23/56

G.P.-S.384—1932-3—10.000. U.D.J. 445.

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

(Eastern DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

[illegible]
Appellant.

versus

The Queen
Respondent.

Appellant's Attorney Louis & Black *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

Mr Wright with him

Appellant's Advocate *Respondent's Advocate* Mr R [illegible]
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on: Wednesday 29th Aug 1956.
Op die rol geplaas vir verhoor op:—

(C.A.V.) 7.8
2.41 [illegible]

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

GREENWOOD NGOTYANA Appellant .

and

REGINA Respondent.

Coram: Schreiner , Fagan, Steyn , Reynolds et de Villiers . JJ.A.

Heard : 29th , August I956. Delivered. 25/9/56.

JUDGMENT:

REYNOLDS.J.A.:- The facts in this case , and the various provisions of section IO (as amended) have already been set out in the preceding judgments and need not be repeated . Stripped of all matter not relating expressly to the main charge against accused who was in an urban or proclaimed area on the IIth May, I955 , for more than seventy two hours , sub-section I reads :

> "No native shall remain for more than
> "seventy two hours unless (d) permission
> "so to remain has been granted to him
> "by a person designated for the purpose
> "by that urban local authority".

As van den Heever J.A. stated in R. vs. Kula (I954 (I) S.A. I57), at page I65 "the prohibitum factum for purposes of the present case is to remain for more than seventy two hours in an urban area ". From the prohibition so to remain for more than this seventy two hours , sub-section I set out four exceptions in (a) to (d) and said that natives who fall inside the four exceptions are entitled to remain in

.....the area ...2.....

the area for more than sevnety two hours . As Kula's case decided that (a) to (d) constituted exceptions to the general prohibition , (d) is referred to as an exception thoughout this judgment . That , however , does not solve the present question as to what is the ambit of the exception carved out from the general prohibition , as to what must be proved by someone before the native is justified in remaining for more than seventy two hours in the period charged under the summons , and that period is the IIth May , I955 . It seems to me that all turns on the question of what is meant by the word "permission" in the phrase "permission to remain has been granted " and when the meaning of that word has been ascertained , that meaning will remain constant right through section IO unless there is something to the contrary . In other words the inquiry in the present case is in two parts . The first is to find out the precise limits of the exception contained in (d), and that involves finding out the meaning of the word "permission", in the phrase in which it occurs there. When that is done it will be found that , the question of onus, or the second portion of the inquiry admits of more easy solution.

Keeping the inquiry strictly to the question of what is the ambit of the exception set out in (d) , it will be seen that sub-section I , standing by itself , in no way limits the word "permission". That permission may be given for a limited period . When that period stated in the permit elapses , the permission obviously comes to an end , and the native who has been granted the permit can no longer remain in the area . He is clearly in no better position than the native who had no permit at all. No matter who has to prove that the permission is no longer operative, that is the meaning of "permission" in (d).

....The words .....3.....

The words in (d) must not be taken in vacuo and the permission has to be in operative existence in reference to a charge which states that the native has no permission to remain in the area at the time stated in the charge. To hold otherwise would be impossible , and mean that a native would come within (d) even if on the IIth day of May , he ~~procured~~ a permit which was proved by someone , either the prosecution or himself , to have long since ceased to be operative. The production of the permission then proves only that the native had a permission to remain at some time but not that he had been "so granted permission to remain " during the period named in the charge sheet.

That would clearly be so as regards the period of time stated in the permission when , on the elapsing of the period of time , the native has no permit at all granted him to remain , and can plainly be charged with contravening sub-section I, for he does not then come within the exception (d). But the position set out in sub-section I, by itself , then is complicated by the fact that "permission" in sub-section I may also include remaining for a"purpose" and the question will then come up (~~in sub-section I~~ as to) whether violation by the native of that purpose also brings the permit to an end , when he is given , in the permit, a period of time to accomplish the purpose. Prima facie one would think it could not , for the violation may be minor and the purpose still continue for which the permit was then granted. Thus a native may be allowed into the area "for the purpose of receiving medical treatment ". The treatment may be protracted in time , and there may be an interval of time when the doctor pauses in his treatment to see what the effect is of the medicine already given . During that time the native may feel well enough to take on some kind of work , though still residing

....in the area .....4.....

in the area for medical treatment. I find it difficult to believe that the taking of some small employment would ever bring his permission to remain , as automatically to an end, as would the elapsing of a period of time , or that what may be a minor breach of the purpose of obtaining medical treatment would ever justify the prosecution in taking up the position that the permit has completely ceased to exist. Prima facie that would seem so , well apart from the provisions of sub-section 2.

Sub-section 2 , however , makes the position clear . It is divided into two portions. Under the sub-section both a purpose and a period of time must figure in the permit , but a distinction is drawn between those who are granted permits for employment , and the wide class of persons who are given permits for purposes other than that of employment. In paragraph (a) of sub-section 2 it is enacted in express terms that the validity of the permit i.e. the permission , comes to an end when the native no longer remains in the employ of the employer, and that can only mean the employ of the employer named in the permit. Then the purpose for which the native was given the permit , which is employment by the named principal , and the period for which he was given it , come to an end at one and the same time. ~~This~~ Thus stating that he must continue in that service , is the stating of a fixed time , even though the time is stated as the happening of an event. But when the sub-section deals with the class of persons other than employees where the fulfilment of the purpose and the elapsing of the stated time will not always coincide , simply nothing is said to the effect that the permit will be invalidated in the sense of no longer being operative as a result of the purpose being violated. But of course it ~~must~~ will no longer be operative when the time stated has elapsed , and it was not necessary to state that.

.....But that .....5.....

