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G.P.-S.117539—1954-5—5,000. U.D.J 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

ATTORNEY-GENERAL OF TRANSVAAL
Appellant.

versus/teen

FLATS MILLING CO (PTY) LTD & OTH.
Respondent.

Appellant's Attorney — *Respondent's Attorney*
Prokureur van Appellant — *Prokureur van Respondent*

Appellant's Advocate M. W. Botha — *Respondent's Advocate* G. Findlay Q.C. + R. Peart.
Advokaat van Appellant — *Advokaat van Respondent*

Set down for hearing on:— Tuesday 6th May, 1958.
Op die rol geplaas vir verhoor op:—

9.45 – 12.50.
2.15 – 2.35 – CAV

— Appeal dismissed, with costs.

Fagan, C.J., de Beer, Beyers, Price (Ag.) & Thompson (Ag.) JJ.A.

Registrar. 22/5/58

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE ATTORNEY-GENERAL OF THE TRANSVAAL .... Appellant.

and

FLATS MILLING CO. (PTY) LTD. .....1st. Respondent

A. BOBROW .....2nd Respondent.

D. BOBROW. ..... 3rd Respondent.

Coram: Fagan, C.J., De Beer, Beyers, JJ.A., Price et Ogilvie Thompson A.JJ.A.

Heard: 6th May, 1958. Delivered: 22nd May, 1958

J U D G M E N T.

OGILVIE THOMPSON, A.J.A.:

The three Respondents - a private company, represented by one of its Directors, and two Directors of the Company in their individual capacities - were charged before the Magistrate of Potgietersrust with contravening various Regulations contained in the annexure to Proclamation No.205 of 24th October 1946 (as amended) read with War Measures Continuation Acts Nos. 29 of 1950 and 31 of 1952, further read with Government Notice No.694 of 12th April 1954 read with Act 51 of 1954 and Section 381 of Act 56 of 1955. The substance of

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the charge was that Respondents had in contravention of the above mentioned provisions sold 3091 bags of kaffir corn of the 1954 crop to a person who was not in possession of a permit or other authority prescribed by the said Government Notice No.694 of 1954. All three Respondents were found guilty and on 25th October 1955 they were each fined £50 (or one month I.C.L.): in addition judgment was, in terms of the aforesaid provisions, entered against them in favour of the Director of Food Supplies and Distribution in the sum of £4250 - 6 - 6. An appeal was noted against this conviction and sentence, but, before the appeal was heard, an application was made by Respondents to the Transvaal Provincial Division for leave to lead certain further evidence. The grounds upon which the application was made are not before us, but it is common cause that the Provincial Division allowed the application, set aside the conviction and sentence, and remitted the case to the Magistrate for further evidence. Pursuant to the Provincial Division's order, the case - after an intermediate remand - again came before the Magistrate on 6th February 1957.

On this last mentioned date, Third Respondent, who

had...../3

had given brief evidence at the trial, was recalled by Defence Counsel and gave further evidence. In the course of this evidence Third Respondent deposed that the Kaffir corn forming the subject matter of the charge had been sold to The Pietersburg Produce Co. who, he said, were authorised to buy and sell Kaffir corn. Third Respondent also, in the course of his evidence, referred to certain letters (Exhibits J (1)-(8)) from the Director of Food Supplies which, he claimed, supported his assertion that the Pietersburg Produce Co., of whom one Worms was apparently the Managing Director, was duly authorised to purchase Kaffir corn. Third Respondent also deposed that Worms had been subpoenaed by the Crown but had not been called. In short, the Defence advanced in 3rd Respondent's testimony was that the Kaffir corn in question had been sold to a buyer (viz. The Pietersburg Produce Co. acting through Worms) who was duly authorised by permit to purchase.

After Third Respondent had been re-examined by his counsel, the Magistrate briefly interrogated him. The Magistrate's record of the proceedings from this point on reads as follows:

" By Court: ...../4

"By Court:

Mr. Worms informed me that he was an appointed agent to purchase kaffir corn. The letters Ex. J.1 to J.8 satisfied me that Mr. Worms was an appointed agent.

DEFENCE EVIDENCE CLOSED.

Crown has no further witnesses to call.

Public Prosecutor addresses Court: Art. 6(4) Onus op besk. Worms sal Besk. staaf.

Onder omstandighede en getuienis nou gegee moet Hof beskuldigdes ontslaan.

ALL THREE ACCUSED: NOT GUILTY AND DISCHARGED."

