New Zealand Transport Agency v Gabani

District Court Christchurch CRI-2016-009-9184; CRI-2016-009-11491; [2017] NZDC 23413
20 July; 16 October 2017
Judge PR Kellar

Criminal Procedure — Previous conviction — "Conviction" — Infringement notice issued and charge laid for offences involved in same act — Driving offences — Whether convicted of an offence arising from the same facts — Whether payment of infringement fee final adjudication of a criminal proceeding — Crimes Act 1961, ss 358, 358(1), 359(1), 375 and 375(1); Criminal Procedure Act 2011, ss 5, 6, 6(a)(i), 6(b), 46, 46(1), 46(2) and 47; Land Transport Act 1998, ss 2, 4, 4(5), 5, 30J, 31, 31(1)(a)(ii), 79A and 139 and Part 4A sub-Part 3; Land Transport (Driver Licensing) Rule 1999, r 26(1)(a); Land Transport (Offences and Penalties) Regulations 1999, reg 4(1) and sch 1; New Zealand Bill of Rights Act 1990, ss 6 and 26(2); Sentencing Act 2002, ss 108 and 110; Summary Proceedings Act 1957, ss 2, 21, 21(1)(a), 21(1)(b), 21(2) and 21(7).

The issue in these proceedings was whether the "special plea" of previous conviction applied where a defendant had received both an infringement notice, in respect of which he had paid the fee, and a charging document for different offences in respect of the same act of driving. The defendants were Uber drivers. The New Zealand Transport Agency (the Agency) issued each of the defendants with an infringement notice for an offence under the Land Transport Act 1998 (the Act) of driving a motor vehicle on a road without the appropriate driver licence, namely a "P" endorsement. On the same day, the Agency filed a charging document against each of the defendants alleging that they had committed an offence against the Act of carrying on a transport service without the appropriate current licence, namely a passenger service licence. Both offences involved the same act of driving.

The defendants had paid the infringement fees. They applied to the District Court to dismiss the charge on the basis that they had been convicted of an offence arising from the same facts.

Held: (declining the defendants' application)

(1) In order to raise the special plea of previous conviction, the Court had to be satisfied: that there was a common punishable act central to both

the previous and the new charge; that the previous offence had reached the point of final adjudication; and the defendant had been "convicted" of the same offence or any other offence arising from those same facts. In regards to final adjudication, it was not necessary for the court to have found the defendant guilty or for the defendant to have entered a plea of conviction. Furthermore, it was unnecessary for the court to have formally entered a conviction in the record. This interpretation of "conviction" in s 46 of the Criminal Procedure Act 2011 recognised the principles underlying double jeopardy and was consistent with s 26(2) of the New Zealand Bill of Rights Act 1990 (see [43]).

(2) The legislative requirements governing the offences were quite distinct. One related to the operation of a business engaged in providing passenger services and the other related to driving a vehicle in a passenger service. Consequently, the defendants had not been convicted of the same offence arising from the same facts (see [68]).

Cases mentioned in judgment

Middleton v Timaru District Court [2012] NZHC 3471.
Overington v Police HC Auckland CRI-2006-404-125, 12 February 2007.
Pullan v Parker [2015] NZCA 166.
Plumbers, Gasfitters and Drainlayers Board v Maaka [2015] NZHC 1948, [2015] 3 NZLR 854.
R v Brightwell (1995) 12 CRNZ 642, [1995] 2 NZLR 435 (CA).
R v Dowling (1989) 88 Cr App R 88 (CA).
R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.
R v Zantoul CA297/06, 6 December 2006.
Rangitonga v Parker [2015] NZHC 1772, [2016] 2 NZLR 73.
Richards v R [1993] AC 217, (1992) 96 Cr App Rep 268 (PC).
Wellington City Council v McCready [1995] DCR 536 (DC).

Application

The defendants applied to have the charge against each of them dismissed on the basis that they had been convicted of an offence arising from the same facts, pursuant to s 46 of the Criminal Procedure Act 2011.

HF McKenzie for the prosecutor.
TJ Mackenzie for the defendants.

JUDGE KELLAR.

Introduction

[1] The issue in these proceedings is whether the "special plea" of previous conviction[1] applies where a defendant has received both an infringement notice, in respect of which he has paid the fee, and a charging document for different offences in respect of the same act of driving.

[2] The defendants are Uber drivers. Uber is a transport system. A person can use the Uber smart phone application to arrange a journey in the driver's car. The New Zealand Land Transport Agency (the Agency)

1 Section 46 of the Criminal Procedure Act 2011.

issued each of the defendants with an infringement notice for an offence under s 31(1)(a)(ii) of the Land Transport Act 1998 of driving a motor vehicle on a road without the appropriate driver licence, namely a "P" endorsement. On the same day, the Agency filed a charging document against each of the defendants alleging that they had committed an offence against ss 30J and 79A(1) and (2) of the Land Transport Act 1998 of carrying on a transport service without the appropriate current licence, namely a passenger service licence. It is an agreed fact that both offences involved the same act of driving.

[3] The defendants have paid the infringement fees and apply to the court to dismiss the charge on the basis that they have been convicted of an offence arising from the same facts.