But that leaves the fact that nothing is stated , making the permit no longer operative if the native departs from the purpose in some way but still also remains in the area to fulfil the stated purpose . The example given in the case of a native who is granted a permit for medical treatment especially shows why this was done and such a sharp contrast made between this case and where the permit automatically comes to an end in time . Of course the position may be the same as regards (a) where the native still remains in the employment of the named employer but takes on additional work , but it is not necessary to decide that point. Nor is it necessary to consider the case of the native who has departed entirely from the purpose stated in the permit and still remains in the area for a different purpose , since enough has been said to show that mere violation of the conditions of a permit as to purpose does not ipso facto bring the permit to an end and make the native , who still remains , also for the stated purpose , in the position of a native with no permit , and so liable to be charged under sub-section I.

Since the native who violates in some way , either major or minor , the purpose for which the permit was granted , and does so within the period stated in the permit , still possesses an operative permit and cannot be charged under sub-section I, it was obviously necessary to create a further offence or else he could violate the conditions as to purpose at will.

Therefore it was necessary to create a further offence of violating the conditions as to purpose in an operative permit.

.....That.....6.....

breach of the lease , when he simply sues on the grounds that the lessee has no right to remain. In the same way that is the position here , and a native , charged purely with contravening the second portion of sub-section 4, could quite properly say he was charged with the wrong offence when it was shown that he had no operative permit but an expired one , during the period which forms the subject of the charge . It seems conceded that in a charge under the second portion of sub-section 4 , the onus would be on the Crown to prove (i) that the native had a permit , and it seems quite incongruous to say that the prosecution must prove as an essential that the native violated the purpose of a permit inoperative during the period for which he is charged as having violated its conditions. It is clear that the second portion refers to offences committed whilst a permit is operative .

It seems to be the case that sub-section 2 creates two quite separate and opposite offences. The first portion in the words preceding "or" makes violation of the provisions of sub-section I an offence , and is based on the native having no operative "permission". The second portion is based on his having such an operative "permission" and his having violated that portion of the operative permission relating to the purpose stated in the permission. As already indicated , violation of the purpose stated in the permission , does not terminate the permission at all. This is the scheme of section IO to enable the urban authority to control the natives in the area , and seems quite adequate. But still more important is that this consideration of the whole scheme for controlling the natives under section IO, shows already that the meaning given to "permission" in sub-section I of being one operative at the time stated in the charge is in no way changed in other portions of section IO, and that

.....meaning .....8.....

meaning remains the same right throughout , and in the second portion of sub-section 4 still indicates a "permission" which is operative when violated at the time set out in the charge .

That being so the question of the onus falls next to be considered and this portion of the inquiry becomes much simplified by reason of the aforegoing. In a charge under the second portion of sub-section 4 , I agree with the Court a quo that the onus was on the prosecution. There is nothing in this portion constituting any exception at all but only an offence enacted of violating the conditions as to"purpose" laid down in an operative permit. That is an essential the prosecution must prove and also any other essential , for there is nothing in the Act of I9I7 , or the Act of I955 , which replaced it , relieving the prosecution of the necessity. Nor can it be argued at all that this helps in construing the extent of the onus , when the onus is to some extent , at least , laid on the defence in a prosecution not under the second portion but under sub-section I , created an offence by the first portion of sub-section 4.

Turning now to the onus in a prosecution under sub-section I , it has already been pointed out that to fall under (d) , the native must be in possession of a permission , or a permit , which is operative at the time set out in the charge sheet . That enables him to escape the general prohibition against remaining for more than seventy two hours i.e. that he has (a) a permission and (b) an operative one covering that time. But in Kulas case it was decided that this amounted to an exception or exemption within the meaning of section I27 (2) (b) of Act 3I of I9I7 , since replaced by section 15 of Act 56 of I955 ,

.....which is .....9.....

which is to the same effect . But the onus is one of proving that he is exempted , and he must prove both essentials that (a) he has the permit and (b) that it is operative. He cannot discharge this onus by proving part of the exception; and producing a permit which may or may not be operative and which is consistent with ~~this~~ it's coming under the exception or not coming under it .

For the native to prove the permit was operative in the instant case of employment , he must , however, prove that he was still employed by the employer named in the permit , for by paragraph (a) of sub-section 2 , the permit can only be operative during the period of that employment . Then of course,he would prove the purpose stated in the permit continued to be his purpose , for the period and the purpose in cases of employment commence and end in the same moment of time.~~(Hence it is not necessary in the instant case to decide whether the native must prove he was still pursuing the purpose stated in the permit.)~~ Whether he would still have to prove that he was pursuing that purpose in cases where the period of time and the purpose stated in the permit come to an end at different times , may be another question. In a prosecution under sub-section I , the question of whether the purpose is still being pursued might be argued to be irrelevant to prove guilt under that sub-section I. When a native is charged under sub-section I in regard to a period of time stated in the charge , it would be quite useless for him to produce a permit setting out an expired period of time , and ~~thus~~ then prove that he kept within the purpose stated in that permit . Similarly , if he is charged under sub-section I in regard to a time stated in the charge, and the native produces a permit reflecting a period of time covering the time averred in the charge , it ~~must~~ might be quite useless for the prosecution to prove that the purpose stated in the permit had been violated , for that might simply

mean that the native could not be charged under sub-section I, but must be charged under the second portion of sub-section 4 . Hence purpose may be a quite irrelevant matter in a prosecution under sub-section I , and it may never be necessary to decide on whom the onus lies of proving purpose. But it is not necessary to decide that point in the instant case which is governed by paragraph (a) of sub-section 2 making the permit operative only during employment by the employer named in the permit .

In this case the appellant discharged , on the prosecution's case , the onus on him of proving that he had a permit , but that still left him with the duty of proving that it was operative , for the permit may not prove that on IIth May , I955 , he was still in the employ of the named principal . Appellant gave no evidence at all in this case but that would not matter if the evidence for the Crown was such as discharged this portion of the onus for him.

