[HIGH COURT OF AUSTRALIA.]

GABRIEL . . . . . APPELLANT;
INFORMANT,

AND

AH MOOK . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF SUMMARY JURISDICTION OF SOUTH AUSTRALIA.

H. C. OF A. 1924.

ADELAIDE, *Sept.* 18.

MELBOURNE, *Oct.* 14; *Nov.* 6.

Isaacs A.C.J. Gavan Duffy and Starke JJ

Immigration—Prohibited immigrant—Evidence—Burden of proof—Averment in information—Evidence given by prosecution—Immigration Act 1901-1920 (*No.* 17 *of* 1901—*No.* 51 *of* 1920), *sec.* 5.

Where, on a prosecution under sub-sec. 2 of sec. 5 of the *Immigration Act* 1901-1920, the prosecution proves some only of the relevant facts and does not complete them so as to enable the tribunal to come to a conclusion one way or the other as to the averment contained in the information that the defendant is an immigrant and has entered the Commonwealth within three years before failing to pass the dictation test, the averment is, under sub-sec. 3, to be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant.

Adelaide Steamship Co. v. *The King*, (1912) 15 C.L.R. 65; (1913) A.C. 781; 18 C.L.R. 30; *Symons* v. *Schiffmann*, (1915) 20 C.L.R. 277, and *Schiffmann* v. *Whitton*, (1916) 22 C.L.R. 142, distinguished.

APPEAL from a Court of Summary Jurisdiction of South Australia.

At the Police Court, Adelaide, before a Stipendiary Magistrate, an information was heard whereby Frederick William Edmund Gabriel charged that Ah Mook was an immigrant and was on 16th May 1924 required to pass the dictation test and failed to do so and that Ah Mook entered the Commonwealth within three years before

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failing to pass such dictation test and was therefore a prohibited immigrant offending against the *Immigration Act* 1901-1920 and was on 11th May found within the Commonwealth in contravention of the said Act. After evidence had been given on behalf of the Crown, the Special Magistrate dismissed the information, his reasons being as follows :—" In this case the prosecution has averred that the defendant is an immigrant and that he failed to pass the dictation test within three years of entering the Commonwealth. The prosecution has led evidence to show that he is an immigrant. There is also evidence on the question as to when he entered the Commonwealth. Certain questions were put to him, his answers to which were not satisfactory. He said he had been in Australia thirty-five years and three years in the shop of Ah Fong. He said he was twenty-nine years of age. There is evidence that Ah Fong came along and stated that he (Ah Mook) was thirty-five years of age and had been twenty-nine years in Australia. There is some evidence for the Court to consider as to whether he had been in the Commonwealth three years. I am of opinion that I must follow the cases in the High Court cited by Mr. *Smith* "—*Adelaide Steamship Co.* v. *The King* (1), *Attorney-General of the Commonwealth* v. *Adelaide Steamship Co.* (2), *Symons* v. *Schiffmann* (3) and *Schiffmann* v. *Whitton* (4) ; " and this is a case which falls within those decisions. I hold that the prosecution is bound to rely on the evidence it has given alone. There is evidence that the defendant failed to pass the dictation test. There is no evidence that he entered the Commonwealth within three years, and for those reasons I dismiss the complaint."

From that decision the informant now, by special leave, appealed to the High Court.

Cleland K.C. (with him *Ward*), for the appellant. The qualification put upon the provision in sec. 5 (3) of the *Immigration Act* 1901-1920, that the averment in the information is to be deemed to be proved, namely, " in the absence of proof to the contrary by the personal evidence of the defendant," is not found in sec. 255 of the *Customs*

(1) (1912) 15 C.L.R. 65.
(2) (1913) A.C. 781 ; 18 C.L.R. 30.
(3) (1915) 20 C.L.R. 277.
(4) (1916) 22 C.L.R. 142.

Act 1901-1923, or sec. 15A of the *Australian Industries Preservation Act* 1906-1910; so that the decisions of this Court relied on by the Stipendiary Magistrate do not apply so as to warrant his decision, and, if they do, they should be reconsidered. Those decisions only apply if the evidence given by the prosecution is directed to proof of all the facts necessary to support a conviction. Here no evidence was tendered by the prosecution in support of the averment that the defendant entered the Commonwealth within three years before failing to pass the dictation test, and the prosecution was entitled to rely on the averment itself as proof of that fact.

