IN THE HIGH COURT OF THE COOK ISLANDS
(CRIMINAL DIVISION)

CR633/92

BETWEEN J. CAFFERY (for Maritime Transport)

Informant

A N D PACIFIC INTERNATIONAL TOWAGE & SALVAGE (COOK ISLANDS) LIMITED

Defendant

Hearing: 13 October 1992 & Counsels' Memoranda of 6th & 26th November 1992

Counsel Mr Gibson for Informant
Mr Mitchell for Defendant

Judgment: 4.12.92

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JUDGMENT OF ROPER C.J.

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The Defendant has been charged with an offence under the Shipping Licence Ordinance 1963, it being alleged that on or about the 5th August 1992 at Rarotonga, in breach of its licence to operate shipping charters it did carry cargo between Auckland and the port of Avatiu in the Cook Islands for persons and companies not specified in the licence.

The licence in force at the relevant time authorised the Defendant to carry only cargo for five specific companies named in the schedule to the licence. It is common ground that on the voyage in question, referred to as V6, cargo was carried for six consignees not mentioned in the schedule.

The Defendant's mode of operation is by tug and barge.

Before dealing with the facts of the case it is appropriate to consider the provisions and scheme of the relevant legislation. This is an exercise I have already been through in the case of Translink Pacific Shipping Ltd v The Attorney General (O.A.4/92, Judgment 20th October 1992) but it will be helpful for an understanding of the case if I repeat the substance of it here.

The Ordinance is described as one "to control the issue of licences permitting ships to engage in the carriage of passengers and goods principally within the Cook Islands". Section 3 provides that "No ship shall be permitted to operate within the Cook Islands unless its owner has been granted a licence for the ship in terms of This Ordinance". Section 3(4) provides that licences (which in terms of s.3(2) are issued by the Queens Representative) shall be granted subject to such condition as may be specified therein.

Section 6(1) provides that the Queens Representative with the approval and consent of the Executive Council may revoke a licence; while subsection (2) reads:

> "(2) Without limiting in any way the powers contained in Subs(1) any licence may be revoked by the Queens Representative acting with the approval and consent of the Executive Council if the owner to whom the licence is issued fails to comply with any condition attached to the licence."

Section 7 provides for an appeal to the High Court against an order of revocation made under s.6.

As originally enacted the Ordinance provided for a fine of $200 for breaches of a licence and $40 for each day the offence continued.

In 1986 a new part, providing for shipping services beyond the Cook Islands, was added to the Ordinance as follows:-

"PART 1A

10.A. Minister to approve certain ships -
(1) No ship shall ply between any port in the Cook Islands and any port in New Zealand, or any port in New Zealand and any port in the Cook Islands, directly or indirectly, without the prior approval of the Minister.
(2) Such approval may be granted in respect of a single voyage or a series of voyages and may be of such duration as the Minister deems fit.
(3) Such approval may be granted subject to such terms and conditions as the Minister deems fit.
(4) The terms 'ship' and 'Minister' in this Act shall have the same meaning as are ascribed to those terms in the Shipping Registry Act 1985.
(5) This section shall not apply to a ship, having as its principal purpose the carriage of passengers."

The penalty clause was also amended to provide for a fine not exceeding $1000 and $500 a day for a continuing offence for any person who operated a ship "to from or in the Cook Islands without obtaining a licence or approval in accordance with the provisions of the Ordinance".

In 1988 s.10A was amended to read:-

"2. Minister to approve certain ships - Section 10A of the Ordinance (as inserted by the Shipping Licence Amendment Act 1986) is amended by deleting subsection (1) and substituting the following new subsection:

(1) No ship shall, -

(a) Ply for the purpose of the carriage of cargo between -

(i) any port in New Zealand and any port in the Cook Islands, whether directly or indirectly; or

(ii) any port in the Cook Islands and any port in New Zealand, whether directly or indirectly;

or

(b) Uplift cargo -

(i) originating from New Zealand and destined for the Cook Islands and trans-shipped via an intermediate port; or

(ii) originating from the Cook Islands and destined for New Zealand and trans-shipped via an intermediate port,

without the prior approval of the Minister in writing."

In 1990 a significant amendment was made to the penalty clause (s.11) so that it read:-

"11. Penalty for not obtaining a licence or approval - Any person and any agent of any person who operates a ship to, from, or in the Cook Islands without first obtaining a licence or approval in accordance with the provisions of this Ordinance or in contravention of the terms or conditions of any licence commits an offence, and shall be liable upon conviction to the following penalties:

(a) A fine of $100,000 or more; and

(b) A fine of $5,000 or more for each day or part of a day during which the offence continues; and

(c) Forfeiture of the ship to the Cook Islands Government."