But the further question arises as to whether appellant had not sufficiently discharged that onus on the prosecution's case here by showing on a preponderance of probabilities that the permit he possessed was an operative one. That was all he was required to do (R. vs. Bolon) I94I A.D. 435 and this was the point really insisted on by Counsel for the appellant . Now, though the production of the permit only does not prove the possession of an operative permit , that does not mean the contents of the permit may not be some evidence that the native can rely on to show that it is prima facie a permit that is still operative. That such a permit may possibly do in some cases , and , in this case , the permit shows a relationship of employment existed between appellant and the named employer in it , on the I4th May , I954 , when it is stated in evidence that the permit was granted on the strength of a permit signed by

the named employer. (Ex.A.) The charge is that on IIth May, I955 , a year later , appellant had not the necessary operative permit to remain. It is urged that there is a presumption of fact that the relationship existing in May I954, is presumed to have continued to be still in existence in May, I955. The presumption of the continuation of events is dealt with in R. vs. Fourie I937 A.D. 3I, where it is stated that the presumption is one of fact "and may be weak evidence or it may be strong evidence ". In Hailsham Vol. XIII para. 624 it is stated :-

> "In many cases the existence of the main fact may "be shown by proving its previous existence at a "reasonably proximate date , there then being a "probability that certain conditions or relations "continue . It was formerly regarded as a presump- "tion of law , but the better opinion now is that "it is , in most cases , merely a probability or "presumption of fact , which will vary with the "particular circumstances."

Though usually applied in questions of the continuance of life , para. 624 shows that the presumption is one of wide application , and I can see no reason for not applying it , with the necessary caution , to the relationship of master and servant . But , as stated in the authorities quoted , though it is some evidence , the weight given to it must vary according to circumstances.

Here the "permit" signed by the employer and produced by the prosecution showed that the permit was for a weekly employment at a wage of £3.I.6. It could be terminated by the employer or the native at will, for many reasons depending on the will of two persons , and for many other reasons or because of changing circumstances . Standing by itself it seems quite weak evidence that the relationship

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continued for a year . As regards other admissible evidence , the only other facts emerging in the case are those detailed in the judgment of Steyn J.A. as to appellant being at the place of business of the named employer for only brief periods of four days , and that after his arrest on the I4th May. That cannot be enough to discharge the onus in terms of Bolon's case , The remaining evidence is that of appellant being engaged in trade Union and similar activities having nothing to do with his employment , stated to be that of a cleaner and messenger. Though I agree with the Court a quo these activities do not affirmatively prove that he had completely left the employment of his named employer , it is obvious that they constitute no affirmative evidence that he was still in that employ.

I agree that the appeal should be dismissed.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

GREENWOOD NGOTYANA Appellant

and

R E G I N A Respondent

Coram:Schreiner, Fagan, Steyn, Reynolds et de Villiers JJ.A

Heard: 29th. August, 1956. Delivered: 25-9-1956

J U D G M E N T

SCHREINER J.A. :- The appellant, a native, was charged in a native commissioner's court with contravening section 10 (4) read with section 10 (1) of Act 25 of 1945, as substituted by section 27 of Act 54 of 1952, and read with section 44, the general penalty section, of Act 25 of 1945. In its substituted form section 10, as far as relevant, reads:-

"10(1) No native shall remain for more than seventy-two hours in an urban area or in a proclaimed area in respect of which an urban local authority exercises any of the powers referred to in section (1) of section twenty-three or in any area forming part of a proclaimed area and in respect of which an urban local authority exercises any of those powers, unless -

(a)/.....

(a) he was born and permanently resides in such area;or

(b) he has worked continuously in such area for one employer for a period of not less than ten years or has lawfully remained continuously in such area for a period of not less than fifteen years and has not.....been convicted of any offence.....;or

(c) such native is the wife, unmarried daughter or son.....of any native mentioned in paragraph (a) or (b) of this sub-section and ordinarily resides with that native; or

(d) permission so to remain has been granted to him by a person designated for the purpose by that urban local authority.

(2) An officer so designated shall issue to any native who has been permitted to remain in any such area a permit indicating the purposes for which and the period during which such native may remain in such area: Provided that -

(a) where a native has been permitted to remain in any area for the purpose of taking up employment, the period of validity of the permit shall be limited to the period during which he remains in the service of the employer by whom he has been engaged;

(b) where a native has been permitted to remain in any area for the purpose of seeking work, the period of validity of the permit issued to such native shall be not less than seven or more than fourteen days, unless such native finds employment before the expiration of his permit, in which case the permit shall remain valid until the expiration of the period during which such native remains in the service of the employer by whom he is engaged.

(4) Any person who contravenes any provision of this section, or who remains in any area for a purpose other than that for which permission so to remain has been

granted/.....

Crown had to prove beyond reasonable doubt that the appellant had remained in the area for a purpose other than that for which permission had been granted to him. WATERMEYER J. held that the finding that the Crown had proved the alternative count could not be supported; but he also held that on the main count, in respect of which, in terms of the decision in Regina v. Kula (1954(1) S.A.157), the onus lay upon the appellant to prove by a balance of probabilities that he fell within paragraph (d), the only applicable paragraph, of section 10(1),the appellant had failed to discharge that onus . The court had power to substitute a conviction on the main charge (cf. Regina v. V. 1953 (3) S.A. 314) and this was accordingly done, the sentence remaining unaltered.

The appellant gave no evidence but a Crown witness proved, and it was not in dispute, that on the 14th May 1954 a permit to remain in the area was issued to the appellant by an official designated by the City of Cape Town, the local authority in question. The material portions of the permit read, "The bearer, Greenwood Ngtyana, ...is herby permitted to remain in the "Proclaimed Area of the Cape Peninsula for the purpose of

"employment/.....

