[HIGH COURT OF AUSTRALIA.]

ALI ABDUL . . . . . APPELLANT;
DEFENDANT,

AND

MAHER . . . . . RESPONDENT.
INFORMANT,

H. C. OF A. 1931.

SYDNEY, *Dec.* 14.

Rich, Evatt and McTiernan JJ.

Immigration—Alleged prohibited immigrant—Entry into Australia before Federation—Name of vessel by which he travelled—Immigrant's failure to state—Immigration Act 1901-1930 (*No.* 17 *of* 1901—*No.* 56 *of* 1930), *sec.* 5 (1), (3), (3A).

The provisions of sec. 5 (3A) of the *Immigration Act* 1901-1930 do not operate as a legal obstacle in the way of a person who satisfies the proper tribunal that he arrived in Australia before the establishment of the Commonwealth.

APPEAL from a Court of Quarter Sessions of New South Wales.

The informant, Thomas Victor Maher, a detective inspector employed in the Department of Trade and Customs, Sydney, on 9th September 1931, laid an information against the defendant,

* The *Immigration Act* 1901-1930, by sec. 5, provides, so far as material, as follows:—"(1) Any immigrant who (*a*) evades or has, since the commencement of the *Immigration Restriction Act* 1901, evaded an officer . . . may, if at any time thereafter, he is found within 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 either of the last two preceding sub-sections, the averment of the prosecutor, contained in the information, that the defendant is an immigrant who (*a*) has evaded an officer . . . 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. (3A) Proof to the contrary by the personal evidence of the defendant, within the meaning of the last preceding sub-section, shall not (unless it is proved that the defendant was born in Australia) be deemed to have been given unless the defendant in his personal evidence states truly the name of the vessel by which he travelled to Australia and the date and place of his arrival in the Commonwealth."

Ali Abdul, in the Court of Petty Sessions at Sydney, under the provisions of secs. 5 and 7 of the *Immigration Act* 1901-1930, alleging that the defendant was " a prohibited immigrant within the meaning of the " Act " in that he is an immigrant who has evaded an officer and in that he has since the commencement of the *Immigration Restriction Act* 1901 evaded an officer, and at a time thereafter being found within the Commonwealth was required at Sydney on the twenty-sixth day of August 1931 to pass the dictation test within the meaning of the *Immigration Act* 1901-1930 and on such last mentioned date failed to do so." The defendant was convicted by the Magistrate before whom the information was heard, and he was sentenced to six months' imprisonment with hard labour.

From that conviction the defendant appealed to the Court of Quarter Sessions. The prosecution did not rest its case wholly upon the statutory force of the averments in the information but called evidence in support. The informant gave evidence that the defendant informed him that he, Ali Abdul, travelled from Colombo to Melbourne about the year 1897 by a vessel named *Omrah* belonging to the " Orient Company," and that the defendant also made statements as to his movements in Australia subsequently to his arrival. It was shown that the s.s. *Omrah* made its first voyage to Australia on 14th October 1899, and that a search of its passenger lists for the years 1899 to 1902 inclusive, and of the passenger lists for the year 1897 of vessels somewhat similarly named, and also one named *Valetta*, all of which traded between India and Australia, failed to reveal any record of the defendant. Rhamut Khan, an Indian, gave evidence that he met the defendant in Brisbane in 1916 or 1917 just after the defendant had surreptitiously landed in the Commonwealth from a ship, the name of which was not given. The defendant himself gave evidence (and called several witnesses to support him) that he had arrived in Australia more than thirty years ago, sometime about 1897. He stated that the vessel by which he travelled on that occasion was named either *Oonala* or *Roonala* or *Valetta* or *Rosetta*. The Chairman of Quarter Sessions dismissed the appeal and confirmed the conviction. In the course of his judgment his Honor said :—" If this were a prosecution subject to the ordinary rules as to onus of proof, I should find that the charge

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was not made out against the appellant, that is, if the onus of proof lay upon the prosecution to establish that the appellant was an immigrant within the meaning of the Act. Again, if the provision as to onus of proof went no further than to enact that the averments in the information were sufficient to put the person charged to the proof of his case I should be strongly disposed to hold that, notwithstanding the evidence of Rhamut Khan and certain weaknesses in the appellant's case which were disclosed as the result of inquiries conducted in juxtaposition with the appellant's own story, there was sufficient in the independent evidence called on his behalf to displace that which was given against him. . . . But the provisions of sec. 5 (3A) go very much further. They require as part of the proof to the contrary that the appellant should state truly the name of the ship by which he travelled to Australia. As I have pointed out already, his evidence has failed in that respect. . . . The effect of sec. 5 (3A), in my opinion, is that the Court is precluded from finding that the defence is made out if the appellant has not stated truly in his personal evidence the name of the ship by which he travelled to Australia."