Appellant then required the Magistrate to state a case, in terms of Section 104(1) of Act 32 of 1944, for the consideration of the Court of Appeal (i.e. the Provincial Division). In complying, the Magistrate, as his " findings of fact in so far as they are material " (vide section 104(1)), stated that:

> "The Public Prosecutor at the end of the case for the Defence and in his address to the Court, used the following words:
>
> ' Onder omstandighede en getuienis nou gegee moet die Hof die Beskuldigdes ontslaan.' "

He went on to say that on this, he had decided " that the Public Prosecutor had in fact withdrawn the case against the Accused", and that the Prosecutor had made " an implied request to the Court to discharge the Accused ". The Magistrate then, as required by section 104(1), stated two "questions of law" in the following

terms...../5

terms, viz.:

" (a) Was the Court's interpretation wrong, that by the use of the said words, the Public Prosecutor had withdrawn the case against the accused?
(b) Has the Public Prosecutor the right to withdraw a case at any stage of the proceedings or is this right reserved to the Attorney-General personally? "

In terms of Section 104(2) of Act 32 of 1944, Appellant then appealed to the Transvaal Provincial Division against the Magistrate's decision as set out in the stated case, the grounds of appeal being ~~set out~~ stated in the notice of appeal as follows:

" (a) That the Magistrate erred in interpreting the words used by the Prosecutor to mean in law that the Prosecutor had withdrawn the case.
(b) That in any event the Magistrate erred in holding that the Prosecutor and not only the Attorney-General was empowered by section 8 of Act No.56 of 1955 to "stop" a prosecution as envisaged by that section. "

Contemporaneously Appellant issued a review summons in which he claimed that the best evidence of Worm's authorization to buy Kaffir corn had not been led, that Exhibits J (1)-(8) were inadmissible, and that 3rd Respondent's above-recorded reply to the Magistrate, being hearsay, was in any event, inadmissible.

When the matter came before the Provincial Division the

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latter, without ~~leading~~ deciding any of the legal issues raised in the stated case and review, dismissed both the appeal and the review and, in terms of Section 105(2) of Act 32 of 1944, awarded Respondents their taxed costs of appeal. The Provincial Division declined to decide any of the legal issues raised by the Appellant for the reason that,in the Court's view, those issues were merely academic since Respondents were, in any event, entitled to an acquittal on the ground that the above-cited remarks of the Prosecutor constituted an admission of a fact (viz. that Worm's company held a buyers-permit authorizing the purchase from Respondents) which Respondents had to prove in order to secure their acquittal.

Being dissatisfied with the decision of the Provincial Division, Appellant has now, pursuant to the provisions of Section 105(1) of Act 32 of 1944, appealed to this Court. In the notice of appeal to this Court, the grounds of appeal are set out as follows :

> "The Court a quo erred in holding that when deciding a question of law in a case stated in terms of Section 104 of Act 32 of 1944 it was entitled
>
> (a) to take into consideration matters extraneous to that stated case; and
>
> (b) to refrain from giving a decision on that question of law; and
>
> (c) alternatively that the Court a quo erred

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"in holding that it was entitled to decide the matter in issue on facts extraneous to the stated case at a juncture when those facts had not yet been finalised and the Magistrate had not yet given a decision on those facts. "

Section 104(1) of Act 32 of 1944 provides that when a Magistrate has in criminal proceedings " given a decision in favour of the accused on any matter of law " the Attorney-General may require him to state a case for the consideration of the Court of Appeal " setting forth the question of law and his decision thereon, and, if evidence has been heard, his findings of fact in so far as they are material to the question of law." In terms of Subsection (2), the Attorney-General may appeal from this decision to the Court of Appeal referred to in section 103(1): and such appeal must be prosecuted in terms of section 103(3). Subsections (4) and (5) of Section 104 go on to provide:

" (4) If an appeal under sub-section (2) is allowed, the magistrate's court which gave the decision appealed from shall, subject to the provisions of sub-section (5), after giving sufficient notice to both parties, reopen the case in which the decision was given and deal with it in the same manner as it should have dealt therewith if it had given a decision in accordance with the law as laid down by the court of appeal.

(5) In allowing such appeal, whether wholly or in part, the court of appeal may itself impose such sentence upon the respondent or make such order as the magistrate's court ought to have imposed or made, or it may remit the case to

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the magistrate's court and direct that court to take such further steps as the court of appeal thinks proper."

Section 105(1) of Act 32 of 1944 reads as follows:

105(1) When in any criminal appeal, whether brought by the accused or by the Attorney-General or other prosecutor, the court of appeal has given a decision in favour of the accused on a matter of law, the Attorney-General or other prosecutor against whom that decision was given may appeal to the Appellate Division of the Supreme Court which shall, if it decides the matter in issue in favour of the appellant, set aside or vary the decision appealed from and-

(a) if the matter was brought before the provincial or local division of the Supreme Court in terms of sub-section (1) of section 103, reinstate the conviction sentence or order of the magistrate's court appealed from, either in its original form or in such a modified form as the Appellate Division may think desirable; or

(b) if the matter was brought before the provincial or local division in terms of sub-section (2) of section 104, give such decision or take such action as the provincial or local division ought, in the opinion of the Appellate Division, to have given or taken (including any action under sub-section (5) of section 104) and thereupon the provisions of sub-section (4) of that section shall mutatis mutandis apply.

