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C.P.-S.12137—1952-3—10,000. U.D.J. 220.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

CRIMINAL APPEAL
~~EX PARTE/OPPOSED APPLICATION OF~~
~~EX PARTE/BESTREDE APPLIKASIE VAN~~

NIGEL K. WEBB Applicant
Applikant

versus

THE QUEEN Respondent

Applicant's Attorney [illegible] Respondent's Attorney
Prokureur van Applikant *Prokureur van Respondent*

Applicant's Advocate [illegible] QC Respondent's Advocate [illegible]
Advokaat van Applikant *Advokaat van Respondent*

Nature of Application
Aard van Applikasie

EDL

Set down for hearing on Thursday, 1st March, 1956.
Op die rol geplaas vir verhoor op

[redacted]

1.3.56

35 - 5.10 - CAV

Appeal dismissed

[illegible]

Original

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

WEBB Appellant

v

REGINA Respondent

CORAM : Centlivres C.J., Fagan, Steyn, de Beer & Beyers JJ.A.

Heard :- 1st March 1956. Delivered :- 12:3:56.

JUDGMENT

CENTLIVRES C.J. :- The appellant was acquitted in a magistrate's court on a charge of having contravened Sec. 2 of Ord. 1 of 1838 (Cape). The Solicitor-General appealed in terms of Sec. 104(2) of Act 32 of 1944 on the following ground :-

" That the magistrate erred in law in holding that the discharging of a firearm at game on the Lord's Day by a person in possession of a valid licence to shoot game constitutes a 'lawful occasion' within the meaning of those words as used in the bracketed phrase 'except upon some lawful occasion' in section 2 of Ordinance No. 1 of 1838."

The Eastern Districts Local Division reversed the decision of the magistrate and ordered the case to be dealt with by him in terms of Sec. 104(4) of Act 32 of 1944. The Local Division granted leave to appeal to this Court.

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The Solicitor-General objected in limine to the hearing of the appeal on the ground that the appellant had no right in law to appeal to this Court at the present stage of the case. The question in issue is whether it was competent for the Local Division to grant leave to appeal. The answer to this question is to be found in the proper interpretation to be placed on Act 32 of 1944 and on Sec. 105 of the South Africa Act. The mere fact that Act 32 of 1944 does not give any right to appeal is not decisive, for the appellant might have a right to do so under Sec. 105 of the South Africa Act. Cf. Shacklock v Shacklock (1949 (1) S.A. 91 at p. 99). It may, however, be said that, as the Legislature in Sec. 105 of Act 32 of 1944 expressly gave a right of appeal to the prosecutor only, the maxim expressio unius est exclusio alterius should be applied and that it should therefore be held that an accused person cannot, in the circumstances of this case, apply for leave to appeal to the Appellate Division. That maxim "may sometimes "afford useful guidance for construing a doubtful enactment, "but it is not a rigid rule of construction to be applied with-"out reference to the context in which the 'expressio unius' "occurs" (per Lord de Villiers C.J. in Chotabhai v Union Government, 1911 A.D. 13 at p. 28) and is to be applied with caution (R. v Ngwevela - 1954 (1) S.A. 121 at p. 124). The

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reason why only a prosecutor is mentioned in Sec. 105 of Act 32 of 1944 may well be that the Legislature considered that he would have no right, without special statutory authority, to appeal against a decision of a provincial or local division whereas an accused would have such a right, after leave granted, under Sec. 105 of the South Africa Act. If that was the view of the Legislature it was unnecessary for it to make any mention of an accused in Sec. 105 of Act 32 of 1944. However that may be, section 114(3) of that Act seems to me to put the matter beyond doubt. It says " nothing in this Act contained shall be "construed as affecting the provisions of S. one hundred and five "of the South Africa Act 1909, relating to appeals to the App- "ellate Division." Consequently if it is competent to grant leave to appeal under that section an accused is entitled to avail himself of the provisions of that section.

I may add that the following observation made by Viscount Haldane L.C. in National Telephone Company Limited v Postmaster-General (1913 A.C. 546 at p. 552) seems to support the view at which I have so far arrived :-

" When a question is stated to be referred to an extablished Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

I now proceed to consider whether the accused is entitled to appeal / after leave granted in terms of Sec. 105 of the South Africa Act. In Rex v Botes and Botha (1945 N.P.D. 47) Carlisle A.J.P. said at pp. 48 and 49 :-

" Section 105 of the South Africa Act, as amended, enacts that in every criminal case in which, at the establishment of the Union, an appeal might have been made from a court of resident magistrate or other inferior court, to a superior Court, the appeal is to be made to the corresponding division of the Supreme Court, and it directs that there is to be no further appeal against any judgment given on appeal by such division, without the leave of such corresponding division, or if such leave is refused, by leave of the Appellate Division itself. At the date of the establishment of the Union, no appeal by the prosecutor or Attorney-General was permitted to the Supreme Court. See Rex v Brasch, (1911 A.D. 525). At the date of Union, consequently, this Court could not have interfered with the magistrate's view of the law in a case like this. The accused, of course, having received the magistrate's decision in his favour, would be acquitted, so that from the point of view of both the Crown and the accused, there was an end to the matter. "