"employment with Cape Peoples Clothing Club, 9 A Main "Road, Newlands. This permit is issued in terms of "Section 10(2)(a) of the Natives(Urban Areas)Consolidated "Act of 1945, as amended by the Native Laws Amendment Act "No. 54 of 1952. The validity of this permit is limited "to the period during which he remains in the service of "the ~~same~~ said employer." The issue of fact at the trial was whether a year after the grant of permission the appellant was still in the service of the same employer.

A new point of a preliminary character was raised on behalf of the appellant on appeal. It was contended that the evidence did not establish that the place where the appellant was alleged to have remained fell within ~~the~~ a proclaimed area within the meaning of section 10(1). A witness, Sergt. van Dyk, gave evidence that he arrested the appellant at his home in the township of Athlone and that Athlone is within the proclaimed area of the Cape Peninsula. It was argued that this did not necessarily mean that the area was covered by a proclamation of the kind referred to in section 10(1) i.e. a proclamation issued under and for the purposes of section 23(1) of Act 25 of 1945. It was submitted that the evidence of van Dyk might/.....

same employer which is laid down in cases falling under paragraph (a) of sub-section (2), one might have such limitations as "for so long as he attends the X training "institute" or "for so long as he is receiving treatment for "the Y complaint from which he is suffering". An example of a limitation in the resolutive form would be one where an aged native, wishing to end his days with his son who lives in an urban area, is granted permission to remain in the area until his death or until the death of his son. But when the period for which the permission has been granted has come to an end there is no doubt that the protection ceases; whether there is a seventy-two hours period of grace after the cessation was canvassed in argument/but does not in my view call for decision. The native is from the cessation or from seventy-two hours thereafter prohibited from remaining in the area and if he remains he commits an offence.

But does it follow that the onus rests on the accused to prove not only that he has been granted permission to remain in the area but also that the permission has not expired ? In favour of this view, it is contended, is the fact that on the form of section 10(1) the offence of remaining in the area for more than seventy-two hours is committed unless one or other of the situations

mentioned/.....

mentioned in paragraphs (a) to (d) exists, and, on the decision in Kula's case (supra), the existence of such a situation must be proved by the accused. If then permission under paragraph (d) is relied on the accused must, so the argument runs, prove all those things that would give him exemption i.e. he must prove that he held a permit which was operative at the material time and not merely that permission had at some earlier date been granted to him. If this were not so, the argument proceeds, and if paragraph (d) is treated as referring merely to the event, consisting of the grant of permission and the issue of a permit, the accused would be protected even if he produced a clearly expired permit. So that, unless paragraph (d) refers to something more than an event and includes the existence of a state of exemption at the time in respect of which the charge is laid, every permit, despite its expressed limitations, would be a perpetual one, which would be absurd. If then paragraph (d) means by permission subsisting, operative permission, that and no less is what the accused has to prove.

There is certainly force in this reasoning. But in the first place it requires that paragraph (d) should be read as meaning "permission so to remain

"has/.....

"has been granted to him.....and is operative at the "time in respect of which he is charged." I am unable to avoid the conclusion that the argument involves a departure from the clear meaning of paragraph (d) as it stands. It does not seem to me to be possible to meet this difficulty by relating "permission so to remain" to the time in respect of which the accused is charged. "So to "remain", as already indicated, means to remain for more that seventy-two hours; paragraph (d) does not purport to refer to any particular period of seventy-two hours but describes the kind of permission, namely, permission to remain for more than seventy-two hours, that has been granted. On the ordinary meaning of paragraph (d) the native has proved the requirements of that paragraph when he has proved that permission of that kind has been granted to him.

It should next be noted that in Kula's case this Court was not concerned with the present problem; it did not have to consider how far the accused had to go in discharging the onus resting upon him in respect of paragraph (d). Moreover the considerations which led the Court to hold that the onus on paragraphs (a)

to (d) lay on the accused, and which are mentioned at page 161 of the report, have little if any application to the question whether a duly granted permission has ceased to provide protection to the grantee. If a period limited by months, years or date is mentioned in the permit, proof of expiry or non-expiry is as easy for the Crown as for the accused. For the permit itself proves whether it is operative or not. In other kinds of case proof might generally be easier for the accused, though it might sometimes be easier for the Crown and would often be ~~as~~ as easy for the one as for the other. In the present case the appellant gave no evidence and presumably he could with ease have made the position clear, but the Crown could apparently also have established it by calling a representative of the Club. However that may be, such considerations cannot affect the interpretation of the section; that interpretation must be equally applicable to cases where all possible evidence has been put before the court but the matter is still in dubio.

The argument that the onus resting on an accused who relies on paragraph (d) can only be discharged by proof that he had, at the time in respect of which he is charged, a then operative permission to remain in the area seems in any event to be too wide; for it would

require him also to prove inter alia that the purpose or purposes for which he was permitted to remain had not been disregarded by him since the issue of the permit. In my view one who has been granted a permit loses the protection afforded by it if he abandons the purpose for which it was granted, just as certainly as if he outstays the period of the permit. Under section 14(1) of the Act he may be removed from the area if he is convicted under section 10(4) and this is difficult to reconcile with his permit continuing to be operative even though he has ceased to observe the purpose for which it was granted. In view of the provisions of sub-section (4) one cannot simply take sub-section (1) by itself and say that if the accused relies on paragraph (d) this means that he must prove an operative permission providing him with protection. Whatever the meaning of "purpose", in cases where the question is whether the permission has ceased to provide protection because the purpose has not been adhered to, the argument that, on the form of sub-section (1), the offence is committed unless an operative exemption under paragraph (d) is proved by the accused, cannot be maintained in its full

width unless sub-section (4) is disregarded. The presence of that sub-section shows that the onus to prove paragraph (d) is not the same as an onus to prove that the accused is fully protected by that paragraph. Had sub-section (4) in its second part read "or who remains "in any area for a ~~period~~ purpose (which expression includes "a period) other than that for which permission so to "remain has been granted" it would certainly have been quite clear that the form of sub-section (1) could not be dominant in the decision of the question of onus. Sub-section (4) does not contain the words in brackets, but the result is the same if they are to be understood upon the proper interpretation of the section taken as a whole. The inquiry is thus shifted to the ascertainment of what is covered by the second part of sub-section

(4)./.....