As appears from the foregoing, Appellant's grounds of appeal to this Court do not coincide with his grounds of / 9

of appeal to the Provincial Division. Having regard to the provisions of sub-section 105(1) of Act 32 of 1944, that is not necessarily fatal. In terms of that subsection the Attorney-General may appeal to this Court when the Court of appeal (in this instance, the Provincial Division) " has given a decision in favour of the accused on a matter of law." It is conceivable that a Court of appeal might decide a question of law brought before it by the Attorney-General under section 104 in his favour but at the same time give "a decision in favour of the accused on a matter of law". In such a case the Attorney-General would have the right to appeal to this Court under section 105(1) and his grounds of appeal - if any were stated (vide infra) - would differ from those placed before the Court of appeal. Moreover, although it will often be desirable that he should do so, the Attorney-General is not compelled, when appealing to this Court under section 105, to furnish any grounds of appeal. (See Attorney-General (Transvaal) versus Moores (SA) (Pty) Ltd.(1957 (1) SA 190 (AD)) It must, however, be emphasized that the Attorney- General's appeal to this Court, pursuant to the provisions of subsection 105(1), is restricted to cases where the court a quo " has

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given a decision in favour of the accused on a matter of law". As was laid down in Moores' case (supra at page 196), this Court will examine the reasons of the Court a quo in order to determine whether that court gave such a decision: and, if it appears from the reasons that the Court a quo gave a decision in favour of the Accused, not on a matter of law, but on the facts, this Court will not entertain the appeal.

In the present case the Provincial Division decided the appeal in favour of the Accused on the facts, and, in my view, that was a correct decision. The issue at the trial was whether Worms' company held a buyers-permit authorizing the purchase of kaffir-corn from the Accused. Third Respondent deposed - albeit in terms of hearsay - that Worms' company did hold such a permit. The only possible construction to be placed upon the above quoted remarks of the Prosecutor is that he, on behalf of the Crown, admitted the existence of such a permit and added that, accordingly, the Magistrate must now discharge the Accused. The Provincial Division's decision in favour of the Accused was, therefore, on the facts and not " on a matter of law " within the meaning of subsection 105(1). It follows that, even if it be assumed that the

Magistrate incorrectly decided the two questions of law propounded by him in the stated case, no appeal would lie to this Court against the decision of the Provincial Division if that Division had the right to decide the case on the facts. It is this right, however, which the Appellant, though perhaps somewhat indirectly, challenges in the submissions set out in his notice of appeal.

As regards the first of Appellant's grounds of appeal - namely, that the Provincial Division erred in taking into consideration matters extraneous to the stated case - it is true that, ideally speaking, all relevant facts should appear in the stated case. Subsection 104(1) requires the Magistrate to "set forth the question of law and his decision thereon" and also, if evidence has been led, " his findings of fact in so far as they are material to the question of law". The Magistrate may, however,not always succeed in doing this. The present case affords an apt illustration. In order to determine the precise significance of the Prosecutor's above-cited remarks, it is necessary to ascertain the full context in which these remarks were made. The case stated by the Magistrate fails to reveal that full context.

It was, consequently, necessary for the Provincial Division to ascertain the full context, and it could only do so by having recourse to the record of the trial. Moreover, always to restrict the Court within the confines of the stated case might, in certain circumstances, preclude the Court from determining whether or not the questions of law which have been raised are merely academic - an aspect of the matter which is dealt with later in this judgment.

The foregoing considerations lead me to the conclusion that, while the Court will, in deciding appeals under sections 104 and 105 of Act 32 of 1944, as a general rule confine itself to the findings of fact as reflected in the case stated by the Magistrate under Section 104(1), that is not an absolute rule: in appropriate cases the Court of appeal, and this Court, may have recourse to the facts of the case as disclosed at the trial. In so far as they indicate the contrary, the following cases must be held to have been wrongly decided: Attorney-General versus Port (1938 T.P.D. 208 at 212); Attorney-General versus Devon Properties (Pty) Ltd. (1952 (2) S.A. 328 (T)); Rex versus Foley (1953 (3) S.A. 496 at 499 (E); Rex versus Bono (1953 (3) S.A. at 310 (C)).

Appellant's third ground of appeal is that the Provincial Division erred in holding that it was entitled to decide the matter in issue on facts extraneous to the stated case at a juncture when those facts " had not yet been finalised and the Magistrate had not yet given a decision on those facts." The Provincial Division gave no express ruling or decision on this point. The Attorney-General is thus himself formulating, as a point of law, something which was never considered in that form by the two Judges who sat in the Provincial Division because he apparently considers that the view that he attributes to them is implicit in their judgment. The learned Judges may well have considered that the facts had been "finalised" when both the Crown and the defence closed their cases in the Magistrate's court, and that the Magistrate's judgment was in effect a decision on them. Whether they did so or not, the form in which the question is put to us can not rightly be regarded as a submission on "a decision in favour of the accused on a matter of law" which was "given" by the Court a quo; and I accordingly do not see how it can be brought within the wording of section 105(1) of the 1944 Act. In so far, however, as it

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is really simply another formulation of the Appellant's objection to the Provincial Division's decision that on the facts of the case the accused had to be acquitted, and that therefore the points of law on which the Attorney-General appealed to it were academic, this ground of appeal is disposed of by what is set out in the remainder of this judgment.