From this decision the defendant now, by special leave, appealed to the High Court.

Wells, for the appellant. The evidence shows that the appellant arrived in Australia prior to the establishment of the Commonwealth, and, therefore, he is not affected by the provisions of the *Immigration Act* 1901-1930 (*Williamson* v. *Ah On* (1); *Ah You* v. *Gleeson* (2)). Persons entering Australia prior to Federation do not come within the immigration power of the Commonwealth. In the circumstances the appellant is not prejudiced by the doubt which exists as to the name of the vessel by which he travelled to Australia. The Legislature did not intend that the provisions of sec. 5 (3A) of the Act should be applied to persons who entered Australia prior to Federation: not only would such application be *ultra vires*, but it would also be unreasonable and manifestly unfair. [He was stopped.]

E. M. Mitchell K.C. (with him *Bowie Wilson*), for the respondent. Sec. 5 of the *Immigration Act* 1901-1930 is valid as to the whole of

(1) (1926) 39 C.L.R. 95 (2) (1930) 43 C.L.R. 589.

the averments. It throws upon the person charged the onus of proving that he is not a prohibited immigrant, and the matter is concluded unless satisfactory evidence to the contrary, as required by sec. 5 (3A), is given by such person (*Williamson* v. *Ah On* (1)). The appellant has failed to establish the name of the vessel by which he travelled to Australia and, therefore, he has not discharged the onus of proof imposed upon him by sec. 5 (3A). The requirement of such proof from the person charged is, in the circumstances, not unreasonable, as he alone would be in possession of the information sought. It is obvious that the onus of proof should be upon such person as otherwise the effect of sec. 5 would be wholly destroyed. Until such proof is given, it must be deemed that he arrived in Australia after the establishment of the Commonwealth, and he would be within the immigration power, especially so if he entered Australia surreptitiously. Unless the person charged submits himself as a witness and furnishes the necessary proofs he does not satisfy the requirements of sec. 5 (3A) as to "personal evidence" and he must be convicted. The term "Commonwealth" in the *Immigration Act* 1901-1930 is used interchangeably with the term "Australia" as referring to a geographical area, and not as to a political organization.

[EVATT J. That does not seem to be so as regards sec. 5.]

The proper interpretation of the section is that, no matter how much evidence is called by the defendant, that evidence leaves his defence incomplete unless he gives his own personal evidence, and that is deemed not to have been done unless he states truly the name of the vessel by which he travelled to Australia. The evidence given by and on behalf of the appellant is to some extent contradictory and unsatisfactory, and, without more, does not entitle him to a decision.

THE COURT delivered the following judgment:—

In this case the appellant was convicted by the Magistrate of being a prohibited immigrant, within the meaning of the *Immigration Act* 1901-1930, on the ground that he was an immigrant who had evaded an officer since the *Immigration Restriction Act* 1901, and, at a time thereafter, was required to pass the dictation test and

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failed to do so. The Magistrate convicted the appellant and sentenced him to six months' imprisonment with hard labour.

From that conviction the appellant appealed to the Quarter Sessions, and the learned Chairman of the Quarter Sessions upheld the conviction. The case for the prosecution was not rested on sec. 5 (3) and (3A) alone, but evidence was given to show that the appellant was an immigrant within the meaning of the Act, and the appellant led evidence in answer to show that he was not. The learned Chairman of Quarter Sessions was prepared, we gather from his judgment, to find that the appellant had arrived in Australia before the establishment of the Commonwealth, but was of the opinion that by the operation of sub-sec. 3A he was precluded from so finding. In our opinion, sub-sec. 3A of sec. 5 does not operate as a legal obstacle in the way of a person who satisfies the proper tribunal that he arrived in a colony before the establishment of the Commonwealth. The learned Chairman of the Quarter Sessions treated the sub-section as such an obstacle. In our opinion he was wrong in doing so. That reduces the case to a question of fact. The learned primary Judge had the advantage of seeing the witnesses, and he believed the independent testimony that was given before him that the appellant came to Australia before the establishment of the Commonwealth. On the whole, we accept that view and, accepting that view, we shall allow the appeal with costs, quash the conviction, and order the appellant to be discharged.

Order made accordingly.

Solicitor for the appellant, *J. B. Jackson.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.