In the above case the Court's attention was not drawn to the decision in Dhanabakium v Subramanien (1943 A.D. 160) which was applied in Fred Saber (Pty.) Ltd v Franks (1949 (1) S.A. 388 at p. 396) and where Tindall J.A. in giving the unanimous judgment of the Court on this part of the case said on p. 165 :-

" It is true that at the establishment of Union an appeal could not have been made from a decision in a case like the present because no inferior court such as the children's court existed, and a proceeding such as an application for an adoption order or for the rescission of such an order was unknown. But that consideration, in my judgment, does not show that the present appeal does not lie. The children's court is an inferior court and sec. 74 of Act 31 of 1937 gives a right of appeal from such court to the Provincial Division. And the sentence in Sec. 105 of the South Africa Act commencing with the words 'but there shall be no further appeal', etc., in my judgment really amounts to an empowering provision the effect of which is that, if a judgment is given by a Provincial Division in an appeal which such Division is competent to hear from a magistrate's court or an inferior court, there is

" a further appeal to the Appellate Division if the Provincial Division shall have given leave to appeal (or, according to the proviso, if the Provincial Division has refused such leave, then on leave granted by the Appellate Division). As this is a case where an appeal was competent from an inferior court to the Provincial Division under sec. 74 of Act 31 of 1937, and that section contains no indication of an intention on the part of the legislature that the decision of the Provincial Division shall be final and conclusive (sec. 74 differing in this respect from the statutory provisions under consideration in Durban Chamber of Commerce v Malcomess & Co. Ltd., 1917 A.D. 577), an appeal lies to the Appellate Division by virtue of the words in sec. 105 of the South Africa Act, above quoted, on leave given. "

It will be noted that in the case of Botes and Botha (supra) the Court laid some stress on the words "at the establishment of the Union" in Sec. 105 of the South Africa Act but, to use the language of Tindall J.A., those words do not show that an appeal does not lie. As this Court has held that the sentence commencing with the words "but there shall be no further appeal" is an empowering provision

it follows that there is a right of appeal in the present case after leave granted.

To return to ss. 104 and 105 of Act 32 of 1944 I may observe that there is nothing in those sections which clothes with finality a decision by a provincial or local division against an accused. Under s. 104(5) a provincial or local division may, in allowing an appeal, itself impose such sentence upon the accused as the magistrate's court ought to have imposed. I do not think that it could be successfully contended that the Legislature intended that, if a provincial or local division sentenced the accused, he should have no right, after leave granted, to appeal to the Appellate Division. The accused would have no such right if a strictly literal meaning were to be given to the words "at the establishment of the Union" in s. 105 of the South Africa Act for, at that date, there could not have been an appeal in the circumstances of the present case from a magistrate's court. Such a construction of those words would lead to the anomaly that if a provincial or local division were to remit the case to the magistrate's court and the magistrate were to convict, the accused would have the right to appeal to a provincial or local division and after leave granted to the Appellate

Division whereas if the provincial or local division were to sentence him he would not be entitled to obtain leave to appeal to the Appellate Division. If a statute is reasonably capable of a construction which does not produce an anomaly that construction should be adopted. See Rex v Dave (1954(4) S.A. 736 at p. 742).

For these reasons I think that the case of Botes and Botha (supra) should be overruled. I may point out that the decision at which I have arrived enables this Court to give a final decision (which will be binding on all other courts) on the point of law which has been raised and may well obviate another appeal to the Local Division in the event of the accused being convicted by the magistrate - an appeal which would be hopeless on the point of law in issue as that Division has already given its decision on that point. In these circumstances an appeal to the Local Division would in all probability be merely a step towards an appeal to the Appellate Division.

The Solicitor-General also contended that as the accused is not a convicted person leave should not have been granted to him to appeal under s. 105 of the South Africa Act. For this proposition he relied on R. v Dave (supra at pp. 741/2).

The question in that case was whether the prosecutor was given by s. 105 of Act 32 of 1944 the right to appeal to the Appellate Division without obtaining leave to appeal. The majority of the Court answered that question in the affirmative and in answering that question it found it necessary, in view of the provisions of s. 114(3) of Act 32 of 1944, to enquire into the meaning of s. 105 of the South Africa Act. It pointed out that at the time of the establishment of Union only a convicted person had the right to appeal from a magistrate's court to the Supreme Court of the Colony concerned and that "the only appeal that could have been in contemplation at the time of the South Africa Act was an appeal by the accused because..... there was no provision in the legislation of any of the Colonies, enabling an appeal by the prosecutor against an acquittal in a magistrate's court." (p. 742). This line of reasoning may not be altogether consistent with the ratio decidendi in Dhanabakium's case (supra) to which I have already referred. But be that as it may, there is no mention of that case in the majority judgment in Dave's case (supra), although the minority judgment relies at p. 745 on the cases of Dhanabakium and Fred Saber (Pty.) v Franks (supra at pp. 389 et seq.). Both those