The special plea of previous conviction

[4] Section 46(1) of the Criminal Procedure Act 2011 provides:

> **46 Previous conviction**
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> If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—
>
> The same offence as the offence currently charged, arising from the same facts; or
>
> Any other offence arising from those same facts
>
> Subsection (1) does not apply if—
>
> The defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and
>
> The court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

[5] There is no suggestion that the evidence of the charge in respect of either defendant was "not readily available at the time the charging document for the previous offence was filed". However, the implications of the reference to the words "charging document" for the more serious offence will be considered later in this judgment.

[6] The key questions are whether the Court is satisfied that the defendant has been "convicted" of an offence "arising from the same facts". Before considering those questions it is appropriate to examine the previous legislative provisions relating to the special plea of previous conviction.

[7] Section 46 of the Criminal Procedure Act came into force on 1 July 2013. It replaced s 358 of the Crimes Act 1961 which read as follows:

> **358 Pleas of previous acquittal and conviction**
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> (1) On the trial of an issue on a plea of previous acquittal or conviction to any count, if it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made,

have been convicted of all the offences of which he may be convicted on any count to which that plea is pleaded, the Court shall give judgment that he be discharged from that count.

(2) If it appears that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count to which that plea is pleaded, but that he may be convicted on that count of some offence of which he could not have been convicted on the former trial, the Court shall direct that he shall not be convicted on that count of any offence of which he might have been convicted on the former trial, but that he shall plead over as to any other offence charged.

[8] Aside from the obvious changes in terminology between s 46 of the Criminal Procedure Act 2011 and s 358 of the Crimes Act 1961 nothing in the Criminal Procedure Act 2011 alters the previous law that a plea of previous conviction has any application when a conviction is entered simultaneously.

[9] The first part of s 358(1) of the Crimes Act required "the matter" of the former charge to be the "same in whole or part" as the matter of the current charge. This prerequisite required that the legal elements of the original charge and the current charge be the same. In *R v Brightwell*[2] the original charge, on which Mr Brightwell was convicted, was presenting a shotgun at another person. The current charge alleged that Mr Brightwell assaulted the same person with the shotgun. Both charges arose out of the same incident in which the defendant confronted the victim with the shotgun and threatened to shoot him. The Court rejected Mr Brightwell's plea of previous conviction because "it is not an element of [a charge of presenting a firearm] that the offender in the course of doing such an act either commits an assault or has any specific intention". Hence, the lack of identity between the elements of the two offences meant that the offences were "separate and distinct".

[10] Section 359(1) of the Crimes Act 1961 provided:

S 359 Second accusation

Where an indictment charges substantially the same offence as that with which the accused was formerly charged, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to the indictment.

[11] As Richard Mahoney[3] observed "the perhaps surprising effect of s 359(1) is that an acquittal or a conviction for an original charge of, say assault, barred a subsequent prosecution for assault with intent to injure". This is despite the legal elements of the current charge not being the same as the earlier one.

[12] Section 46(2) of the Criminal Procedure Act 2011 introduced a qualification on the ability of a defendant to plead successfully that he or she had previously been convicted where the current charge alleges a more serious offence than the one which formed the basis of the original

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2 *R v Brightwell* (1995) 12 CRNZ 642, [1995] 2 NZLR 435 (CA) at 647.

3 Faculty of Law, University of Otago in "From '*The Same Offence' to 'The Same Facts'—the Criminal Procedure Act suddenly strengthens the pleas of previous conviction and previous acquittal*" [2013] 2 New Zealand Law Review 171 at 179.

conviction. In those circumstances, the special plea of previous conviction will not be available where the defendant satisfies the court that the "evidence of the more serious offence was not readily available at the time the charging document for the original offence was filed". As noted above, there is no suggestion that evidence of the charge, assuming the charge to be more serious than the infringement offence, was not readily available at the time the charging document was filed as both offences occurred in respect of the same act of driving and the Agency would have been aware that the defendants held neither a "P" endorsement or Passenger Service Licence.

[13] Unlike the requirement of s 359(1) of the Crimes Act 1961 for the charges to be substantially the same all that is required under s 46(2) of the Criminal Procedure Act 2011 is that the previous charge and the current charge arise from the same facts. The question is whether this has fundamentally altered the law in relation to the special plea of previous conviction.

[14] The Court of Appeal has recently considered s 47 of the Criminal Procedure Act in *Pullan v Parker*.[4] Section 47 of that Act relates to the special plea of previous acquittal and is otherwise identical to s 46.

[15] The second limb of s 358(1) of the Crimes Act required a defendant to show that "he might on the former trial ... have been convicted of all the offences on which he may be convicted on any count". This aspect of the section required the defendant to demonstrate that he or she has previously been in jeopardy of being convicted. Mr Rangitonga had been acquitted of rape. Ms Parker brought as private prosecution against him on a charge of injuring with intent to injure. On appeal to the High Court against a finding in the District Court that the injuring charge could proceed Katz J[5] found that the alleged rape and the assault formed part of a series of events. While those events were closely linked in time and place, they arose out of different incident, involving different facts which occurred sequentially.