I turn now to the contention of substance advanced by Appellant in his second ground of appeal: namely, that the Provincial Division was not entitled to refrain from giving any decision on the two questions of law which Appellant had brought before it in terms of section 104(2). The contention thus advanced is that the Court of Appeal is, wholly irrespective of the ~~ø~~ effect upon the conviction or acquittal of the accused, obliged to decide any question brought before it by the Attorney-General in terms of section 104(2). This contention is directly supported by, and is in entire conformity with, the decision in Attorney-General versus Devon Properties (Pty) Ltd., supra, and other cases which have

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followed that decision.

In dealing with appeals to it by the Attorney-General under section 105, this Court has consistently declined to decide academic questions of law which have no bearing upon the conviction or acquittal of the accused. Thus in Rex versus Burwood (1941 A.D. 217), which came before this Court on appeal by the Attorney-General pursuant to the provisions of Section 100 ter of Act 32 of 1917 (which were identical with those of the present Section 105 of Act 32 of 1944), Tindall J.A., giving the judgment of the majority of the Court, said at page 226:

> " The provision requiring the Appellate Division, if it decides the matter in issue in favour of the Attorney-General, to reinstate the conviction by the Magistrate (either in its original or a modified form), shows that sec. 100 ter does not give a right of appeal on academic questions of law but on questions of law on the the correct decision of which the conviction or acquittal of the accused depends."

Rex versus Burwood (supra) was applied in Rex versus Singh (1944 A.D. 366) and was followed as recently as Attorney-General (Transvaal) versus Raphaely (1958(1) 309 (A.D.)). In this last mentioned case, the point was raised by this Court mero motu and, because the notice of appeal did not attack

the acquittal of the accused, the appeal was struck off the roll. In both Burwood's and Raphaely's cases it was the accused who had appealed against the Magistrate's decision: the appeals to this Court were consequently governed by the identical provisions of subsection 100ter (1)(a) of Act 32 of 1917 and subsection 105(1)(a) of Act 32 of 1944 respectively. Singh's case had been brought before the Provincial Division by the Attorney-General and the latter's further appeal to this Court was, therefore, governed by the provisions of subsection 100ter (1)(b) of Act 32 of 1917 (which were identical with those of section 105(1)(b) of Act 32 of 1944.)

In his argument for Appellant in the present case Mr. Botha accepted the situation, as laid down in Burwood's and Raphaely's cases (supra) - viz: that this Court will not decide academic questions of law - in relation to appeals falling under subsection 105(1)(a); but, contending that the position was radically different for appeals falling under subsection 105(1)(b), urged us to overrule Rex versus Singh (supra) which, he claimed, incorrectly applied Rex versus Burwood. Appeals falling under subsection 105(1)(b) - so Mr. Botha's argument continued - are not to be distinguished

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from appeals falling under section 104; which latter (together with its identical predecessor section 100bis) was, in Mr. Botha's submission, correctly construed in Attorney-General versus Devon Properties (Pty) Ltd. (supra) and in the other cases which followed that decision.

In Rex versus Singh (supra) Tindall J.A., in delivering the judgment of the Full Court, said at page 373:

> " Though in the present proceedings we have to deal with a matter which was brought before the Provincial Division in terms of sec. 100 (bis), and in which, in compliance with that section, the magistrate stated a case setting forth questions of law, the facts have an important bearing on the decision to be given. For in both the Provincial Division and the Appellate Division, if the appeal of the Attorney-General is allowed, the decision is not merely academic, but has the practical results mentioned in secs. 100(bis)(4) and 100(ter)(1)(b) respectively. As was explained in Rex v. Burwood (1941, A.D. 217, at 226), sec. 100(ter) does not give a right of appeal on academic questions of law but on questions of law on the correct decision of which the conviction or acquittal depends. The Attorney-General cannot, by making use of the machinery provided by secs. 100(bis) and 100(ter), claim to be entitled to raise a question of law which does not arise on the facts as proved by the evidence in the particular case."

