IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2009-485-23

ANGELA JOANNE BEAZER
Appellant

v

WELLINGTON CITY COUNCIL
Respondent

Hearing: 23 June 2009

Appearances: The appellant in person
K M Anderson for the respondent

Judgment: 26 June 2009

JUDGMENT OF CLIFFORD J

Introduction

[1] On 30 January 2009, Ms Beazer, being a person in charge of a motor vehicle on a road, was found guilty of the offence of causing or allowing that vehicle to be used on a road without a current license issued for the vehicle affixed in the prescribed manner. Costs of $30 were ordered against her.

[2] Ms Beazer now appeals against that finding and the costs order. The sole ground of appeal is whether the reference to the offence being against "s 243" and "Part 17" of the Land Transport Act 1998 – which provisions do not in fact exist – in

the reminder notice rendered that notice – and subsequent steps taken thereon – invalid so that, as a matter of law, there was no offence capable of being proved.

Background

[3] On 2 July 2008, a Wellington City Council parking warden issued an infringement notice against a vehicle which Ms Beazer concedes she owns. The infringement notice specified the "Offence" as:

> Using a vehicle while not displaying a current licence label in the manner required.

[4] The rear of the infringement notice specified that if Ms Beazer did not do anything "a reminder notice explaining fully how to defend the charge and containing a statement of your rights will be issued to you".

[5] Ms Beazer elected not to do anything. A reminder notice was issued to her on 4 August 2008, alleging an infringement offence:

> In that you being a person in charge of motor vehicle PB6302 did cause it or allow it to be operated on a road without a current licence issued for the vehicle affixed or displayed in the vehicle in the prescribed manner.
>
> This is an offence against Section 243 Part 17 Land Transport Act 1998.

[6] On 20 August 2008 Ms Beazer wrote to the respondent. She said that s 243 and Part 17 of the Land Transport Act did not exist. Ms Beazer was correct. The purported "s 243" and "Part 17" of the Land Transport Act 1998 are not in force. There is currently a Bill before Parliament (the Land Transport Amendment Bill (No. 4)) which would introduce a s 243 prohibiting the operation of motor vehicles on a road unless licensed and registered. The original version of the Bill provided that the proposed s 243 was to come into force on 1 March 2008. In the event, however, and at all relevant times, the Bill has not been passed and does not constitute the law.

[7] Ms Beazer went on to assert further that "even if such an offence provision exists in law, the Notice in respect of the alleged infringement is clearly invalid and

legally unenforceable as it refers to legislation that does not exist". Ms Beazer concluded her letter thus:

> Unless I am advised otherwise, I therefore consider that the Notice is invalid and has no effect, and that no fine is payable.

[8] The respondent replied on 2 September. It refused to cancel the infringement notice. More than a little surprisingly, given the actual legal position, it asserted that the Land Transport Amendment Bill (No. 4) had come into force on 1 March 2008 and, therefore, that the reference to s 243 of Part 17 of the Land Transport Act 1998 was correct.

[9] On 10 October 2008 Ms Beazer wrote to the respondent requesting a defended hearing in relation to the matter, again stating that s 243 did not exist.

[10] The respondent subsequently filed a Notice of Hearing in respect of the infringement notice (per s 21(6)-(8) of the Summary Proceedings Act 1957). That notice states as relevant:

> The infringement notice alleges that on the 2nd day of July 2008 at Wellington the Defendant committed an offence against
>
> Section 243 Part 17 Land Transport Act 1998 and Sections 5(1)(b) and 5(2) of the Transport (Vehicle and Driver Registration and Licensing) Act 1986.
>
> In that the defendant did
>
> being a person in charge of a motor vehicle registration number PB6302 (the vehicle) on a road namely Cuba Street did cause it or allow it to be used on a road without a current licence issued for the vehicle affixed or displayed in the vehicle in the prescribed manner.

[11] Section 5 of the Transport (Vehicle and Driver Registration and Licensing) Act 1986 provides, and has at all relevant times provided, for the substantive offence of which Ms Beazer had been given notice in the original infringement notice, namely that of operating a motor vehicle on a road without a current licence displayed in the prescribed manner.

