

127/1959
U.D.J. 445.

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

(APPEL L A T E

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPËL IN KRIMINELE SAAK.

ABSOLON SHANGASE

Appellant.

versus

THE

QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate In Person
Advokaat van Appellant

Respondent's Advocate Grey. F.W.A.
Advokaat van Respondent

(Leave NPD) Set down for hearing on: Tuesday 1st December, 1959
Op die rol geplaas vir verhoor op:—

bonam: van Blerk, Ogilvie-Thompson, Hans Botham, Holmes et al. dagk.

b. A. T.

Abraham

1.12.59

Postea: Thursday 10th December, 1959

Appeal is dismissed; the conditions of suspension of sentence are amended to read: "suspended until 26th Jan. 1960 upon condition that during that period the appellant: (i) obtains written permission to remain in Durban and exhibits it to the Clerk of the Natal Council; and (ii) is not convicted of any contravention of act 25 of 1945 as amended."

Rep. P. R. ...

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter of:

ABSALOM SHANGASE Appellant.

versus

REGINA..... Respondent.

CORAM: VAN BLERK, OGILVIE THOMPSON, RALSBOTTOM, JJ.A.
HOLMES, et VAN WYK, A.JJ.A.

HEARD: 1st December 1959.

DELIVERED: 10 Dec 1959.

J U D G M E N T .

HOLMES, A.J.A.: This is an appeal from a decision of the Natal Provincial Division dismissing an appeal from a conviction by a Native Commissioner. The gist of the charge against the appellant was that he contravened section 10(1)(d) read with section 10(4) of the Natives (Urban Areas) Consolidation Act 25 of 1945, as amended by section 27 of Act 54 of 1952 and section 30 of Act 36 of 1957, in that on 26 November 1958, and being a Native, *He urban area of* he remained in ~~in~~ Durban for more than 72 hours without permission from a designated officer. He was fined £5 suspended on certain conditions.

Section 10(1)(d) of Act 25 of 1945 as amended,

in so far as relevant , reads as follows:

"No native shall remain for more than seventy-two hours in an urban area.....unless -
(d)....permission so to remain has been granted to him by an officer designated for the purpose by the urban local authority concerned....."

Section 10(4) provides that contravention shall be an offence.

In this Court the appellant, who appeared in person, took a new point in limine. He contended that the charge was fatally defective because it referred to him as a native , instead of a native "as defined". Section 1 of Act 25 of 1945 defines "native" as "any person who is a member of an aboriginal race or tribe of Africa". This definition ^{coincides} ~~co-incides~~ with the ordinary meaning of "native" in this country, and I therefore hold that the charge is not invalidated by the absence of a reference to the definition

Section 10(1)(d) of Act 25 of 1945 as amended, constitutes an exception, proviso, etc. within the meaning of section 315(2) (b) of Act 56 of 1955; R.v.Kula and Others 1954(1) S.A.157. Although that case dealt with paragraphs (a) to (d) of section 10 (1) of Act 25 of 1945 as substituted by section 27 of Act 54 of 1952, the reasoning applies equally to paragraphs (a) to (d) as inserted by section 30 of Act 36 of 1957. The old and the new paragraphs (a) to (d) are in pari materia and there is nothing in the language of the later paragraphs to make them distinguishable from the previous paragraphs in respect of the point under consideration. In the present case the onus was therefore on the appellant to show on

3. a balance/.....

a balance of probabilities that he fell within paragraph (d) of section 10(1) of Act 25 of 1945 as amended.

(Paragraphs (a) to (c) are not relevant to this case.)

The main ground of appeal relied upon in the Natal Provincial Division, and in this Court, was that the appellant had permission, at the time of his arrest, to remain in Durban for more than 72 hours. The contention was that one Borquin, the Manager of the Native Administration Department in Durban, had given the appellant a certain certificate (to which I shall refer later) which impliedly authorised him to ~~be~~ remain in Durban.