cases were unanimous decisions of five judges of this Court on the point there in issue and in view of the absence of any mention of those cases in the majority judgment in Dave's case (supra) it cannot be said that this Court intended to overrule the two prededing cases. The actual decision in Dave's case (viz: that a prosecutor need not obtain leave to appeal to the Appellate Division) is, of course, binding [redacted] but if there is an inconsistency between the ratio decidendi of that case and Dhanabakium's case this Court is free to follow the reasoning of the earlier case. Cf. Fellner v Minister of the Interior (1954 (4) S.A. 521 at p. 532). If one were to adopt what appears to be the reasoning in the majority judgment in Dave's case it would seem that an accused who is sentenced by a provincial or local division in terms of s. 104(5) of Act 32 of 1944 would, for the reason I have already given, be unable to appeal to the Appellate Division. In these circumstances I prefer the ratio decidendi in Dhanabakium's case and in my opinion the preliminary objection taken by the Solicitor-General should be overruled.

I now come to the merits of the appeal. The relevant portion of Sec. 2 of Ordinance 1 of 1838 reads as follows :-

" It shall not be lawful for any person to sell or offer for sale any goods, merchandise, cattle, or other live-stock, or to trade or deal or keep open any shop, store, or other place for the purpose of trade or dealing ; or to cut or carry any fuel or to engage in field labour, except for the preservation of the fruits of the earth in cases of urgent necessity, or (except on some lawful occasion) to discharge any gun or other firearm on the Lord's Day. "

Ordinance 1 of 1838 repealed Ordinance 4 of 1837 section 1 of which also prohibited the discharge of any gun or other firearm (except upon some lawful occasion) on the Lord's Day. The preamble of the 1837 Ordinance recited that it was "expedient to make provision for the better observance of the Lord's Day in this Colony" and the preamble of the 1838 Ordinance stated that it was "expedient to make other provisions for the better observance of the Lord's Day in this Colony." The reason for passing these ordinances is thus clear viz: the Legislator considered that legislation was necessary to ensure the proper observance of the Lord's Day. The remarks made by Wessels A.C.J. in Rex v Clarke (1931 A.D. 453 at p. 454) in reference to the Sunday Observance Law 28 of 1896 (Transvaal) apply, in my opinion, also to the Cape Ordinance. The learned Acting Chief Justice said :-

" If we look at the whole law, it is clear, apart from

" the history of Sunday observance legislation, that the Legislature intended to prevent people from doing acts on a Sunday - even innocent acts such as gardening and agricultural work - and from playing games in public places, because the Legislature thought at that time that it was essential that Sunday should be strictly observed. "

To hold, as it was suggested on behalf of the appellant that the Court should hold, that because the appellant was in possession of a valid licence to shoot game he was therefore acting on a "lawful occasion" within the meaning of those words in s. 2 of the Ordinance would, in my opinion, defeat the object of the Ordinance. The whole idea underlying the Sunday Observance legislation is that nothing should be done on the Sabbath which can be performed on any other day of the week unless necessity or some other sufficient consideration dictates otherwise. That was undoubtedly the intention when the Lord's Day Observance Ordinance was passed in 1838. It is a matter of historical knowledge that in those days a stricter view was taken in this connection than is the case in these more modern times. That this is so appears from s.13 of a Proclamation issued by Lord Charles Somerset on March 21st, 1822 in which it is stated that "the employing of the "Sabbath day for the amusement of shooting, is a most immoral

and profligate practice." The section then goes on to penalise the shooting of any kind of game on a Sunday.

To say that because the appellant held a licence to shoot game when he shot game on the Lord's Day he discharged a firearm on a lawful occasion would be tantamount to saying that a person cannot be convicted of discharging a firearm on the Lord's Day unless at the same time he was committing some other offence. To place such a construction on the Ordinance would be absurd. It is not necessary in this case to define what is meant by the words "except upon some lawful occasion" : it is sufficient to say that what the appellant did in this case was not a "lawful occasion" within the meaning of the Ordinance. It may be conceded that the quoted words are vague and that it is difficult to say exactly what falls within the exception but some meaning must be given to those words. Clearly the Legislature intended to prohibit the discharging of a firearm on the Lord's Day but recognised that there may be occasions on which such a discharging would be justified in law. Without in any way attempting to define the words in question I may say that my view is that a discharge of a firearm on the Lord's Day in self defence

or to attract attention in the case of being lost on the veld or to kill game to avert death by starvation would be a discharge upon a "lawful occasion."

The appeal is dismissed.

Fagan J.A.
Steyn J.A.
de Beer JA
Beyers JA
} Concur.