(4).

That sub-section draws a distinction between two classes of case. The first covers cases of contraventions of the section; taken by itself this might seem to be all-sufficient, as penalising all breaches of the prohibition against remaining more than seventy-two hours in the area. But the legislature did not so regard the matter for it added another class of case - the case of a person ~~f~~ "who remains in any area for a purpose other than "that for which permission so to remain has been granted "to him." The effect in my view was to take out of the class of contraventions of the section cases of failure to adhere to the purpose for which permission has been granted. At first sight sub-section (4) appears to be a somewhat curious provision, but its form is explainable on the lines that the legislature considered that permission cases under paragraph (d) required special mention. For that paragraph exempts every one who has been granted permission. But such a person might not observe the terms of the permission that had been granted to him, and it had therefore to be provided that then, too, he commits an offence.

Sub-section (4) speaks of a purpose other than that for which permission has been granted;

it/.....

it does not speak of the period for which permission has been granted, though the period is specifically mentioned in sub-section (2). One might accordingly be disposed to say that the Crown has to prove that the accused has lost the protection of the permission granted to him by not keeping to its purpose, but that the accused has to prove that he has not out-stayed the permission. But if this were so the position would be surprising if not anomalous. Period and purpose, though distinguished in sub-section (2), are in the present context forms of limitation on the permission which are not dissimilar in nature. If, in a case like the present, one were to ask why the native has been given permission to remain in the area the answer would be, "in order that he "may work for X." And if one were to ask for how long he has been given permission, it would be "for so long as he "works for X." In a case like the present the purpose and period are really inseparable; neither can be proved or disproved without proving or disproving the other. In cases falling outside paragraph (a) of sub-section (2) - and sub-section (4) covers such cases too - one may postulate a case where a native has been granted permission to remain in the area "for medical treatment" or "so long as

"he/.....

"he is receiving medical treatment." It would be strange indeed if when the permit took the first form the onus were on the Crown to prove that the accused remained for a different purpose, while if the permit took the second form, the onus would be on the accused to prove that he did not remain on after the purpose ceased to operate.

If the word "purpose" is used in sub-section (4), as apparently it is used in sub-section (2), in a narrow sense, distinct from "period", the effect to be given to paragraph (d), in the light of Kula's case, would be that the accused must prove the negative, namely, that the protection which he enjoyed has not come to an end by lapse of time, including the termination of his employment, but that he need not disprove the invalidation of the permission by non-adherence to the purpose. Particularly where the permit states the period by reference to the purpose the result would be most awkward, if not actually unworkable. Moreover, as I have indicated above, it would involve recasting of paragraph (d) or, which amounts to the same thing, reading into it a great deal which is not obviously there. Admittedly, on the other hand, if the language of paragraph (d) is given no more than its literal meaning it would, in order to harmonise the provisions, be

necessary/.....

necessary to give the word "purpose" in sub-section (4) a wide operation, so as to include both the period and the purpose mentioned in sub-section (2), and perhaps also other conditions, falling under neither if narrowly construed.

On either view some strain must be put upon the language; either on the language of paragraph (d) or on that of sub-section (4). There are what seem to me to be cogent reasons why it is sub-section (4) that should bear the strain. In contrast with the awkward position that would exist if a narrow meaning were given to the word "purpose" in that sub-section, if the wide meaning is given to it the operation of paragraph (d) becomes simple and reasonable; the accused must prove that the permit was granted to him, while the Crown must prove that the permit has lost its efficacy in one way or another; in all such cases, whether time is involved or not, it may not improperly be said that he has remained in the area for a purpose other than that for which permission to remain there was granted. The purpose (using the word in a narrow sense) would appear to be the dominant notion, for the period was presumably intended to be adequate to the purpose. It is, moreover, not lightly to be supposed that Parliament departed more than was necessary from the

important general principle that the Crown must prove its case. Parliament must be taken to have had in mind the section of the Criminal Code applied in Kula's case (section 315(2) (b) of Act 56 of 1955, or its predecessor), but in so far as it was thought necessary to impose any further onus on the accused this was expressly done - see sub-section (5). I may add that there could, as I see the matter, only be a question of overriding the provisions of section 315 (2)(b), if section 10 were given a different construction from that which I have given to it. Finally, the language of section 10 at least fairly admits of the interpretation which I have preferred and recourse may and, if necessary, should be had to the principle, applied in Rex v. Milne and Erleigh (1951(1) S.A. 791 at page 823), that in dealing with penal provisions the more lenient of two reasonably possible meanings should be adopted.

To sum up, the preferable interpretation of section 10 seems to me to be that it makes it an offence for a native to remain in the area for more than seventy-two hours, but that he must be acquitted if he proves that the permission referred to in paragraph (d) has been granted to him. If, however, the Crown proves that, although a permit has been granted to him, it was not

operative/.....

operative at the time in respect of which he was charged it has proved him guilty of the offence mentioned in the second part of sub-section (4).

For these reasons I have come to the conclusion that upon the main charge, too, the onus rested upon the Crown to prove that the permit was not operative on or about the 11th May 1955 because the appellant was no longer in the service of the Cape People's Clothing Club. It is unnecessary to refer to the evidence in detail for I agree with WATERMEYER J. that it did no more than leave in doubt whether the appellant had left the service of the Club at the time in respect of which he is charged. The Crown accordingly did not prove the case against him beyond reasonable doubt.

In my view the appeal should be allowed and the conviction and sentence be set aside.