The factual background was summarised by Bizzell , A.J. in the Court a quo, as follows:

" The appellant is a native within the meaning of "native" as defined in Act 25 of 1945 and was arrested on the 26th November 1958 in Fountain Lane in the Urban Area of Durban. He is a member of the S.J. Smith Native Location Advisory Board, Durban, his period of office expiring on the 30th September, 1959, this Board being an Advisory Board authorised by section 21 of Act 25 of 1945 to be established by an urban local

Ford's evidence the appellant said he had applied for a clerical post with an insurance company and was awaiting news of his application. Ford said that, in consequence he was prepared to give the appellant permission to remain in Durban for 10 or 14 days from the 18th September 1958 while he was awaiting this news and he said he arranged for that permission to be given for that purpose. It is not disputed that this permission was given, but the appellant's contention in his evidence was that ~~this~~ this permit arranged by Ford was forced upon him, his view being that he did not require such a permit to be in Durban.....

At the time of his arrest the appellant had not received permission from Ford to be in Durban for any period longer than 14 days reckoned from the 18 th September 1958..... One Bourquin, the Manager of the Native Administration Department mentioned, is by virtue of

made the following observations. First, the certificate does not bear to be permission to remain in Durban. Second, it does not purport to be signed by a "designated officer" appointed under section 22(1) bis of Act 25 of 1945, as amended, or ^{an officer} acting under section 22(1) ter, for the purpose of granting permission under section 10(1)(d), ~~or by~~. Third, in any event there is no evidence that in signing the said certificate Bourquin was applying his mind to the question whether he should grant or was granting permission to the appellant to remain in Durban until 30 September, 1959. Fourth, there is no evidence or explanation of the reason or purpose for which the certificate was granted. In the result, it seems to me clear that the appellant failed to discharge the onus of proving, upon a balance of probability, that the certificate in question granted him permission, as required by section 10(1)(d), to remain in Durban.

The next submission made by the appellant was that section 10(1) of Act 25 of 1945 as amended in 1957 did not apply to him because he was already residing in Durban when it was promulgated. There is no substance in this contention. The original section 10(1) provided for the restriction of the right of Natives to enter an urban area. But the new section 10(1) as substituted by section

27 of Act 54 of 1952, and amended by section 30 of Act 36 of 1957, was much more drastic. It affected the right of Natives to remain, that is even if they were there already. See Mashinini vs. Boksburg Town Council and Others, 1958(4) S.A. 3 at pp. 8/9.

A further point raised by the appellant was that as a member of a location advisory board in Durban he was exempted under the provisions of section 23(2)(f), from the operation of section 10(1) of Act 25 of 1945 as amended. This submission is unfounded. Section 23(1) of Act 25 of 1945 makes provision for the operation of that Act in regard to the control of Natives in proclaimed areas. It is not necessary to discuss the relationship between sections 23 and 10, for I shall assume in favour of the appellant that Durban is a proclaimed area in terms of section 23(1), and that an exemption under section 23(2)(f) would be a defence to a charge under section 10(1). Section 23(2)(f), as inserted by section 1 of Act 42 of 1946, exempted from the operation of section 23(1) certain Natives referred to in Proclamation 150 of 1934 which deals with passes. The exemptions included members of Native Advisory Boards established under section 10 of the Natives (Urban Areas) Act 21 of 1923. The appellant is a member of such a board in Durban. The short and sufficient answer, however, is that the said section 23(2)(f) was amended by section 39^(h) of Act 36 of 1957 in such a way that members of Native Advisory Boards are no longer exempted.

At this stage I point out in passing that section 23(2)(a) of Act 25 of 1945 exempts natives "who hold letters of exemption granted under any law in force in the Province of Natal, Transvaal or Orange Free State....."

In my view these "letters of exemption" were those by which formerly a Native could be ~~completely~~ exempted from the operation of ^{certain laws affecting Natives.} ~~Native Law~~. See, as regards Natal, Law 28 of 1865, which was repealed by Act 38 of 1927. The appellant did not claim to hold any such letters of exemption.