[16] The Court of Appeal drew upon Katz J's summary of the lengthy history of the rule against double jeopardy which underlies ss 46 and 47 of the Criminal Procedure Act 2011.[6] The Court also reviewed the position at common law and s 358 of the Crimes Act as well as the legislative history leading to the special plea provisions.[7]

[17] The Court of Appeal agreed with Katz J that the references to offences "arising from the same facts" in s 47 (it must be the same in s 46 as it is expressed in identical terms)

> ... is intended to apply to cases where there is a common punishable act central to both the previous and the new charge ... The new section focuses on the substance of the facts giving rise to the previous and the new charges rather than a fine-grained comparison of each element of the charges.[8]

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4 *Pullan v Parker* [2015] NZCA 166 (*Pullan*).
5 *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 (*Rangitonga*).
6 *Pullan*, above n 4, at [17]–[19].
7 *Pullan*, above n 4, at [20]–[35].
8 *Pullan*, above n 4, at [41].

[18] The Court explained its approach by noting that the central punishable act for the rape charge was a sexual connection without the consent of the complainant. By contrast, the central punishable act for the injuring charge was punching and attempting to strangle the complainant. Hence, the special plea of previous acquittal was not available because the current charge did not arise from the same facts as the previous charge.

[19] The Court of Appeal summarised its reasons for adopting that approach[9] one of the most significant of which in the present case is that by focusing on the substance of the facts giving rise to the previous and the new charges, an unduly technical approach to the availability of the special plea would be avoided giving better effect to the double jeopardy principle recognised by s 47 and by s 26(2) of the New Zealand Bill of Rights Act. The Court also noted that an expansive approach to the interpretation of the special plea provisions would not sit well with the provisions limiting the circumstances in which previously acquitted persons could be re-tried and the flexibility of the abuse of process doctrine.[10]

[20] The Court of Appeal also stated that a close analysis of the evidence in each case in order to determine how closely the facts are linked in time, place and circumstance would be contrary to Parliament's policy gaols of increasing clarity and certainty. The Court also stated that there was no indication that Parliament intended to broaden the scope of the special plea provisions from the existing approach.[11]

Whether the defendants were previously "convicted"

[21] Section 375 of the Criminal Procedure Act 2011 provides—

> **375 Conviction not to be recorded for infringement offences**
> (1) If a defendant is found guilty of, or pleads guilty to, an infringement offence (whether or not an infringement notice has been issued), the court
> (a) must not convict the defendant; but
> (b) may order the defendant to pay any fine and costs and may make any other order that the court would be authorised to order or make on convicting the defendant of that offence.
> (2) Every reference in this or any other Act, or in any regulation or bylaw, to a conviction for an offence is, in relation to an infringement offence, deemed to be a reference to
> (a) an order that the defendant pay a fine and costs under subsection (1)(b); or
> (b) a deemed order that the defendant pay a fine and costs under section 21(5) or (5A) of the Summary Proceedings Act 1957.
> (3) However, sections 229, 244, and 246 do not apply to any deemed order that the defendant pay a fine and costs under section 21(5) or (5A) of the Summary Proceedings Act 1957.
> (4) Subsection (1) overrides any other provision of this Act or any other Act.

[22] Section 2 of the Summary Proceedings Act 1957 defines "infringement offence"—

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9 *Pullan*, above n 4, at [43].
10 *Pullan*, above n 4, at [43](d) and (e).
11 *Pullan*, above n 4, at [46].

Infringement offence means any offence under any Act in respect of which a person may be issued with an infringement notice.

[23] "Infringement notice" is defined by reference to a list of other statutes, one of which is s 139 of the Land Transport Act 1998.

[24] Section 5 of the Criminal Procedure Act 2011 defines "infringement offence" in the same terms as s 2 of the Summary Proceedings Act 1957. Section 6 of the Criminal Procedure Act 2011 relevantly provides that a Category 1 offence is either an offence that is not punishable by imprisonment other than an infringement offence (s 6 (a)(i)) or an infringement offence, if the proceedings in relation to that offence are commenced by the filing of a charging document not by issuing of an infringement notice (s 6(b)).

[25] Regulation 4(1) of the Land Transport (Offences and Penalties) Regulations 1999 provides that a breach of a provision specified in the first column of sch 1 for which an infringement fee is specified in Schedule 1 is an infringement offence against the Land Transport Act. The offence under s 31(1)(a)(ii) of the Land Transport Act 1998 of driving a motor vehicle without an appropriate driver licence is included in the Schedule to the Regulations.

[26] There are two means by which proceedings in respect of an infringement offence may be commenced. Section 21 of the Summary Proceedings Act provides:

21 Procedure for infringement offences

(1) Proceedings in respect of an infringement offence may be commenced
- (a) with the leave of a District Court Judge or a Registrar, by filing a charging document under the Criminal Procedure Act 2011; or
- (b) Where an infringement notice has been issued in respect of the offence, by [providing particulars of a reminder notice in accordance with subsections (4) and (4A), or by filing a notice of hearing in a Court], under this section.

(2) Where
- (a) an infringement notice has been issued in respect of an infringement offence; and
- (b) on the expiration of 28 days from the date of service of the notice, or a copy of the notice,
  - (i) the infringement fee for the offence has not been paid to the informant at the address specified in the notice; and
  - (ii) the informant has not received at that address a notice requesting a hearing in respect of the offence,—

  the informant may serve on the person or one of the persons served with the infringement notice, or a copy of the infringement notice, a reminder notice [that contains] the same or substantially the same particulars as the infringement notice.