Discussion

Overview

[12] By the time Ms Beazer's prosecution was considered by the Justices of the Peace the respondent had, belatedly and as reflected in the Notice of Hearing, recognised the correct legal position.

[13] At the hearing before the Justices, the respondent relied on ss 43 and 204 of the Summary Proceedings Act. The Justices declined to amend the notice of hearing pursuant to s 43 to delete the incorrect references to the non-existent statutory provisions. The Justices did, however, rely on s 204 to find the notice of hearing valid, and a sufficient basis for finding the offence proved against Ms Beazer.

[14] Section 204 provides:

> No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any District Court or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice.

[15] In this appeal, Ms Beazer submitted that the infringement and reminder notices issued to her were not legally valid and were legal nullities. She argued that they were therefore incapable of being "saved" or amended by s 204 or s 43 of the Summary Proceedings Act, because there was nothing to save or amend. She submitted, moreover, that the error here was not in the nature of a clerical error, minor defect or omission, but a serious mistake. The reminder notice had referred to a statutory provision that did not exist. Important rule of law issues were raised. An essential part of the rule of law was that access to the law should be available to citizens. A reminder notice that referred to a non-existent statutory provision was not in conformity with that fundamental requirement of the rule of law.

[16] In her submissions on appeal, Ms Beazer paid particular attention to the scheme of the Land Transport Act as it applies to infringement notices, reminder notices and notices of hearing. I do not think it is necessary for the purposes of this

appeal to review those provisions in an extensive manner. I think it is sufficient to note at this point that where, as here, a person requests a hearing in respect of an infringement offence, and a notice of hearing is issued, then, in terms of s 21(8)(d) of the Summary Proceedings Act, the proceedings before the Court are to continue in the same way as if they had been commenced by an information under that Act.

[17] What is clear, moreover, is that Ms Beazer cannot be held to have committed an offence against "s 243" of the Land Transport Act.

[18] Therefore, the issues in this appeal are:

a) Whether a defective reminder notice impacts on the validity of a notice of hearing thereafter issued, and the consequent proceeding; and

b) Whether an erroneous reference to a statutory provision in a reminder notice and/or in a notice of hearing renders that notice a nullity which cannot be saved by s 204.

Relevance of defective reminder notice

[19] It is clear from *Ministry of Chamberlain* HC ROT AP70/90 3 December 1990, *Hall v Ministry of Transport* HC DUN AP62-90 1 August 1990 and *Hall v Ministry of Transport* [1991] 2 NZLR 53 on appeal, and more recently, *Ross v Wellington City Council* HC WN CRI-2006-485-000047 28 July 2006, that a defective infringement notice or reminder notice does not automatically render a subsequent notice of hearing a nullity.

[20] In *Chamberlain* Anderson J found that the purported "infringement notice" was so defective as to not be such a notice at all, and therefore that the "purported 'reminder notice' sent after a spurious 'infringement notice'" was not a relevant reminder notice. In reaching that conclusion Anderson J also held that s 204 was not wide enough to "embrace such notices preceding the judicial process". His Honour found, however, that "invalid notices antecedent to the filing of a notice of hearing,

do not have an automatically vitiating effect on an inherently valid notice of hearing", which could be saved by s 204 of the Summary Proceedings Act.

[21] In *Hall*, the Court of Appeal disagreed with Anderson J in *Chamberlain* and held that s 204 could also be used to save deficiencies in an infringement notice. At the same time it agreed that a notice of hearing is not automatically invalidated by a defective prior infringement notice, stating at 59:

> In any event his view that a consequent notice of hearing is not necessarily vitiated offers an alternative route to the result that seems to us required by s 204 in the present case.