This passage is clear and explicit. There is no substance in Mr. Botha's contention that Rex versus Burwood was incorrectly

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applied. As is apparent from the words used by the learned Judge in the above-cited passage, he was fully appreciative of the fact that the appeal fell to be dealt with under sub-section 100ter(1)(b) (now 105(1)(b)). In Burwood's case the refusal to decide academic points of law was based upon the provision, occuring in subsection 100ter(1)(a) (now 105(1)(a)), that if this Court allows the appeal it shall "reinstate the conviction sentence or order of the Magistrate's court etc.": in Singh's case that refusal was based upon "the practical results mentioned in section 100(bis)(4) and 100(ter)(1)(b) (now 104(4) and 105(1)(b)) respectively". No good grounds suggest themselves for differentiating between subsections 105(1)(a) and 105(1)(b) in relation to the matter under discussion. For that reason, and for the reasons which will appear from what is said below in relation to section 104, I find myself in respectful agreement with what was said in Rex versus Singh supra. The law as there laid down in relation to section 105(1)(b) must, accordingly, be reaffirmed.

I turn now to a consideration of the provisions of section 104, pausing only to remark that, curiously enough, neither Burwood's case nor Singh's case was mentioned in

Attorney-General versus Devon Properties (Pty) Ltd. (supra) or in any of the decisions which followed it. Under the Common Law our Courts will not ordinarily decide academic questions. As Innes C.J. put it in Geldenhuys and Neethling versus Beuthin (1918 A.D. 426 at 441), " Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions, however important." This situation should not,in my view, be held to be altered by a statutory provision unless the wording of the latter points clearly to such a conclusion (cf. the remarks of Greenberg J. - as he then was -, made in relation to the provisions of Section 102 of Act 46 of 1935, in Ex parte Ginsberg (1936 T.P.D. 155 at 157)). At least two of the earlier Magistrates' Courts Acts which were repealed by Act 32 of 1917 (viz: Ordinance 38 of 1903 (O) Sec. 6 and Proclamation No. 21 of 1902 (T) Sec. 43) contained provisions enabling an Attorney-General (or Legal Adviser to the Administration), who was dissatisfied with the decision of a Magistrate upon a point of law in a criminal case, to bring the matter before the High Court " in order to take the opinion of the said Court

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on the point involved for the future guidance of the Courts of Resident Magistrates". This right was, however, made subject to the proviso that the High Court's ruling should " in no way affect the finality of the finding of the Court of the Resident Magistrate in the particular case so brought in review." So far as concerned the particular conviction or acquittal, therefore, the decision of the High Court, when functioning under these earlier Acts, was entirely academic. That situation was preserved by section 106(1) of Act 32 of 1917 which, while enabling the Attorney-General to obtain a "ruling" from the Provincial Division upon a " decision given in the Magistrate's Court in a criminal case on a matter of law ", made no provision for such ruling to alter the result of the trial in the Magistrates Court. That situation remained unaltered under the new subsection 106(1) of Act 32 of 1917 which was substituted by section 58 of Act 39 of 1926. The position was, however, radically changed by Act 46 of 1935 which repealed section 106 of Act 32 of 1917 and, in its stead, enacted new sections numbered 100bis and 100ter. In these last mentioned sections provision was now, for the first time, made as to what should occur, in relation to the particular trial from

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which the "question of law" derived, in the event of the Attorney-General's appeal being upheld. The provision in question was identical with that now appearing in subsections (4) and (5) of Section 104 and in subsections 105(1)(a)and(b) of Act 32 of 1944: for, as indicated above, the earlier sections 100bis and 100ter (introduced by Act 46 of 1935) were preserved in toto in section 104 and 105 of Act 32 of 1944.

Considered against the background of the fact that our Courts do not normally decide academic questions of law, and having regard to the marked departure from earlier legislation introduced by Act 46 of 1935 and preserved by Act 32 of 1944, it would prima facie appear to be very unlikely that the Legislature could ever have intended that the relatively limited right of appeal accorded to the Attorney-General by the provisions of Section 104 and 105 of Act 32 of 1944 should also include the right to have academic questions of law decided by the Court of Appeal, Nor, as a pure matter of construction, does the wording of those sections, in my opinion, support the opposite view which was taken in Attorney-General versus Devon Properties (Pty) Ltd. supra

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and is now advanced by Appellant. On the contrary, those provisions, in my opinion, show that the Legislature did not intend the Courts to decide academic questions at the instance of the Attorney-General.. The provisions of subsection 104(5) - whereunder the Court of Appeal may, inter alia, "itself impose such sentence upon the respondent or make such order as the Magistrates Court ought to have imposed or made" - clearly indicate, in my opinion, that it was contemplated by the Legislature that a decision given by the Court of Appeal, upholding the Attorney-General's contention on the "question of law" submitted to it, should be, not an academic decision, but an operative decision having a practical effect upon the conviction of the accused. This view is further confirmed by the provisions in subsection 104(4) that, if the Attorney-General's appeal is allowed by the Court of Appeal - and subject to the provisions of subsection 5 - the Magistrate shall reopen the trial. By reason of the incorporation of subsections (4) and (5) of Section 104 into subsection 105(1)(b), this latter must - as stated earlier in this judgment - also be construed as not requiring the Court to decide academic questions. If, as was urged upon us by Mr. Botha and was