It will be seen the amendment made it an offence to operate without a licence or approval or "in contravention of the terms and conditions of any licence".

Furthermore, the penalty provision is so worded that it appears that the only way to make sense of it is to conclude that the fines of $100,000 and $5,000 were minimum penalties cumulative with forfeiture of the ship, not alternatives.

An amendment assented to on the 16th September 1992 made it clear that "any one or more" of the penalties could be imposed but retained the wording indicating that the fines were minimum penalties. (It is not necessary for me to determine whether they are in fact minimum penalties but that is certainly the stand taken by the Department.)

That same amendment added two further subsections to s.11 as follows:-

> "(2) Where the conviction relates to a breach or breaches of the terms or conditions of any licence, the Minister shall have the authority to cancel any such licence immediately and without notice.
>
> (3) The Minister may in his discretion and without any further authority than this subsection suspend any licence for any period of time and on such terms and conditions as he may deem fit if he is satisfied that a breach of licence has been committed or is about to be committed."

In summary the Ordinance authorises the issue of licences to ships operating within the Cook Islands and approvals in respect of ships carrying cargo between New Zealand and the

Cook Islands.

A ship owner may be prosecuted for operating without a licence or an approval and for operating in contravention of the terms or conditions of a licence, but not it would seem for operating in contravention of the terms of an approval. Because of the view I take of the case it is not necessary for me to resolve that apparent inconsistency.

I understand from Counsel that a Bill is apparently now before the House which would amend the Ordinance with effect that a breach of the conditions of an approval would be specifically provided for.

Turning now to the facts of the case, it is accepted that the Defendant did carry cargo in circumstances which prima facie amounted to a breach of its approval. However, Mr Mitchell submitted that as the legislation stands there is no such offence as acting in breach of the conditions of an approval as distinct from a licence.

As indicated earlier, I do not propose to make a final decision on that point but rather concentrate on Mr Mitchell's further submission that if the Defendant was in breach then there were facts which made its actions innocent - in short there was an absence of mens rea. Mr Gibson argued that this was an offence of strict liability but having regard for the draconian penalties I cannot accept his argument.

I believe the present case comes squarely within the observations of Lord Diplock in Sweet v Parsley (1970) A.C. 132 at P163 as follows:-

> "But the importance of the actual decision of the nine judges who constituted the majority in Reg. v Tolson, which concerned a charge of bigamy under section 57 of the Offences Against the Person Act, 1861, was that it laid down as a general principle of construction of any enactment, which creates a criminal offence, that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and upon reasonable grounds, in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in Bank of New South Wales v Piper [1897] A.C. 383, 389, 390, the absence of means rea really consists in such a belief by the accused."

The evidence from Mr D. Brown, managing director of the Defendant, and Mr Manafangi his solicitor, was that on the 21st July 1992 they attended at the office of the Minister responsible for shipping. This was prior to the departure of V6 from Auckland on or about the 5th August. According to Mr Manafangi's file note the Minister was concerned about the current shipping situation and requested that Mr Manafangi meet with Mr Puna, the Secretary of Trade & Labour, with a view to obtaining a variation of the shipping approval so that the voyage could proceed. It appears that Mr Brown's concern was that materials were required urgently for the cultural centre but voyages from Auckland were uneconomic unless he could obtain extra cargo to fill the barge.

According to Mr Manawtangi and Mr Brown the Minister gave an assurance that if necessary, presumably meaning that if satisfactory arrangements could not be made with Mr Puna, he, the Minister would direct that a provisional licence (or approval) be issued.

In fact Mr Puna refused to issue an approval and on the 24th July Mr Manawtangi wrote to the Minister informing him. In that letter Mr Manawtangi said:-

> "It was understood that if necessary you would direct that a provisional licence would be issued."

In the meantime Mr Brown had returned to New Zealand and, believing that a provisional licence at least would be issued, authorised the sailing of V6.

It may be that there was confusion as to what the Minister said or intended but I am not satisfied that Mr Brown authorised the voyage without having an honest and reasonable belief that he was entitled to do so.

In fact a short time later the Defendant did receive an amended approval which contains no limitation as to consignees, only frequency of voyages.

The charge is therefore dismissed.