[22] More recently, in *Ross v Wellington City Council* HC WN CRI-2006-485-000047 28 July 2006 a reminder notice for a parking infringement had correctly described the infringement offence but cited the wrong part of the relevant bylaw (Wellington Consolidated Bylaw 1991 Part 18 (Traffic) clause 18.4.1(a) as opposed to clause 18.6). MacKenzie J commented at [13]:

> The appellant asserts that the real nature of the allegation was not made clear to him in that, by reason of the error on the reminder notice as to the relevant provision in the bylaw, the alleged offence was not correctly set out in the reminder notice. There was an error in the citation of the bylaw. As the Justices correctly noted in their decision here, there is a clear distinction between a reminder notice and a notice of hearing. The citation of the wrong provision in the reminder notice was remedied by the citation of the correct provision in the notice of hearing. (my emphasis)

[23] It therefore seems clear that, where a person issued with a defective infringement or reminder notice elects a hearing, the validity of the notice of hearing – and the consequent proceeding – is not necessarily affected by the defect in the earlier document.

Was the notice a nullity?

[24] Whereas the reminder notice referred only to the purported "s 243", the notice of hearing referred to both the purported "s 243" and the correct statutory offence provision, s 5(1)(b) and (2) of the Transport (Vehicle and Driver Licensing) Act. Both notices clearly referred to the wrong statutory provision, which is an apparent defect in that the prescribed forms (Schedule 5 of the Land Transport

(Infringement and Reminder Notices) Regulations 1998 and Form 10A of the Summary Proceedings Regulations 1958) require the notices to state the enactment and provision against which the particularised offending constitutes an offence.

[25] It is clear from the Court of Appeal's decision in *Hall* that both a notice of hearing, and the earlier infringement and reminder notices, may be saved under s 204, provided that there has been no miscarriage of justice. It is well established, however, that an information that discloses no offence is a nullity and cannot be saved by s 204 (or amended under s 43 of the Summary Proceedings Act): *Muirson v Collector of Customs* [1982] 2 NZLR 506, 511.

[26] Giving the judgment of the Court of Appeal in *Hall*, Cooke P (as he then was) stated further at 57:

> Mahon J thought in *Police v Walker* [1974] 2 NZLR 418 that an information was so unintelligible that the exact nature of the supposed offence could not be ascertained, and characterised it as a nullity. He declined to apply the section. "Nullity" or otherwise can be a question of degree. No doubt if a document or proceeding is so gravely defective that it should be treated as completely non-existent, the section will not apply. The Court is slow, however, to reach such a drastic conclusion, even where there are substantial deficiencies; see, for example, *Hemapala v R* [1963] AC 859, 867, where the judgment of the Privy Council was delivered by Sir Kenneth Gresson; *Re Kestle (No 2)* [1980] 2 NZLR 353, 359. … [T]he form used in the present case was certainly intelligible and complied with most of the extensive statutory requirements for an infringement notice for a speeding offence. The Court is not constrained to go as far as to dismiss it as a nullity.

[27] In terms of the Court of Appeal's decision in *Hall* the question would appear to be whether the notice was so unintelligible that the exact nature of the supposed offence could not be ascertained.

[28] Authorities such as *Terry v Police* [2004] NZAR 489, *Garry v Ministry of Transport* HC WHA App42/88 25 August 1988 and *R v Terry* CA460/03 6 April 2004 establish further that where an information or notice of hearing adequately particularises an offence, but refers to the wrong statutory provision, the information or notice of hearing is not so defective as to be a nullity, and instead may be saved by the operation of s 204.

[29] In *Terry v Police* the charge was originally purported to be laid under the Telecommunications Act 1987, which, at the time of the offending, had been repealed and replaced by the Telecommunications Act 2001. William Young J (as he then was) upheld a s 43 amendment to the information in the District Court which had substituted a reference to the correct Act. His Honour also held at [17]:

> … The substance of the charge remained the same irrespective of the amendment. If there had been no amendment s 204 would apply and, in the absence of any prejudice, the irregularity contended for by the appellant would be of no moment.

[30] In *Garry* the information erroneously charged the appellant with an offence under s 58(1)(c) of the Transport Act 1962 instead of s 58(1)(e) of the Transport Act 1987. The wording in the correct section was "essentially the same" as in the section stated. Chilwell J had no difficulty in concluding that the information fully and fairly informed the appellant of the charge to which he was pleading guilty.