(2AA) The reminder notice referred to in subsection (2) and subsection (3C) must,
- (a) if a form has been prescribed in any other Act or in regulations made under any other Act for the relevant infringement offence or the relevant class of infringement offences, be in that form; or
- (b) if no form has been so prescribed, be in the general form prescribed in regulations made under this Act.

(2A) For the purposes of this section, a reminder notice that is in a form prescribed under [any Act or in any regulations made under that Act is to be treated as containing substantially the same particulars as the relevant infringement notice under that Act or those regulations].

(3) The informant may provide particulars of the reminder notice in accordance with subsections (4) and (4A) if
- (a) a reminder notice has been served under subsection (2); and
- (b) on the expiration of 28 days from the date of service of that notice,
  - (i) the infringement fee for the offence has not been paid to the informant at the address specified in the notice; and
  - (ii) the informant has not received at that address a notice requesting a hearing in respect of the offence.

(3A) If
- (a) The informant has not [provided particulars of a reminder notice under subsection (3), in accordance with subsections (4) and (4A)]; and
- (b) The informant has instituted the necessary management and accounting systems to allow [the infringement fee to be paid] to the informant by instalments,—

  the informant may, but is not required to, enter into an arrangement allowing [the infringement fee to be paid] to the informant by instalments.

(3B) An arrangement under subsection (3A) must
- (a) Be entered into before the close of the date that is 6 months from the time when the infringement offence is alleged to have been committed; and
- (b) Be completed before the close of the date that is 12 months from the time when the infringement offence is alleged to have been committed.

(3C) If the informant has entered into an arrangement under subsection (3A), and default is made in the payment of any instalment, the informant may,
- (a) Despite subsection (3B)(a), enter into another arrangement under subsection (3A) allowing [the infringement fee to be paid] to the informant by instalments; or
- (b) Serve on the defendant or 1 of the defendants served with the infringement notice, or a copy of the infringement notice, a reminder notice in the prescribed form containing the same or substantially the same particulars as the infringement notice.

(3D) The informant may provide particulars of the reminder notice in accordance with subsections (4) and (4A) if
- (a) a reminder notice has been served under subsection (3C)(b); and
- (b) on the expiration of 28 days from the date of service of that notice, the infringement fee for the infringement offence has not been paid to the informant at the address specified in the notice.

(4) For the purposes of subsections (1), (3), and (3D) and subsections (4A) to (5A), the particulars of a reminder notice are
- (a) the contents of the reminder notice, or such parts of the reminder notice that are prescribed as the particulars for the purposes of this subsection; and
- (b) any particulars relating to the service of the infringement notice and reminder notice that may be prescribed; and
- (c) any other particulars that may be prescribed.

(4A) The particulars described in subsection (4)

(a) must be provided by the informant in electronic form in a manner and by means of an electronic system approved by the chief executive of the Ministry of Justice; and

(b) once provided, must, for the purposes of any enactment or rule of law, be treated as information held in a Court in relation to its judicial functions.

(4B) Particulars of a reminder notice provided under subsection (3) or subsection (3D), and in accordance with subsection (4A), must be verified by the Ministry of Justice to ensure they contain the particulars described in subsection (4)(a) and (b), in accordance with a procedure approved by the chief executive of the Ministry of Justice.

(4C) When particulars of a reminder notice provided under subsection (3) or subsection (3D) are verified under subsection (4B) as containing the particulars described in subsection (4)(a) and (b), the reminder notice is deemed to have been filed in the Court appointed for the exercise of the criminal jurisdiction which is the nearest by the most practicable route to the place where the offence was alleged to have been committed.

(5) If,

(a) under subsection (3), particulars of a reminder notice are provided before the close of the date that is 6 months after the date on which the infringement offence is alleged to have been committed; and

(b) those particulars are verified under subsection (4B),—

then the court in which the reminder notice is deemed, by subsection (4C), to have been filed is also deemed to have made an order (as if on the determination of [a charge] in respect of the offence) that the defendant pay a fine equal to the amount of the infringement fee then remaining unpaid for the offence together with costs of the prescribed amount.

(5A) If,

(a) under subsection (3D), particulars of a reminder notice are provided before the close of the date that is 12 months after the date on which the infringement offence is alleged to have been committed; and

(b) those particulars are verified under subsection (4B),—

then the court in which the reminder notice is deemed, by subsection (4C), to have been filed is also deemed to have made an order (as if on the determination of [a charge] in respect of the offence) that the defendant pay a fine equal to the amount of the infringement fee then remaining unpaid for the offence together with costs of the prescribed amount.]

(5AB) An order under subsection (5) or subsection (5A) is deemed to have been made on the date that the relevant reminder notice is deemed to have been filed under subsection (4C).

(5B) If the informant has entered into an arrangement under subsection (3A) or subsection (3C)(a), no defendant may give notice requesting a hearing in respect of the infringement offence to which the arrangement applies.

(6) A notice requesting a hearing in respect of an infringement offence must

(a) Be in writing signed by the person or one of the persons served with the infringement notice in respect of the offence, or a copy of the infringement notice; and

(b) Be delivered to the informant at the address specified in the infringement notice before or within 28 days after service of a reminder notice in respect of the offence, or within such further time as the informant may allow.