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said in the Devon Properties case (supra), it is often, with an eye to future cases, convenient for the Attorney-General to obtain a decision upon a question of law independently of its effect upon the particular trial which gave rise to such question, that is a matter for which Parliament must make appropriate provision. That object is not achieved by sections 104 and 105 in their present form. In regard to those sections as they stand, I find myself in full agreement with the following passage from the judgment of Van Den Heever J.A. in Rex versus Lusu (1953(2) S.A. at 494 (A.D.)):

> " I do not think it could ever have been the intention of the Legislature in enacting sec. 104 of the Magistrates' Courts Act that a Court of Appeal should be called upon to answer a hypothetical and abstract question..... Moreover, as appears from the provisions of sub-secs. (4) and (5) of sec. 104 of that Act and sub-sec. (1) of sec. 105, this type of appeal was not conceived merely with the object of clarifying the law, but in order that justice be done in individual cases."

It follows that Attorney-General v. Devon Properties (Pty) Ltd (supra) and the other cases which followed it (viz. Rex v. Day (1952(4) S.A. 105 (N)), Regina versus Haelbich (Pty) Ltd. (1957(1) S.A. 139 (SWA)), Regina versus Tshabalala (1957(3) S.A. 88 (T)), must, in relation to this question, be held to have been wrongly decided. In so far as it lays down that the

Court of Appeal is under section 104 compelled to decide a question of law submitted to it pursuant to the provisions of that section even though such decision would have no bearing upon the conviction or acquittal of the accused, Attorney-General versus Port (supra) must also be regarded as overruled. That is, however, not to say that the decision reached in that particular case was wrong. Port's case was somewhat unusual in that it was there claimed that the accused was entitled to an acquittal upon legal grounds other than those embraced in the "question of law" upon which the Magistrate had given a decision in accused's favour. The legal grounds so sought to be advanced before the Court of Appeal had not been the subject of decision by the Magistrate, and it is not entirely clear from the report whether such legal grounds were apparent from the stated case. In circumstances such as these, the Court of Appeal must necessarily exercise its discretion having due regard to the balance of convenience, the preparedness of counsel to argue the additional questions of law, and suchlike practical considerations. Subject to the considerations just mentioned however, if the circumstances reveal that the accused is entitled

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to be acquitted on some question of law other than the one decided in his favour by the Magistrate and appealed against by the Attorney-General, the latter question is, so far as concerns the conviction or acquittal of the accused, entirely academic and, as such, the Court of Appeal is not obliged by the provisions of Section 104 to give a decision upon it.

In the present case the Accused were, as indicated earlier, entitled to be acquitted on the facts. The questions of law brought before the Provincial Division by Appellant were, accordingly, entirely academic in relation to the conviction or acquittal of the Accused. The Provincial Division was, therefore, fully entitled to decline to give any decision thereon. It follows that Appellant's second ground of appeal to this Court can not be sustained and that the appeal must fail. In terms of section 105(2), Respondents are entitled to be awarded their costs.

For the foregoing reasons, the appeal is dismissed with costs.

(Signed) N. OGILVIE THOMPSON.

FAGAN, C.J.
DE BEER, J.A.
BEYERS, J.A.
PRICE, A.J.A.

} Concur.

REASONS FOR JUDGMENT.

REGINA VERSUS (1) FLATS MILLING COMPANY (PTY) LTD.
(2) A. BOBROW.
(3) D. BOBROW.

On the 24th October, 1955, the accused were charged with contravening Regulation 5(1)(a) read with Regulation 1, 3(4)(a), 5(2), 6(2) and 6(4) of the Annexure to Proclamation No. 205 of 24th October, 1946, as amended, read with War Measures Continuation Acts 29/50 and 31/52, further read with Government Notice No. 694 of 12th April, 1954, read with Act 51/54 and Section 381 of Act 56/1955.

The charge sheet is a long one and further details are contained there in, to which charge sheet the Court of Appeal is respectfully referred.

For easy reference Regulations 3(1)(e) and 3(4)(a) of Proclamation 205/46 and Government Notice 694/54 are set out here in full:-

3(1)(e)

"to prescribe the maximum quantity of any foodstuff, determined according to weight or value or on any other basis which the Director may deem fit, which may on any day or during any period be disposed of to or acquired by any person, and the conditions subject to which any maximum quantity so prescribed may be so disposed of or acquired."

3(4)(a)

"prescribe that no person shall acquire any quantity of a foodstuff to which that requirement relates, except under permit or other authority in such form as the Director may prescribe, issued by the Director or a person (including any such board as is referred to in paragraph (d) of sub-regulation (2) of Regulation 2.), designated by the Director, and that no person shall dispose of any quantity of that foodstuff except to a person who is in possession of such permit or other authority."

