20 February 2009 it wrote to Mr Overington proposing that the appeal should be withdrawn or dismissed by consent. On 2 March 2009 Mr Overington elected not to accept the Council's offer of re-hearing in the District Court.

Summary proceedings should not be filed and heard ex-parte

[34] The proceedings in the District Court were not filed *ex parte*. They were filed following a request by Mr Overington made on 16 August 2007, and in accordance with the statutory procedures set out in s 21 of the Summary Proceedings Act 1957.

[35] Nor were the proceedings heard *ex parte*. Mr Overington was advised of the hearing date. The hearing commenced on 24 April 2008. Mr Overington was present. The hearing concluded on 21 August 2008 by way of formal proof after Mr Overington failed to appear. That course was open to the Justices of the Peace as I have explained above.

[36] It cannot be asserted that it is not in the interests of justice that summary proceedings such as these be disposed of by way of formal proof. The Summary Proceedings Act expressly so provides, and indeed common sense suggests that the District Court must have the power to dispose of proceedings where defendants fail to appear. Otherwise defendants could frustrate the curial process.

Abuse of process

[37] For the reasons I have set out above, I am satisfied that there was no abuse of process. The Council complied with the provisions of the Summary Proceedings Act. The Justices of the Peace who heard the matter had jurisdiction to proceed when Mr Overington did not appear. They cannot be criticised for doing so.

Request for a hearing – appeal from the Council's decision? What should be before the Court?

[38] First, a request for a hearing in respect of an infringement notice is not an appeal. Section 21 was introduced into the Summary Proceedings Act to provide an automated system of dealing with the very large number of minor matters that had previously been going before the Court in the minor traffic offence jurisdiction – see *Davies v Ministry of Transport* [1989] 3 NZLR 300. A notice requesting a hearing initiates the judicial process where a person named in an infringement notice wishes the matter to be referred to the District Court for determination. It is not an appeal.

[39] Mr Overington further submits that the District Court did not receive everything he had forwarded to the Council when it filed the request for a hearing. He asserts that there was an obligation on the Council to provide all relevant materials to the District Court.

[40] The evidence established that Mr Overington had forwarded two letters to the Council with his request for a hearing – one dated 10 August 2007 and the other dated 18 March 2007, which enclosed a number of photos. Although those letters in part admit elements of the offending and provide explanations, the letter requesting a hearing itself is clear. It denied liability and requested a hearing in relation to the infringement notices.

[41] The Council complied with s 21(8)(b) of the Summary Proceedings Act 1957. It provides as follows:

> Where the defendant does not, in the notice requesting a hearing, admit liability in respect of the offence, the informant shall serve on the defendant a copy of the notice of hearing filed pursuant to paragraph (a) of this subsection.

The prescribed form is Form 10A in the first schedule to the Summary Proceedings Regulations 1958. It does not require that all information made available by the defendant to the informant be annexed to the notice of hearing. Where a defendant denies liability, the presentation of a defence, and production of the materials necessary to support that defence, becomes the responsibility of the defendant. The obligation to provide the Court with copies of a defendant's request for a hearing only arises when the defendant admits liability in respect of the offence – see s 21(8)(c).

[42] Mr Overington had the opportunity to produce any information he wished to produce to the Justices of the Peace at the hearing on 24 April 2008, and again on 21 August 2008. Mr Overington also had a third opportunity to present his materials to the Court when the Council offered to consent to a re-hearing.

[43] I cannot see that there has been any breach of the relevant legislation or any abuse of process by the Council.

Operating or using a vehicle

[44] Mr Overington submits that his vehicles were not being used or operated because they were parked on the road.

[45] There is nothing in this point. The infringement notices alleged the commission of offences under the Land Transport Act 1988 and the Transport Act 1962. Operating or using a vehicle can include parking a vehicle on a road. The definition of "operate" in s 2 of the Land Transport Act 1998 includes:

> … to cause or permit the vehicle to be on a road, whether or not the person is present with the vehicle.

The definition of "use" in relation to a vehicle in s 2 of the Transport Act 1962 includes permitting it to be on any road.

[46] I refer also to the decisions of Barker J in *Stevenson v Auckland City Council* HC Auckland AP 53/96, 22 April 1996 at p 4, and Holland J in *Auckland City Council v Levard* HC Auckland M1044/85, 25 June 1986. These cases are authority for the proposition that if a vehicle is on the road, whether it is capable of being driven or not, it must have a warrant of fitness so long as someone has permitted it to be on the road.

Summary – convictions

[47] In summary, Mr Overington has failed to make out any of his grounds of appeal against the convictions. The appeal must fail in this regard.

Sentence

[48] The Justices of Peace reduced the fine imposed in the infringement notices in relation to two of the offences – operating vehicles without displaying current evidence of vehicle inspection – from $600 to $300. They also decided to forego Court costs on five of the seven charges.

[49] The evidence given by Ms Milne at the hearing established that Mr Overington had previously received infringement notices when he had parked his trucks on the street without evidence of vehicle inspections, or current licences, and without displaying rear position lamps. He had previously submitted explanations in

relation to those events, and the Council had cancelled the infringement notices. It had also warned him on previous occasions not to repeat the infringements.

[50] In the circumstances, I am satisfied that the fines were reasonable and appropriate. This aspect of the appeal must fail as well.

Costs

[51] The Council seeks costs under the Costs in Criminal Cases Act 1967. The provisions of that Act are applicable – see s 21(8)(d) of the Summary Proceedings Act.

[52] I have power to impose costs on the appeal – s 8 of the Costs in Criminal Cases Act. That power is subject to regulations made under the Act. The applicable regulations are the Costs in Criminal Cases Regulations 1987. Part 1B of those Regulations deals with appeals and provides that the maximum costs that can be awarded are $226.

[53] Mr Kiewik submitted that that sum was applicable in regard to each infringement notice – effectively arguing that there were seven appeals. He submitted that costs in the sum of $100 should be payable in respect of the appeal on each infringement notice.

[54] In the circumstances of this case, I do not accept that it is appropriate to deal with each infringement notice on an individual basis, and to treat them as though there were seven individual appeals. In reality there was one appeal, and the time taken in Court was approximately 1 hour 15 minutes. The maximum costs permitted by the Regulations is $226, and I order that that sum be paid by Mr Overington by way of costs to the Council.

Wylie J