(7) A person giving notice requesting a hearing in respect of an infringement offence may, if the person thinks fit, in that notice
  (a) Admit liability in respect of the offence; and
  (b) Make any submissions as to penalty or otherwise that the defendant would wish to be considered by a Court hearing proceedings in respect of the offence.

(8) Where a notice requesting a hearing in respect of an infringement offence is given in accordance with this section, the following provisions shall apply:
  (a) The informant shall, if it is proposed that proceedings be commenced in respect of the offence, file in a Court a notice of hearing in the prescribed form:
  (b) 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:
  (c) Where the defendant does, in the notice requesting a hearing, admit liability in respect of the offence, the informant shall file that notice in the Court in which the notice of hearing is filed:
  (d) [if a notice of hearing is filed in a Court within 6 months from the time when the offence is alleged to have been committed,
    (i) the Criminal Procedure Act 2011 and the Costs in Criminal Cases Act 1967 apply, with any necessary modifications:
    (ii) the notice of hearing is to be treated as if it were a charging document:
    (iii) a copy of the notice served on the defendant under paragraph (b) is to be treated as if it were a summons to the defendant:
    (iv) a notice of the defendant filed in the Court under paragraph (c) is to be treated as if it were a notice of the defendant pleading guilty to the offence under section 38 of the Criminal Procedure Act 2011.]

(9) Where a defendant is found guilty of, or pleads guilty to, an infringement offence for which an infringement notice has been issued, the Court shall order the defendant to pay costs of the prescribed amount in addition to the fine (if any) and other costs (if any) ordered by the Court.

(10) In any proceedings for an infringement offence for which an infringement notice has been issued
  (a) It shall be a defence if the defendant proves that the infringement fee for the offence has been paid to the informant at the address specified in the notice before or within 28 days after service on the defendant of a reminder notice in respect of the offence:
  (b) It shall not be a defence that the infringement fee for the offence has been paid otherwise than as referred to in paragraph (a) of this subsection.

(11) Where an infringement fee is paid to the informant at the address specified in the infringement notice but not within the time referred to in subsection (10)(a) of this section, the amount paid may be held and applied towards any fine or costs that the defendant may become liable to pay in respect of the offence.

(12) In any proceedings for an infringement offence for which an infringement notice has been issued it shall be presumed, unless the contrary is proved, that

(a) The infringement notice in respect of the offence has been duly issued, and the notice, or a copy of the notice, has been served on the defendant:

(b) Any reminder notice or copy of a notice of hearing required to have been served on the defendant has been duly served:

(c) The infringement fee for the offence has not been paid as required under this section.

(13) If the informant has entered into an arrangement under subsection (3A) or subsection (3C)(a), and default is made in the payment of any instalment, proceedings may be taken as if default had been made in the payment of all instalments then remaining unpaid.

[27] The prosecutor submits that s 375 is engaged and the court must not convict a defendant "if a defendant is *found* (emphasis added) guilty of, or pleads guilty to, an infringement offence (whether or not an infringement notice has been issued)"—s 375(1) of the Act. Hence, the prosecutor submits that the defendants have not been "found" guilty and they have not entered a plea of guilty to the infringement offence. The first question therefore is: when is a defendant "found guilty" of an infringement offence?

[28] Section 21(1)(b) of the Summary Proceedings Act provides that proceedings may be commenced for an infringement offence by providing particulars of a reminder notice or by filing a notice of hearing in a court where an infringement notice has been issued in respect of the offence. As mentioned above, proceedings for an infringement offence may also be commenced by filing a charging document with leave of the court.[12]

[29] In the current proceedings, the Agency chose to issue an infringement notice rather to file a charging document. Both defendants respectively paid the infringement fee in respect of the offence and neither of them requested a hearing in respect of the infringement offence—s 21(7) of the Summary Proceedings Act 1957. Furthermore, a reminder notice was not issued in terms of s 21(2) of the Act. Hence, a proceeding in respect of the infringement offence was not commenced in any of ways which s 21 of the Summary Proceedings Act provides.

[30] The defendants have not been "found" guilty because no proceeding was issued in respect of the infringement offence. Nor have they entered pleas of guilty because a charging document was not filed in respect of the infringement offence and the defendants did not request a hearing in respect of the offence.

[31] It is not in issue that the special plea of previous conviction under s 46(1) of the Criminal Procedure Act 2011 requires the court to be satisfied that the defendant has been "convicted" of the same or any other offence arising from the same facts. Aside from the clear working of the section itself it is well established that no conviction may be entered for an infringement offence.[13]

[32] Counsel for the defendants submits that the term "conviction" in s 46 of the Criminal Procedure Act 2011 and its predecessor s 358 of

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12 Section 21(1)(a) of the Summary Proceedings Act 1957.

13 *Plumbers, Gasfitters and Drainlayers Board v Maaka* [2015] NZHC 1948, [2015] 3 NZLR 854 at [31].

the Crimes Act 1961 is not intended to require the entry of a conviction on a defendant's criminal history before the special plea could be utilised.