O.D. Schreiner

22.9.56

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

GREENWOOD NGOTYANA Appellant

and

R E G I N A Respondent

Coram: Schreiner, Fagan, Steyn, Reynolds et de Villiers JJ.A

Heard: 29th. August, 1956. Delivered: 25-9-1956

J U D G M E N T

STEYN J.A. :- The relevant provisions of section 10 of the Act are set out in the judgment of my brother SCHREINER. The dominant provision in that section is that, in the areas mentioned therein, which may be broadly described as urban areas, and with the specified exceptions, "no native shall remain for more than seventy-"two hours." As stated by van den HEEVER J.A. in Regina v. Kula and Others (1954(1) S.A. 157 at page 165), in regard to this section: "The prohibition factum for the purposes "of the present case is to remain for more than seventy-"two hours in an urban area. Once the Crown has averred "and proved that the accused is a native within the meaning-

"of/.....

"of the definition and that he has remained in an urban "area for more than seventy-two hours, it has averred and "proved all the incriminating factors contained in the "statutory prohibition." Paragraphs (a) to (d) of Section 10(1) being, according to that decision (at page 161), exceptions, exemptions, provisos, excuses or qualifications within the meaning of Section 127(2) (b) of Act 31 of 1917 (which is now Section 315(2) (b) of Act No. 56 of 1955), they may, in terms of that section, "be proved "by the accused but need not be specified or negatived in "the charge and, if so specified or negatived, need not be "proved by the prosecution." The effect of this is that prima facie if any accused who is charged under this section with having remained in an urban area for more than seventy-two hours, claims to be excused from observance of the general prohibition by reason of the provisions of paragraph (d), it is for him to show by a balance of probabilities that he is so excused. That cannot, I think, and does not appear to be disputed. The ~~only~~ question then is what an accused must prove in order to come within the exemption under that paragraph. What does paragraph (d) mean ? What it says is that an accused will be excused from the prohibition

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where permission to remain in the urban area for more than seventy-two hours has been granted to him. On a scrupulously literal reading this would mean that once a native has been issued with a permit under paragraph (d) he is, in respect, at any rate, of the area in question, permanently exempted from the prohibition, whether or not the permit has expired. Whatever the charge under section 10(1) may be in relation to such area, the contention that permission to remain in the area for more than seventy-two hours has been granted to him, would always be literally correct, and if such a literal reading reflects the true meaning of this paragraph, that would always be a complete defence. In fact, any evidence by the prosecution that the permit was no longer valid at the time to which the charge relates, would be irrelevant and inadmissible. The only relevant consideration would be whether or not the accused had in fact been granted permission to remain in the area in question for more than seventy-two hours. Once that appears there would be an end to the case, no matter what other limitations may have been imposed in regard to the duration of the permit or the purpose for which it may be used. From this effect of a rigid adherence to the precise meaning of the words used, I can see no escape;

and/.....

and I have no doubt that Parliament could not possibly have intended to say any such thing. It is plain, I think, that the words in paragraph (d) were not intended to have and cannot be given any such abstract literal meaning. They readily find a sensible meaning if construed not in vacuo, but in relation to concrete cases. In relation to an accused charged with having remained in an urban area for more than seventy-two hours at a particular time, the words "permission to remain" in this paragraph could hardly have been intended to refer to a remaining at a time which the accused may at his pleasure select to bring it within the period covered by his permit. They would much more appropriately refer to a remaining at the time selected by the prosecutor as the time at which Section 10(1) was contravened by the accused, and I can find nothing in Section 10 which militates against such a construction. Neither would any amendment of the Section be necessary to express that meaning. The words used are well capable of it. If that is the right construction, as I think it clearly is, the accused would not come within the exemption if the permit granted to him is no longer operative at the time stated in the charge. That the lapsing of the permit would take him out of the exemption in regard to a period

subsequent thereto appears to be conceded. But once that is conceded, it must follow that the subsistence of a valid permit is an essentail element of the exemption and that, in the absence of some provision to the contrary, it would, in terms of Sec. 315(2)(b) of Act 56 of 1955, be one of the facts which the prosecution is not required to negative in the charge or to disprove if so negatived, and which the accused must prove if he wishes to rely upon the benefit of the exemption.

Is there any such provision to the contrary, overriding the provision in Sec. 315(2)(b) of the 1955 Act or modifying what would otherwise be the result of its application of the exemption ? It is suggested that Sec. 10(4) contains such a provision. The contention appears to be that the effect of the provision in this Section making it an offence for any person to remain in any area for a purpose other than that for which permission so to remain has been granted to him, is to leave on the accused the onus of proving one element of the exemption i.e. the grant to him of a permit to remain for more than seventy-two hours, and, in spite of the provisions in Section 315(2)(b), to cast upon the prosecution the duty of negativing and disproving the other element of the exemption, i.e. the continued operation of the permit. The argument in

support of this contention, if I understand it correctly, proceeds from the assumption that whenever the offence referred to is committed, the permit lapses. As a result thereof, it is argued, certain anomalies would arise if an accused were to be required to discharge the onus of proving all the elements of the exemption under paragraph (d). This assumption appears to me to be wrong. It is true that in terms of Sec. 10(2), a permit must indicate both the period and the purposes for which the native concerned may remain in the area in question, but in terms of paragraph (a) of the proviso to this sub-section, it is only where a native has been permitted to remain in any area for the purpose of taking up employment, that "the period of validity "of the permit shall be limited to the period during which he "remains in the service of the employer by whom he has been "engaged." It is in such a case only that by express provision the period of validity is to co-incide with the duration of the purpose for which the permit is issued. In such a case a permit would not specify a definite period of time. It would be sufficient to state, as was done in this case, that the validity of the permit is limited to the period during which the holder remains in the service of the employer in question. There is no similar provision in regard to permits issued for any other purpose. It is clear, I think, that such permits could specify a definite period while at the same time

indicating.....