Government Notice/....

Government Notice 694/54:

PROHIBITION OF THE PURCHASE OR SALE OF KAFFIR CORN.

Under the powers vested in me by Regulation 3(4)(a) read in conjunction with Regulations 2(1)(A) of the regulations contained in War Measure No.55 of 1946 (Government Notice No.205 of 24th October, 1946), as further continued by War Measure Contimuation Act No. 29/1950 and 31 of 1952, I, Heinrich Rudolph Philip August Kotzenberg, do hereby prescribe that, with effect from date hereof and until further notice, no person shall acquire any quantity of Kaffir Corn of the 1954 Crop, except under permit or other authority in such form as the Director or other person designated by the Director may prescribe, and that no person shall sell or in any other way dispose of any quantity of such kaffir corn except to a person who is in possession of such permit or other authority.

Furthermore in terms of regulations 3(1)(x) I hereby require that any person other than a producer in possession of kaffir corn of the 1954 season's crop, at date of this notice, shall render to this Department, on or before the 30th April, 1954, a return showing details of all such stocks held by him, from whom purchased and at what prices."

The accused were found guilty and sentenced as follows:-

Accused No.1: Fined £50.

Accused No.2: Fined £50 or one month I.C.L.

Accused No.3: Fined £50 or one month I.C.L.

Judgment was further given in favour of the Director of Food Supplies and distribution for an maount of £4250.6.6., this judgment being given in terms of Reg. 5(2)(a) of Proclamation 205/1946.

FACTS FOUND TO BE PROVED.

(1) That the Flats Milling Co. (Pty) Ltd. is a corporate body and that accused No.2 and accused No.3 are Directors of the said Company.

(2) That the accused purchased, 3,689 bags of undergrade kaffir corn of the 1954 crop from various sellers.

(3) These sellers,,farmers, also gave evidence of having sold the kaffir corn to the accused.

(4) That witness Combrinck gave evidence of visiting the premises of the accused and finding on the premises 598 bags of kaffir corn.

(5) That the Flats Milling Co. (Pty) Ltd., was appointed by the Director of Food Supplies and Distribution as an agent to buy and sell kaffir corn. (See exhibit "B").

(6) That in terms of Government Notice No. 694 the disposal of kaffir corn of the 1954 crop to a person other than a permit holder is prohibited.

(7) That the accused disposed of 3091 bags of kaffir corn of the 1954 crop to a person or persons other than permit holders or holders of an authority issued by the Director of Food Supplies and Distribution.

REASONS FOR JUDGMENT.

Two Notices of appeal, dated 5.11.55 and 7.11.55 have been filed.

The second Notice of Appeal, dated 7.1155 is merely repetition in more detail, of the first notice of appeal and I shall confine myself to this second notice of Appeal.

GROUND OF APPEAL:

This ground of Appeal was raised at the trial by the Attorney for the Defence and argued at length.

HIS ARGUMENT WAS;-

(a) That the Director of Food Supplies and Distribution (hereinafter called the Director) had failed to prescribe in Government Notice 694/54, the maximum quantity of kaffir corn which may be supplied to a person;

(b) that a total prohibition of the sale of kaffir corn is not permitted and that the words "any quantity" appearing in Government Notice 694/54 mean a total prohibition;

(c) that the Director had prescribed a prohibition for an indefinite period and that the phrase "during any period", appearing in Regulation 5(1)(e) of Proclamation 205/1946, must be narrowly construed and does not cover the phrase "until further notice" which appear in Government Notice 694/54, and;

(d) that Government Notice 694/54 is ultra vires in that the director had exceeded the powers granted him in Proclamation 205/1946.

I shall deal first with these arguments.

Proclamation 205/46 in Regulation 3(1)(E) lays down that "the Director shall have power to prescribe the maximum quantity of any foodstuff, determined ....., which may on any day or during any period be disposed of to or acquired by any person, and ....."

In the same Proclamation, Regulation 3(4)(a) prescribes "that no person shall acquire any quantity of a foodstuff to which that requirement relates, except under permit or other authority in such form as the Director may prescribe, issued .....

the/...

the Director, and that no person shall dispose of any quantity of that foodstuff except to a person who is in possession of such permit or other authority".

The wording of Government Notice 694/54 is almost identical to that of Regulation 3(4)(a) of Proclamation 205/46 except that it specifically mentions the foodstuff, kaffircorn of the 1954 crop and instead of stating a definite period makes use of the words "until further notice."

Now reading Regulations 3(1)(e) and 3(4)(a) of Proclamation 205/46 together with Government Notice 694/54 it seems to me that the words "any quantity" do not imply a total prohibition of the sale of kaffir corn of the 1954 crop but mean that the Director restricts the sale or disposal of kaffircorn of the 1954 crop to persons who are permit holders or holders of some other authority granted by him.

Once having authorised the sale or disposal, as the case may be, to a permit holder the Director will then fix the maximum quantity to be sold or disposed of to that person.