A further point mentioned by the appellant, in his reply, was that he was exempted from the operation of section 10(1) of Act 25 of 1945, as amended, by reason of the fact that he was the holder of what is commonly known as a "green reference book". The facts are as follows. In 1951 the appellant was exempted under section 14(bis) of Proclamation 150 of 1934, from certain pass laws. In 1958 he took out a reference book, under the provisions of the Natives (Abolition of Passes and Coordination of Documents) Act 67 of 1952. The ~~green colour~~ ^{of that Act.} reference book owes its distinctive colour to section 3(4)(b) ~~thereof~~. Page 81 of the appellant's reference book contains the endorsement: "Exemption Certificate No 1/1951 dated 3/2/51 at Camperdown surrendered." Now prior to the passing of Act 36 of 1957 a Native who was exempted in respect of pass laws by virtue of section 14 of Proclamation 150 of 1934, was also exempt from the

operation of section 23(1) of Act 25 of 1945. See section 23(2)(f) of Act 25 of 1945 as inserted by section 1 of Act 42 of 1946. But this exemption was swept away in the amended section 23(2)(f). See section 39(h) of Act 36 of 1957. Thereafter the pass-law exemption (which the appellant surrendered when he obtained his green reference book in 1958), did not save him from the operation of section 23(1) of Act 25 of 1945 as amended. And there is no statutory provision by which his green reference book so exempts him.

The next contention of the appellant was that he was entitled to remain in Durban because he holds a licence to carry on the business of a broker. There is no substance in this argument. The licence in question was issued by the Receiver of Revenue under item 7 of part III of schedule 11 to the Licences Consolidation Act 32 of 1925. It is not a municipal licence under chapter III of Ord. 19 of 1942 (Natal). Nor is it a licence in respect of which the municipal authority has a discretion in the matter a certificate of authority for its issue, under chapter 11 of the said Ordinance. Nor is it a licence under section 23(1)(g) of Act 25 of 1945 as amended by section 39 (e) of Act 36 of 1957. (I need not decide what the position would have been if the appellant's licence had been granted under one of the foregoing three provisions.) In these circumstances there is nothing in the appellant's submission that his licence is some evidence of permission by the municipal authorities to remain in Durban.

To sum up so far, the appellant was charged with the offence of remaining in the urban area of Durban in contravention of section 10(1) of Act 25 of 1945 as amended. It is clear that he did remain in Durban. He failed to prove that permission to remain had been granted to him under paragraph (d) of section 10(1). He was therefore rightly convicted.

I mention at this stage that Ford, the designated officer in Durban, refused, according to his evidence, to grant the appellant permission to carry on business as a broker and agent in Durban, presumably acting under section 23(1)(g) of Act 25 of 1945 as amended. But what the appellant basically requires is permission to remain in Durban. As he has resided in Durban for some time, and is ^{or has been} a member of a location advisory board, it may well be that he will be granted permission to remain if he applies for it.

The appellant's sentence (a fine of £5) was suspended for 12 months (from 27 Jan., 1959) on condition that he either obtained the necessary permission to remain in Durban, or left the area within 3 days and thereafter was not convicted of a similar offence during the period of 12 months. In view of the time that has elapsed pending

the hearing of this appeal, some amendment of the conditions of suspension will be necessary.

In the result:

- (a) the appeal is dismissed;
- (b) the conditions of suspension of sentence are amended to read: "suspended until 26th January, 1960 upon condition that during that period the appellant:

- (i) obtains written permission to remain in

- Durban and exhibits it to the Clerk of

- the Native Commissioner's Court; and,

- (ii) is not convicted of any contravention of

- Act 25 of 1945 as amended.

Neill K. K. K.
.....

VAN BLERK, J.A.

Ogilvie Thompson, J.A.

Ramsbottom, J.A.

Van Wyk, A.J.A.

CONCUR

REGINA Vs. AMBROSE SHANGASE.
Appeal against conviction under Section 10(I) (d) read with
Section 10 (4) of Act 25 of 1945.