indicating the purposes for which they ~~may be~~ have been issued. If such a permit is used for another purpose, the holder would commit an offence under Section 10(4), but it would not follow that the permit would on that account lapse before the expiry of the period mentioned therein. That would be contrary to the tenour of the permit itself, as reflected by the indication, in pursuance of the requirement in Section 10(2) of the Act, of a definite period for its duration, without any indication of any other event which will affect its validity. In such a case, therefore, a prosecution under Section 10(1) could not succeed. The charge would be ~~xxxxxxx~~ answered by production of the permit. Such cases would be met by the provision in question in Section 10(4). On conviction for a contravention of this provision, the native concerned may under warrant be removed to his home or his last place of residence (Section 14(1)), but that again does not necessarily imply that the permit has lapsed. The power of removal is discretionary and is accounted for by the abuse of the permit. There is no apparent reason why a native should , for instance, not be allowed to remain under the permit already issued to him, notwithstanding his conviction, if it should appear that he will in future confine himself to the purpose authorized by the permit. In the

first place, therefore, it would be incorrect to suggest that in all cases the offence of remaining after the permit has lapsed and the offence of remaining for a purpose other than that for which permission has been granted would be committed at the same time. In the second place it does not appear that even in the case of a permit issued for the purposes of employment, these offences would be so committed. The words "who remains in any area for a purpose "other than that for which permission so to remain has "been granted" in Section 10(4), rather seem to imply the existence of a valid permit, specifying a purpose binding upon the holder of the permit. Once a permit has lapsed, no such binding purpose can be derived from it in relation to any period subsequent to the lapsing. In respect of such a period the permit does not exist at all and the purpose for which it was issued becomes completely irrelevant. A native cannot, therefore, be charged with this offence under Section 10(4) because of any activities he may have entered into after his permit has been invalidated by the termination of his services with the employer contemplated by the permit. In regard to lapsed permits issued for purposes other than employment, the position would be the same.

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The offence under Sec. 10(1) and the offence under the second portion of Sec. 10(4) are not only separate and distinct offences but they can also not be committed at the same time. They have different fields of operation and serve different purposes. The first offence cannot be committed except in relation to a period in respect of which there is no permit and the second offence cannot be committed except in relation to a period in respect of which there is an operative permit. The one is directed against unlawful presence in an unban area, while the other aims at the enforcement of what may be regarded as the conditions of lawful presence. The exemptions in Sec. 10(1) fall entirely outside the ambit of the second offence and it is in no way affected by any of them. In my view the exemption under Sec. 10(1)(d) is equally unaffected by the nature of the second offence under Sec. 10(4).

But even if both offences could be committed at the same time, it is not apparent how that would show that Sec. 10(4) has such effect upon Sec. 10(1)(d) as would qualify what would otherwise be the ordinary incidence of Sec. 315(2)(b) of the 1955 Act upon the onus of proof in relation to this exemption. The offences would still be separate and distinct. If on such an interpretation a prosecutor charges a contravention of Sec. 10(1), proof of the exemption would lie with the accused. If he prefers to proceed under the relevant provision in Sec. 10(4), he would

even on the same facts, be alleging a different offence and would have to discharge the full onus of establishing his case without the assistance of Sec. 315(2)(b). It is true that, depending upon the meaning to be given to the words already quoted, he would then have to prove facts which may or will incidentally at the same time show that the permit is no longer valid, while the accused would, in the case of a charge under Sec. 10(4), have to prove as an essential part of his defence, facts showing the contrary. If from this there arises any anomaly, I do not think it is such an anomaly as would in itself justify any departure from the apparent intention expressed in Sec. 10(1)(d) or any modification of Sec. 315(2)(b) in its application to this exemption. Any such anomaly may in any case be said to point equally strongly to the correctness of the view that these offences cannot be committed at the same time. In the result, I am unable to find any clear implication arising from Sec. 10(4) which would have the effect of dividing the onus of proof and disproof of the abovementioned elements of this exemption between the

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accused and the prosecutor. In my opinion Section 315 (2)(b) applies without any such modification and the appellant had to prove both elements of the exemption~~s~~ ~~this time stated in the charge~~

It remains then to consider whether such proof has been adduced. The permit, dated 14th May 1954, which was placed before the trial court, did not specify any fixed period for its duration, but limited its own validity to the period during which the appellant remained in the service of the Cape People's Clothing Club. It did not, therefore, in terms proclaim its own validity or invalidity at the time stated in the charge. Evidence was necessary to show whether at that time the appellant was employed by this Club. Although this was a matter very much within the appellant's knowledge, he elected to give no evidence and to lead no evidence. His contention on appeal is that the evidence led by the prosecution shows that on a balance of probabilities he was so employed at the time in question. This evidence discloses that the appellant entered the employ of this Club on 1st May 1954 as a messenger and cleaner. From 4th June 1954, at the latest, he was the general secretary of a Non-European trade union, the S.A.

Railways/.....