Abbott, for the respondent. It is not necessary for the prosecution to give evidence as to all the matters which are necessary to constitute the offence charged in order to deprive it of the right to rely on the averments in the information (*Symons* v. *Schiffmann* (1)). If the prosecution gives evidence upon one of the necessary facts and that evidence is insufficient to justify a finding one way or the other as to that fact, then the prosecution cannot fall back upon the averment as proof of that fact. Here the prosecution gave evidence that the defendant said he had arrived in the Commonwealth twenty-nine years before the material date, but another witness for the prosecution gave evidence that the defendant said he had arrived in the Commonwealth thirty-five years before that date. Upon that evidence the Magistrate was entitled to say that he was not satisfied that the defendant was a prohibited immigrant. The Court should not reconsider the previous cases.

Cleland K.C., in reply.

Cur. adv. vult.

Oct. 14.

THE COURT delivered the following written judgment :—

This is an appeal from the decision of a Stipendiary Magistrate at Adelaide sitting in Federal jurisdiction.

A complaint was made on 6th June 1924 by the appellant, an officer of the Home and Territories Department, containing several

(1) (1915) 20 C.L.R., at p. 280.

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averments, namely, (i.) that the respondent was an immigrant; (ii.) that he was at Adelaide required on 16th May 1924 to pass the dictation test and failed to do so; (iii.) that he entered the Commonwealth of Australia within three years before failing to pass such dictation test; (iv.) that he was found in Adelaide on 16th May 1924 in contravention of the Act.

As to (i.) and (ii.) and (iv.), the evidence was clear and undisputed. But as to (iii.), there was evidence that, on being questioned by the officer as to when he entered the Commonwealth, he gave answers which the Stipendiary Magistrate describes as "not satisfactory." The respondent said he had been in Australia thirty-five years, and was twenty-nine years of age. The Magistrate, seeing there was *some* evidence as to the period the respondent had been in the Commonwealth which the prosecutor had elected to put before the Court, thought he was bound by the decisions of this Court in *Adelaide Steamship Co.* v. *The King* (1), affirmed on appeal (*Attorney-General of the Commonwealth* v. *Adelaide Steamship Co.* (2)); *Symons* v. *Schiffmann* (3) and *Schiffmann* v. *Whitton* (4), to disregard the provisions of sub-sec. 3 of sec. 5 of the *Immigration Act* 1901-1920. Accordingly he disregarded that sub-section, and, although the defendant did not give any personal evidence, the Stipendiary Magistrate dismissed the complaint on the ground that there was no evidence that the defendant entered the Commonwealth within the three years mentioned.

Sub-secs. 2 and 3 of sec. 5 are in these terms:—"(2) Any immigrant may at any time within three years after he has entered the Commonwealth be required to pass the dictation test, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act. (3) In any prosecution under the last preceding sub-section, the averment of the prosecutor, contained in the information, that the defendant is an immigrant and has entered the Commonwealth within three years before failing to pass the dictation test, shall be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant either with or without other evidence."

(1) (1912) 15 C.L.R. 65.
(2) (1913) A.C. 781; 18 C.L.R. 30.
(3) (1915) 20 C.L.R. 277.
(4) (1916) 22 C.L.R. 142.

What the prior cases referred to establish is that, where the prosecution elects to place before the Court what it represents to be, or what appear to be, all the facts relating to an averment, then it is bound by the proper conclusion to be drawn from those facts. If the proper conclusion is adverse to the averment, it is because the proof is to the contrary. But if it appears that merely some of the relevant facts are proved and that the prosecution is unable for some reason to complete them so as to enable the tribunal to come to a conclusion one way or the other as to the averment, then the cases referred to do not apply. The present case is quite untouched by those precedents. Sub-sec. 3 of sec. 5 exactly meets the circumstances of this case, and there appears to us no escape from the consequences. The third averment must be taken to be proved, and not disproved.

The appeal must be allowed, and the order of dismissal set aside.

Appeal allowed. Appellant to pay costs of appeal in accordance with his undertaking.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Ward, Powers & Jeffries.*

Solicitor for the respondent, *C. L. Abbott.*

B. L.