FACTS FOUND PROVED :-

- (1) That Ambrose Shangase is a Native.
- (2) That he was arrested in the Urban Area of Durban at
11 Fountain Lane on the 26/II/58.
- (3) That accused had had permission to be in Durban granted by
the designated officer on various occasions. The last
10 occasion being for the period 2/9/58 to 16/9/58.
- (4) That accused at the time of arrest had no permission from
the officer designated by the local authority of Durban, to
be in the Urban Area of Durban in terms of Section 10 (I)(D)
of the Act.

REASONS FOR JUDGMENT :-

The grounds of appeal in this matter are :-

- (1) The conviction and sentence were against the evidence,
and the weight of the evidence.
- 20 (2) The learned Native Commissioner, Durban, erred in law in
not holding that Section 10 subsection (I)(d) read with
Section 22(I) (I) bis (I) ter read with Section I of Act
25/45 as amended read together with Exhibit "C" constituted
in terms of Section 10(I)(D) of Act 25 of 1945 as amended
read ~~with~~ together with Section 23 (I) (2) of the same Act
as amended to be ^{and} to remain within the Proclaimed Urban
Area of Durban".

I will deal with the second ground first. The defence during
argument indicated that it relied on the following points :-

- 30 (1) That by virtue of the fact that accused was a holder of a
green reference book, he was exempt from the operation of Pass
Laws, and thus exempted from the provisions of Section 10.
- (2) That as a member of the Native Advisory Board he was exempt

from the operation of the "Pass Laws" and thus exempt from the operation of Section 10, and that the issue to him of Exhibit "C" signed by the Manager, Municipal Native Administration Department constituted the necessary permission in terms of Section 10.

(3) That the issue of a Government Licence (to carry the business of Broker and Agent) committed the designated officer to issue a permit in terms of Section 10.

Green reference books are issued to certain natives who fall within certain categories as set out in Act 67 of 1952 (Native Abolition of Passes and Co-Ordination of Documents Act). The accused in this case is the holder of such a book, by virtue of an exemption previously held by him in terms of Section 14 bis of Proclamation 150 of 1934.

The exemption issued to him in terms of this Proclamation was in respect of the Registration Regulations published under Government Notice 1032 of 1949, made in terms of Section 38(I) of Act 25 of 1945 as amended, and in no way affected any duty imposed upon him under Section 10 of the Act, nor exempted him from the provisions of that Section.

Section 23 (2) (f) of Act 25 of 1945 ~~xxxxxxxxxxxx~~ before its amendment by Section 39(h) of Act 36 of 1957, did grant to members of Native Advisory Boards the **privilege** of exemption from the Registration Regulations but not from the Pass Laws. Since the substitution of Section 23(2)(f) however by section 39(h) of Act 36 of 1957 this **privilege** has lapsed. Members of Native Advisory Boards were however at no time exempted from the provisions of Section 10 of 1945. The issue to the accused in this instance of Card Exhibit "C", even though signed by the Manager who in terms of Section 22(I) ter of Act 25 of 1945 is vested with and may exercise the powers of the designated officer appointed in terms of Section 22(I) (bis) does not, I submit, in view of the facts before the court constitute permission in terms of section 10(I) (D), for the accused to remain within the urban area of Durban.

The fact that the accused was carrying on a business of Broker and Agent, could not, and did not commit the designated officer to issue a permit in terms of Section 10(1) (D) to him.

The accused has been in the Proclaimed Area of Durban for some time, and has on various occasions had the necessary consent in terms of Section 10(1)(D) from the designated officer, to remain in the area. The last occasion being for the period 2/9/58 to 16/9/58.

10 The latter permission was granted to him, he claims, to legitimise his nomination as a member of the Native Advisory Board at the forthcoming election, and was forced upon him.

He claims that at the time he was a holder of a green reference book, and as such was exempted from the "Pass Laws", and was carrying on in Durban a business of Broker and Agent.

He probably was carrying on such a business, but the fact that he was the holder of a green reference book, most certainly did not exempt him as he claims from the "Pass Laws" amongst which he includes Section 10 (1) (D).

20 It was incumbent on him to validate his stay in Durban, after the expiration of the permission which expired on the 16/9/58, and to apply, and obtain further permission in terms of Section 10 (1) (D) to remain in the area. He did not do so.