Railways and Harbours Workers' Union. The evidence as to the relative dates is not clear, but he did in that capacity occupy an office in a building some six miles from the premises of the Cape People's Clothing Club and he was on a number of occasions after 14th May 1954 seen by various persons in this office or entering or leaving this building. He went about in that vicinity neatly dressed - apparently more so than one would expect in the case of a messenger and cleaner - and carried a briefcase. There is no evidence as to the membership of this union, but if it is a large one, as may well be the case, having regard to the number of Non-Europeans working for the Railway Administration, the work of the general secretary would be a full-time occupation. In the beginning of January 1955, the appellant was still in the office in this building, and as late as the beginning of May he was seen at this building. In addition to this work the appellant was the secretary of another organisation, the Congress of the People. Here also there is no satisfactory evidence as to dates, but there are documents signed by him in that capacity in August and September 1954, and in the beginning of May, 1955, he was on three successive

days/.....

days seen at the premises occupied by this organisation. There is further evidence that during October 1954, the premises of the Cape People's Clothing Club were kept under observation for a week and three days and found to be locked during the day, although on a later occasion they were found to be open. One of the witnesses who had occasion to visit these premises on several occasions between October and December 1954, says that he never found any natives there. From 12th May until 16th May, 1955, these premises were kept under observation. On the first day the appellant arrived there at 12.45 p.m. and remained for 40 minutes. On the second day he was seen to arrive at 10. 10 a.m., but because of the crowds passing the door the observer could not say when he left. On the third day he did not come at all, and on the fourth he came at 10.20 a.m. and left again five minutes later. There is also some relevant evidence by a clerk in the employ of the City Council of Cape Town, who is in charge of the native services levy. In so far as his evidence may be regarded as admissible, the last payment of levy by the Club was received on 30th May 1955, and was made in respect of the period 1st January to 14th January 1955. Prior to that payments had been made for the period May 1954 to December 1954. For the period 14th

January/.....

January 1955 to 11th May 1955, no payments were made. He does not say whether these payments were made in respect of the appellant, but his statement that he has knowledge that the appellant went on leave on 14th January 1955, for what it may be worth, and that no levies are payable while an employee is on leave, suggests that they were so made.

Counsel for the appellant sought to rely, in addition to the evidence led by the prosecution, upon the presumption of continuance referred to in Rex v. Fourie and Another (1932 A.D. 31 at page 42), the argument being that the continued employment of the appellant by the Club is on the strength of this presumption to be inferred from the fact of his bona fide employment by it some twelve months earlier. In Fourie's case this Court described this presumption as "a mere statement of "probability, derived from the common experience of man-"kind," and pointed out that "Its scope and intent is "that from the ~~evidence~~ existence of a state of things at "a given time, it may be inferred that that state con-"tinued to exist for a reasonable time thereafter, accord-"ing to the circumstances and the nature of the thing." This presumption, if it can be invoked in a case of this nature, cannot in my view, be of any real assistance to

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the appellant. It may certainly be doubted whether common experience points to the probability that a bona fide employer will, except in very special circumstances not disclosed by the evidence, continue in his employ for twelve months an employee who quite clearly is continuously devoting a great deal of his time during working hours at a place six miles from the employer's premises, to other occupations. I am unable to accept, therefore, that any such presumption could in this case dispel the general impression left by the evidence that the employment of the appellant at the Club, even if initially bona fide, may very well have become a pretence, and merely served to enable him to do the real work he was performing, i.e. the work of the abovementioned organisations. On the evidence that is a patent possibility. Of actual work performed at the Club, there is no direct evidence whatsoever, and the indirect evidence is scanty indeed, while there is quite a volume of evidence of what may be full time occupation in an office in Stalplein buildings, as secretary of a trade union, and of further work done as secretary of the Congress of the People. That the appellant in these circumstances thought fit not to refute, by

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giving or leading evidence, the contention that he was not employed by the Club at the time stated in the charge, is another consideration which cannot be ~~left~~ discarded. Having regard to this consideration and to the general effect of the evidence led by the prosecution, it cannot be said, I think, that a probability of continued employment of the appellant by the Club at the time stated in the charge, has been established.

I agree that there is no substance in the further point taken on appeal that there is no evidence to prove that the area in which the appellant remained was a proclaimed area for the purposes of Section 10 of the 1945 Act.

In my opinion the appeal must be dismissed.

L. C. Steyn.

de Villiers J.A. Concurs.

APPELLATE DIVISION

REGINA versus NGOTYANA

FAGAN J.A.: The judgment of my brother Schreiner sets out both the facts of the case and the relevant provisions of Act 25 of 1945 as amended by Act 54 of 1952.

In answer to the charge of remaining in the urban area for more than seventy-two hours the appellant relies on a permit which permitted him "to remain in the proclaimed area.....for the purpose of employment with the Cape Peoples Clothing Club," and the validity of which was stated in the permit itself to be "limited to the period during which he remains in the service of the said employer." The effect of this limitation, read with section 10(2)(a) of the Act, was to make the validity of the permit depend on the appellant's continuing in the service of the Club.

I do not think that the production of a document which could be a valid permission only under certain circumstances discharged the onus resting on the appellant to prove permission unless it was also shown that those circumstances existed at the time to which the charge related. A document that may or may not have validity, depending on specified circumstances, does not prove its own effectiveness as long as those circumstances remain unproved.

My brother Steyn points out in his judgment that a man cannot properly be said to be bound by conditions attached to a permit which is no longer valid and therefore has no legal existence. The

alternative

alternative offence created by s. 10(4) would therefore seem to postulate that there may be cases in which a permit remains valid despite the fact that the permit-holder is remaining in the area for a purpose other than that for which permission so to remain was granted to him. As I have indicated, however, the limitation in the present case, where the purpose is employment with a particular employer, is one which brings about the invalidation of the permit itselfwhen the Native leaves that employment. Whether it can be argued that, as the permit is valid up to the moment when he leaves that service, his act in so doing without leaving the area may also make him guilty of the alternative offence, is a point I need not consider, for it is sufficient for the present case to say that from that moment onwards he remains in the area with no valid permit and therefore without permission; and that while the onus to show that he has departed from the purpose of his permit rests on the Crown if that is the charge against him, the charge of being in the area without permission throws on him the onus of proving the necessary permission.

I agree with my brother Schreiner that there was sufficient evidence that the locality in which the appellant was found was within an area proclaimed for the purpose of section 10(1), and agree with him and my brother Steyn that the evidence left the question of the appellant's continued employment with the Cape Peoples Clothing Club — on which I hold the onus to have rested on him — in doubt.

I therefore consider that the appeal should be dismissed.

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