[33] The general rule for determining when a defendant has been convicted is that a conviction occurs when a court of competent jurisdiction pronounces in open court that the defendant has been convicted of the offence.[14] The Criminal Procedure Act 2011 itself does not define the term "conviction". Section 376 of that Act deems a person to be convicted where the court proceeds to sentence a defendant or to make an order under s 108 or s 110 of the Sentencing Act 2002 but does not make an order convicting the defendant.

[34] Mr Mackenzie submits that the "state" of conviction is required for the special plea to be raised. The case for the defendant is that the "state" of conviction is reached where a criminal allegation made by the State is proved through plea or proof and final disposition available at law has occurred. Furthermore, Mr Mackenzie submits that it is of no moment whether the allegation occurred through the means of an infringement notice or charging document.

[35] In *Richards v R*[15] the Privy Council reviewed what a conviction requires. Richards had been charged with murder and entered a plea to manslaughter by agreement with the Crown. The Crown then changed its mind, withdrew the proceedings, and re-laid the murder charge. Richards was convicted of murder and appealed on the basis that he had already been convicted of the offence through his earlier guilty plea. Their Lordships wrote—

> The central issue raised by the appeal is whether [the special plea of previous conviction] can be sustained by anything less than evidence that the offence with which the defendant stands charged has already been the subject of a complete adjudication against him by a court of competent jurisdiction comprising both the decision establishing his guilt (whether it be the decision of the court or of the jury or the entry of his own plea) and the final disposition of the case by the court passing sentence or making some other order such as an order of absolute discharge.[16]

[36] Their Lordships confirmed that a final adjudication was necessary as the essence of the special plea was to prevent double punishment. In *Overington v Police*[17] the appellant submitted that the special plea of previous conviction was available by virtue of s 26(2) of the New Zealand Bill of Rights Act. Mr Overington was driving a truck in the left of two lanes which travelled in the same direction. He came upon a parked car blocking his way and turned to the right striking a car travelling beside him. He received an infringement notice for an unsafe lane change. The notice was withdrawn and Mr Overington was charged with dangerous driving which he defended unsuccessfully. The Court acknowledged that an infringement is an offence and concluded that the

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14 *R v Dowling* (1989) 88 Cr App R 88 (CA) adopted in *R v Zantoul* CA297/06, 6 December 2006.
15 *Richards v R* [1993] AC 217, (1992) 96 Cr App Rep 268 (PC).
16 At 2.
17 *Overington v Police* HC Auckland CRI-2006-404-125, 12 February 2007.

infringement procedure is “civil in nature rather than criminal”.[18] The Court correctly, with respect, noted that convictions are not entered for infringement offences and concluded:

> This provision confirms that a conviction shall not be entered for an infringement offence. Accordingly, in the absence of a conviction Mr Overington was never at jeopardy at any time before the charge of dangerous driving was laid on 24 November 2004.[19]

[37] Counsel for the defendants submits that the decision in *Overington v Police* is not good law and this court should not follow it because the court fell into an error of conflating the absence of a “tangible recorded conviction” with the common law requirement for the first offence to have been concluded to the level of conviction. Instead, Mr Mackenzie submits that the correct reason double jeopardy did not apply to the defendant was because the infringement offence had never reached a point of final adjudication. Mr Mackenzie draws a distinction between the position in *Overington* where the infringement notice was withdrawn and the current case where the defendants paid the infringement fee reaching the point of “final adjudication” as he submits is the correct approach.

[38] In *Middleton v Timaru District Court*[20] the defendant unsuccessfully defended infringement offences for having unregistered dogs. After the date of the offences he registered the dogs and paid the late registration fees. He contended that the charges infringed the rule against double jeopardy due to the fact that he has already paid the penalty on the late registration. The Court stated:

> But going back to the reasons that I gave at the outset about the fines, I am satisfied that although the principle of jeopardy which is confined to convictions does not directly apply, the reason behind the principle that you should not be punished twice for the same wrong does apply.

[39] Mr Mackenzie submits that the statutory bar on the entry of a conviction for an infringement offence is not an indication that the fundamental principle of double jeopardy applies only where to offences that can incur a recorded conviction. The infringement offence in the current case could be pursued either by infringement notice or charge. Whatever means is adopted does not alter the fact that this is a criminal proceeding taken by the State against an individual resulting in penalties enforceable by the State. The case for the defendants therefore is that payment of the infringement fee is an acceptance, akin to a plea of guilty, and final adjudication of a criminal proceeding.

[40] Hence, the argument for the defendants is that the term “conviction” as used in s 46 of the Criminal Procedure Act 2011 should not be confined to the entry of a conviction or a finding of guilt but should mean the final adjudication of a proceeding. Mr Mackenzie submits that such an interpretation keeps faith with the underlying purpose of the

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18 Citing *Wellington City Council v McCready* [1995] DCR 536 (DC).
19 *Overington v Police* HC Auckland CRI-2006-404-125, 12 February 2007 at [16].
20 *Middleton v Timaru District Court* [2012] NZHC 3471.

provision, namely to prevent a defendant being punished twice for the same offence arising out of the same facts.