The words "until further notice" as used in Government Notice 694/54 are to my mind, little different in meaning to the words "during any period" used in Regulation 3(1)(e).

Both indicate a period of time. It was argued by the Defence that the words "until further notice" are vague and that the words "during any period" must be strictly construed.

In Government Notice 694/54 the initial day of the period is fixed, the 12th April, 1954. The words until further notice" imply that a future date terminating the period will be fixed.

It must further be borne in mind that the Director was dealing with the 1954 crop of kaffir corn which was not

unlimited/...

unlimited in quantity.

In my opinion therefore the Director of Food Supplies and Distribution has not exceeded the powers conferred upon him in Proclamation 205/46, in publishing Government Notice 694/54.

GROUND 2 OF NOTICE OF APPEAL.

(a) If exhibit B of the Agreement between the Director and appellants is examined it will be seen that the Flats Milling Co. (Pty) Ltd., is therein described and that accused No.2 is therein named as a director of the Company and that accused No.2 signed the Agreement as a Director of the said Company. (See extract from Company's minutes.)

This evidence was not contested by the Defence and in my opinion is sufficient proof of the fact that the Flats Milling Co. (Pty) Ltd. is a corporate body and that accuseds Nos. 2 and 3 are directors of the said corporate body.

(b)& (c) If Regulation 6(4) of Proclamation 205/46 is studied it will be seen that a presumption is created that the accused disposed of 3091 bags of kaffir corn of the 1954 crop. They purchased, and were entitled to purchase, 3689 bags of kaffir corn. Of these 3689 bags of kaffir corn 598 bags were found on the premises of the accused. What happened to the 3091 bags is not explained by accused.

(d) It was for the accused to prove that they had disposed of 3091 bags of kaffir corn to a person or persons holding a permit or authority as required by the Regulations and Government Notice No.694/54.

GROUND 3 OF NOTICE OF APPEAL.

The sentence imposed is the minimum sentence which is allowed by law, see Regulation 5(2) of Proclamation 205/46.

GROUND 4 OF NOTICE OF APPEAL.

(1) In terms of regulation 5(2)(a) of Proclamation 205 of 1946 an accused person who is found guilty of buying or selling a quantity of foodstuffs, in this case kaffir corn, shall in addition to his fine have judgment given against him in favour of the Director of Food Supplies and Distribution for an amount equivalent to the market value of the goods in respect of which the offence was committed at the date on which that offence was committed.

(2) The Public Prosecutor was unable to produce evidence of the market value of kaffir corn during 1954. He further informed the Court that the Director of Food Supplies and Distribution was unable to say what the market value of undergrade kaffir corn was in 1954. The price apparently depends on the quality of each bag or consignment.

(3) The provisions of Regulation 5(2)(a) are peremptory and an amount had to be fixed. As presiding Officer I decided to fix the market value of the kaffir corn for the purposes of this case at the price paid by the accused to the sellers.

(4) This amount was calculated in the manner set out in the record, an amount of £4250. 6.6.

(5) There is no apparent prejudice to the accused resulting from this calculation.

The necessary jurisdiction is conferred upon Magistrate's Court in Regulation 5(2) of Proclamation 205/46.

SIGNED I.M. CAIRNS.

14.11.55.

APPEAL:- FLATS MILLING CO. (PTY) LTD.
A. BOBROW &
D. BOBROW versus REGINA.

MAGISTRATE'S ADDITIONAL REASONS FOR JUDGMENT.

In view of notice of intention to amend grounds of appeal, received on 9.1.56, the following additional reasons for Judgment are furnished.

Para, (e) of said Notice:-

I have nothing to add to reasons already given.

Para. (f):-

There is nothing in the agreement, Exhibit "B", which entitles the accused to dispose of the kaffircorn bought by them as the Agent of the Director of Food Supplies and Distribution without the necessary authorisation or direction of the said Director.

Para. 5(iii):-

Mention is made in the agreement of the Union Grain Co-operative Co. Ltd. Johannesburg. There is no evidence that any undergrade kaffir corn was disposed of to this firm.

Para. (g):-

As already stated no authority was placed before the Court which entitled the accused either as principal or as Agent of the said Director to dispose of the kaffir corn other than to a person or persons holding a permit or authority as required by the Regulations and Gov. Notice No. 694/54, nor was any evidence produced that the undergrade kaffir corn in question was so disposed of.

In the absence of any evidence to the contrary the presumption raised by Regulation 6(a) of Proclamation 205/46 remains unrebutted.

(h):-

The Court accepted that the contents of the 18 bags of "gruis" bought from witness M.C. Genis was kaffir corn.

In/...

In the opinion of the Court ground kaffir corn remains ~~essentially~~ kaffir corn.

SIGNED I.M. CAIRNS.

ASSISTANT MAGISTRATE.

25.1.56.