[31] This approach was adopted by MacKenzie J in *Ross* at [13]:

> … the citation of the wrong section in an information was held in *Garry v MOT* (High Court, Whangarei, AP 42/88, 25 August 1988, Chilwell J) not to be fatal to an information, when allegations were correctly set out. I consider that that principle applies a fortiori to the reminder notice.

[32] In *R v Terry* an information was sworn alleging an offence of threatening to kill under "s 326" of the Crimes Act 1961, the reference to s 326 being an error. A second information was then sworn referring to the correct section, namely s 306(a) of the Crimes Act. The Court commented:

> [13] Section 17 of the Summary Proceedings Act 1957 provides that "every information shall contain such particulars as will fairly inform the defendant of the *substance of the offence* with which he is charged". …
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> [14] As to the inclusion of the statutory provision creating the offence in an information, in *R v Cahill* [1956] NZLR 383, Cooke J noted that the Court may have regard to any reference in the information to the section or subsection of any enactment creating the offence in considering whether the substance of the offence has been adequately stated. That said, s17 does not in terms require reference to a section as a particular which will fairly inform a defendant of the charge, although this Court has observed that it is better practice for an information to include such a reference (see *R v Latu*, CA262/01, 18 October 2001).

> [15] Unfortunately, mistakes of no real consequence are sometimes made in informations. …
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> [16] In *Hall v Ministry of Transport* [1991] 2 NZLR 53, 58 (CA) Cooke P said the correct approach to s 204 is to give "full effect to the ordinary and natural meaning of the language of the section". Of course, if the proceedings are so defective as to amount to a nullity, then there is nothing for s204 to protect.
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> [17] It follows that no objection at all could be taken to these informations – as informations. The one defect in the first information was validated by s 204, but was in any event rendered irrelevant by the second information.

[33] These cases can be contrasted with *Muirson v Collector of Customs* [1982] 2 NZLR 506 and *R v C* (1989) 5 CRNZ 153 where the offending as particularised in the information did not actually constitute an offence.

[34] It is clear, therefore, that where the particulars of the conduct which comprises the offending are adequately and intelligibly stated on the reminder notice or notice of hearing, the failure to refer to the correct statutory provision – or in my judgment the reference to an incorrect provision in addition to the correct provision – is not such a defect as to render the notice a nullity.

[35] Here, apart from the statutory reference, the substantive particulars of the alleged offending have always correctly identified the offence. Ms Beazer has therefore been on notice of the substance of the alleged offence right from the start. The notice of hearing referred to the correct statutory provision, in addition to the purported "s 243". Ms Beazer has, moreover, admitted the facts which give rise to an offence under that section. In these circumstances, and on the above authorities, it cannot be said that there is any miscarriage of justice in the application of s 204. In terms of that aspect of the rule of law that law is to be readily available, the respondent's error in its reminder notice, compounded when that error was confirmed after it was drawn to its attention by Ms Beazer, is not to be condoned. At the same time that error has not, in my judgment, here given rise to a miscarriage of justice for the reasons I have set out.

[36] I therefore find that the defect in the reminder notice did not affect the notice of hearing and in any event, is curable under s 204. Secondly, insofar as there is a

defect in the notice of hearing, this too is curable under s 204. In the circumstances, the Justices of the Peace did not err in their application of s 204.

[37] For these reasons, Ms Beazer's appeal is dismissed.

[38] In written submissions provided to the Court, Ms Anderson for the respondent sought costs in favour of the respondent in accordance with the scale in the Costs in Criminal Cases Act. Although an award of costs is discretionary, there must be good grounds for making it. Ms Beazer's appeal is grounded in what the respondent accepts was its own failure in issuing notices under a wrong statutory provision and, indeed, confirming its reliance on that provision after the matter was brought to their attention by Ms Beazer. In those circumstances I am of the view that costs would be entirely inappropriate. I therefore decline the respondent's application for costs.

"Clifford J"

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