[41] Mr Mackenzie also submits that interpreting the term "conviction" in the broader common law way of "final adjudication" is consistent with s 26 of the New Zealand Bill of Rights Act[21] as required by s 6 of that Act —

> **6 Interpretation consistent with Bill of Rights to be preferred**
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[42] In *R v Hansen* Elias CJ stated:[22]

> Section 6 of the New Zealand Bill of Rights Act now makes it clear that textual ambiguity is not required; if an enactment "can" be given a meaning consistent with the New Zealand Bill of Rights Act, it must be given that meaning. Section 6 is key to the policy of the New Zealand Bill of Rights Act to "promote" as well as "affirm" and "protect" human rights and fundamental freedoms in New Zealand.

[43] I conclude that in order to raise the special plea of previous conviction the Court must be satisfied as to the following:

(1) Whether there is a common punishable act central to both the previous and the new charge. This places the focus on the substance of the facts giving rise to the previous and the new charges rather than a fine-grained comparison of each element of the charges.
(2) Whether the previous offence has reached the point of final adjudication. To that extent, it is not necessary for the court to have found the defendant guilty or for the defendant to have entered a plea of conviction. Furthermore, it is unnecessary for the court to have formally entered a conviction in the record. This interpretation of "conviction" in s 46 of the Criminal Procedure Act 2011 recognises the principles underlying double jeopardy and is consistent with s 26(2) of the New Zealand Bill of Rights Act 1990.
(3) Whether the defendant has been "convicted" of the same offence or any other offence arising from those same facts.

Whether the defendants have been convicted of the same offence or any other offence arising from the same facts

[44] The prosecutor submits that the offences of failing to have a "P" endorsement and of failing to have a PSL are legally and factually distinct and do not arise from the same facts. The defendants submit that the offences are near identical and that it would be difficult to conceive of a closer combination as both stem from one factual occurrence namely the

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21 Section 26(2) of the New Zealand Bill of Rights Act 1990 "No person who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again".

22 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [13].

act of an unlicensed operation of a passenger service. The key submission for the defendants is that the central punishable act is the act of an unlicensed operation of a passenger service.

The infringement offence

[45] Section 5 of the Land Transport Act (the LTA) relevantly provides:

> **5 Drivers to be licensed**
> A person may not drive a motor vehicle on a road —
> Without an appropriate current driver licence;

[46] Section 31 of the LTA comes under a part of the LTA with the heading of "offences relating to driver licensing". Section 31(1)(a) of the LTA creates the offence of driving without an appropriate current driver licence as follows:

> **31 Contravention of sections 5(1)(a) ...**
> A person commits an offence if the person—
> Drives a motor vehicle on a road—
> ...
> (ii) without an appropriate driver licence.

[47] Section 2 of the LTA defines "driver licence" as including "an endorsement on a driver licence". The Land Transport (Driver Licensing) Rule 1999. The requirement for and issuing of P endorsements lies within r 26(1)(a) of the Land Transport (Driver Licensing) Rule 1999 which provides:

> **26 When passenger endorsement required**
> A person must hold a passenger endorsement if that person drives—
> A motor vehicle that is operated in a passenger service;

[48] The same rule defines the term "passenger service" to mean, subject to s 47 of the Transport Services Licensing Act 1989—

> (a) The carriage of passengers on any road for hire or reward by means of a motor vehicle; ... and
> (b) The carriage of passengers on any road, whether or not for hire or reward, by means of a large passenger service vehicle;

[49] Hence, Mr Mackenzie submits that the central punishable act in respect of the infringement offence is *the carriage of passengers for hire or reward by means of a motor vehicle, without the licence required by the LTA*.

The charge

[50] Section 30J of the LTA relevantly provides—

> **30J Transport service operators may not carry on certain transport services unless licensed to do so**
> A transport service operator may not carry on any of the following transport services unless licensed to do so:
> Goods service:
> Passenger service

[51] This becomes an offence under s 79A of the LTA—

> **79A Offence to carry on transport service without licence**
> A person commits an offence if the person carries on any transport service without the appropriate current licence.

[52] A transport service licence is defined in the LTA as:

> **transport service licence** means any of the following licences granted or deemed to be granted under subpart 3 of Part 4A:
>
> (a) a goods service licence:
> (b) a passenger service licence:
> (c) a rental service licence:
> (d) a vehicle recovery service licence

[53] A "passenger service licence" is defined as:

> **passenger service licence** means a licence granted or deemed to be granted under subpart 3 of Part 4A that authorises its holder to carry on a passenger service.

[54] The charge alleges that a passenger service was conducted. A passenger service is defined in s 2 of the LTA as:

> **passenger service**
>
> (a) means
> (i) the carriage of passengers on any road for hire or reward by means of a motor vehicle; and
> (ii) the carriage of passengers on any road, whether or not for hire or reward, by means of a large passenger service vehicle; ...

[55] Hence, Mr Mackenzie submits that the central punishable act in respect of the charge is (emphasis added) *the carriage of passengers for hire or reward by means of a motor vehicle, without the licence required by the LTA*.

[56] Mr Mackenzie consequently submits that the infringement offence and the charge are near identical and that a closer combination would be difficult to conceive. He submits that both the infringement offence and the charge stem from one actual occurrence, namely the act of an unlicensed operation of a passenger service. The case for the defendants is that that factual occurrence did not occur twice. Furthermore, the defence case is that the infringement offence and the charge did not arise out of sequential acts as was the case in *Rangitonga*.[23]

[57] The Agency submits that the different requirements for a "P" endorsement as compared to a passenger service licence illustrate their factual and legal distinction. Ms McKenzie for the Agency submitted that with the exception of the requirement that a person must be fit and proper to hold both a "P" endorsement and a passenger service licence, the requirements are different for each because they relate to two distinct functions that may be distilled to the characterisation that:

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23 *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73.

(a) A "P" endorsement is a type of driver licence that only entitles its holder to drive a vehicle in a transport service; whereas.
(b) A passenger service licence entitles its holder to carry on/operate a transport service business providing passenger services.

[58] Ms McKenzie highlighted the definition of "driver licence" as including an endorsement in distinction to the definition of "passenger service licence" as meaning "a licence granted or deemed to be granted under sub-Part 3 of Part 4A that authorises its holder to carry on a passenger service licence".

[59] The differences between the two concepts are reinforced by the fact that s 2 of the LTA defines terms relating to both driving in and operating a transport service licence as follows:

> (a) **transport service driver** means any person who is, or is from time to time, employed or engaged in driving a vehicle being used in a transport service other than a rental service, whether or not that person is licensed or required to hold a licence to drive such a vehicle; and
> (b) **transport service operator** means a person who carries on a transport service, whether or not that person employs personnel to assist in doing so on its behalf; but does not include those personnel.

[60] There are further distinctions between the processes for obtaining and the requirements in respect of a "P" endorsement and a passenger service licence respectively. For instance, a "P" endorsement may only be issued to a natural person whereas a passenger service licence may be issued to an individual or a body corporate.

[61] There are a number of other conceptual differences between a "P" endorsement and a passenger service licence. There are separate revocation, disqualification, suspension, and penalty regimes and provisions. Ms McKenzie submits that one of the most significant differences is contained within s 4 of the LTA under the heading "General Requirements for participants in the Land Transport System". Section 4(5) of the LTA provides:

> **4 General requirements for participants in land transport system**
> ...
> (5) A participant who holds a land transport document that authorises the provision of a service within the land transport system
> (a) must, if so required by the rules, establish and follow a safety management system that will ensure compliance with the relevant prescribed safety standards and the conditions attached to the document; and
> (b) Must provide training and supervision to all employees of the participant who are engaged in doing anything to which the document relates, so as to maintain compliance with the relevant prescribed safety standards and the conditions attached to the document and to promote safety; and
> (c) must provide sufficient resources to ensure compliance with the relevant prescribed safety standards and the conditions attached to the document.

[62] Ms McKenzie submits that the matters referred to in s 4(5) of the LTA are business management requirements that the holder of a

transport service licence must comply with that are different to the requirements for a transport service driver. Hence, the Agency submits that the requirement to have a "P" endorsement is factually and legally distinct to having a passenger service licence. A person can carry passengers under a "P" endorsement without having a passenger service licence if they are employed by an individual or company that holds the required passenger service licence. This is the situation where taxi drivers are employed but not contractors for taxi companies. The employer company or individual must hold the passenger service licence; and a person or company may hold a passenger service licence without holding a "P" endorsement. This would apply in situations where the licence holder does not himself or herself drive paying passengers. This would be the case for a corporate entity such as a taxi company which holds the passenger service licence but does not drive passengers. It would also be the situation where an individual person might set up a company and employ people such as bus or coach drivers and that individual himself or herself does not drive.

[63] The reference to offences "arising from the same facts" in s 47 of the Criminal Procedure Act 2011 is intended to apply to cases where there is a common punishable act central to both the previous and new charge. The section focuses on the substance of the facts giving rise to the previous charges rather than a fine-grained comparison of each element of the infringement offence and the charge.

[64] There is a deceptive simplicity in the submission for the defendants that the central punishable act for both offences is the carriage of passengers for hire or reward by means of a motor vehicle, without the licence required by the LTA.

[65] The substance of the facts giving rise to the infringement notice is the act of driving a motor vehicle without being the holder of the appropriate driver licence to do so, namely a P endorsement. The infringement offences did not, as Mr Mackenzie submits, allege that the defendants carried on a transport service without the appropriate current driver licence. The infringement notices were not issued for the act of operating a passenger service. The infringement notices related to driving a vehicle without being the holder of the appropriate driver licence, namely a P endorsement.

[66] The substance of the facts giving rise to the charge is the carriage of passengers for hire or reward by means of a motor vehicle without a passenger service licence. While the infringement offence occurred during the course of carrying on or operating a passenger service the act of driving a motor vehicle without being the holder of the appropriate driver licence is a factually distinct act.

[67] The carriage of passengers for hire or reward by means of a motor vehicle is the substance of the charge of carrying on an unlicensed service not of the infringement offence which relates to driving a vehicle that was being operated in a passenger service. Section 30J of the LTA prohibits a transport service operator from carrying on a passenger transport service unless licensed to do so.

[68] The legislative requirements governing the offences are quite distinct. The one relates to the operation of a business engaged in providing passenger services and the other relates to driving a vehicle in a passenger service. Consequently, the defendants have not been convicted of the same offence arising from the same facts and the application to dismiss the charge against each of them cannot succeed.

Reported by: Rachel Marr, *Barrister and Solicitor*