

[HIGH COURT OF AUSTRALIA.]

GAMBLE APPELLANT ;
INFORMANT,

AND

LAU SANG RESPONDENT.
DEFENDANT,

GAMBLE APPELLANT ;
INFORMANT,

AND

LUK LING RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF
NEW SOUTH WALES.

*Immigration—Prohibited Immigrant—Entry into Commonwealth—Member of crew
of vessel—Departure of vessel without member—Member employed within Com-
monwealth—Failure to pass dictation test within five years after entering Com-
monwealth—Offence—Immigration Act 1901-1940 (No. 17 of 1901—No. 36 of
1940), ss. 3 (k), 5 (2), (6).*

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SYDNEY,
July 30.

Latham C.J.,
Rich and
Starke JJ.

The provisions of s. 3 of the *Immigration Act* 1901-1940 do not modify or affect, in any respect, the provisions of s. 5 of that Act. In order to determine whether a person is guilty of an offence under the provisions of s. 5 (6) it is necessary only to consider whether he is a person who by virtue of s. 5 is deemed to be a prohibited immigrant offending against the Act.

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By an information laid by Leo Thomas Gamble, detective inspector, Department of Trade and Customs, it was alleged that on 9th September 1942, at Sydney, the defendant Lau Sang was an immigrant within the meaning of the *Immigration Act* 1901-1940, who, having, on that date, being a date within five years after he had entered the Commonwealth, been required to pass a dictation test within the meaning of that Act, and having failed to do so, was deemed to be a prohibited immigrant offending against the Act, and so was guilty of an offence. It was averred that the defendant was an immigrant who had entered the Commonwealth within five years before failing to pass the said dictation test.

A similar information was laid by Gamble against Luk Ling, the date of the offence charged being 10th September 1942.

Each of the defendants pleaded not guilty.

The evidence showed, *inter alia*, that each defendant was a Chinese national; that Lau Sang arrived at Sydney during March 1942 as a member of the crew of a vessel; that Luk Ling arrived at Sydney during May 1942 as a member of the crew of the S.S. *Orestes*; that the vessels on which the defendants respectively had arrived had left the port and were not at the date of the offence, or of the hearing, in port; and that Lau Sang since 13th August 1942, and Luk Ling since 12th June 1942, had been continuously employed in a cafe in Sydney carried on by fellow nationals.

Upon the evidence the magistrate found as facts:—(a) That each of the two defendants failed to pass the dictation test within the meaning of the said Act within five years of his entry into the Commonwealth; (b) That, at the time of his entry into the Commonwealth, each defendant was a member of the crew of a vessel, and had landed during the stay of the vessel in the Commonwealth; (c) That the vessel sailed without the defendants; (d) That the defendants remained in the Commonwealth and engaged in employment therein; and (e) That neither of the defendants obtained permission to remain in the Commonwealth.

The magistrate found the defendants not guilty of the offence charged and acquitted them. He held that the term “immigrant” in s. 5 of the *Immigration Act* 1901-1940 must have relation to a condition arising at the time of entry into the Commonwealth. At the time of the entry of the defendants they were members of the crew of a vessel within the meaning of s. 3 (k) of the Act and therefore fell within the exceptions therein provided. As no evidence of a muster of the crew, or that the defendants came within the provisoes to s. 3 (k), was given, he held that the informant had failed

to prove that the defendants were immigrants who had entered the Commonwealth in contravention of the Act.

From that decision the informant appealed by way of case stated to the High Court.

The question for the determination of the Court was whether the magistrate's determination acquitting the defendants was erroneous in point of law.

Although duly served with the case stated, there was not any appearance by or on behalf of either of the defendants at the hearing of the appeal.

Kitto K.C. (with him *Bales*), for the appellant. By virtue of sub-ss. 3 and 3A of s. 5 of the *Immigration Act* 1901-1940, the averments contained in the informations must, in the absence of proof to the contrary by the personal evidence of the respondents, be deemed to be proved: See *Symons v. Schiffmann* (1) and *Schiffmann v. Whitton* (2). The constitutional validity of those sub-sections was recognized in *Gabriel v. Ah Mook* (3) and *Williamson v. Ah On* (4). The averments may be relied upon although some facts be proved by evidence given by or on behalf of the informant (*Gabriel v. Ah Mook* (3))—see also *Ah You v. Gleeson* (5). The term “immigrant” is satisfied by the act of coming into the Commonwealth (*Chia Gee v. Martin* (6)). Section 5 is a substantive provision in no way related to or dependent upon s. 3 of the Act. In any event, the onus of proving that a defendant comes within any of the exceptions set forth in sub-ss. *h* to *l* inclusive of s. 3 is upon the defendant. The exception provided by sub-s. *k* of s. 3 applies only during the stay of the relevant vessel in any port of the Commonwealth. Sub-section 2 of s. 5 creates a class of persons deemed to be prohibited immigrants offending against that Act and this is made an offence by sub-s. 6 of s. 5. Those two sub-sections are entirely distinct and create an offence separate and independent from anything that appears in s. 3 (*Williamson v. Ah On* (7); *Griffin v. Wilson* (8)). The offence charged against each respondent was proved by evidence.

The following judgments were delivered:—

LATHAM C.J. This is a case stated under the *Justices Act* 1902-1940 (N.S.W.) in proceedings for a breach of the *Immigration Act*. The two

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(1) (1915) 20 C.L.R. 277.

(2) (1916) 22 C.L.R. 142.

(3) (1924) 34 C.L.R. 591.

(4) (1926) 39 C.L.R. 95, at pp. 128, 129.

(5) (1930) 43 C.L.R. 589.

(6) (1905) 3 C.L.R. 649, at p. 654.

(7) (1926) 39 C.L.R., at p. 129.

(8) (1935) 52 C.L.R. 260, at pp. 265-267.

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respondents were charged with a breach of s. 5 (6) of the *Immigration Act* 1901-1940. Section 5 (6) provides that "any person who is by virtue of this section deemed to be a prohibited immigrant offending against this Act shall be guilty of an offence." By sub-s. 2 of s. 5 it is provided that "any immigrant may at any time within five 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."

The charge was that the respondents (separate charges being made against each but the charges being heard together) were each of them immigrants who within five years after he had entered the Commonwealth had been required to pass a dictation test and had failed to do so. The accused were acquitted. The information in each case contained an averment in the following terms—that the defendant was "an immigrant who has entered the Commonwealth within five years before failing to pass the said dictation test."

Some argument was heard upon the question as to how far the provisions of s. 5 (3) of the Act permit the making of such an averment and the giving of evidentiary effect to such an averment in the absence of evidence of the character set out in sub-s. 3A of s. 5 and as to whether this provision of the Act was constitutionally valid or, if valid, whether it was applicable in the present case. It is not necessary in my opinion to examine any of these questions, because certain facts were proved to the satisfaction of the magistrate. They are stated in the following terms:—“(a) That each of the two defendants failed to pass the dictation test within the meaning of the said Act within five years of his entry into the Commonwealth; (b) That, at the time of his entry into the Commonwealth, each defendant was a member of the crew of a vessel and had landed during the stay of the vessel in the Commonwealth; (c) That the vessel sailed without the defendants; (d) That the defendants remained in the Commonwealth and engaged in employment therein; (e) That neither of the defendants obtained permission to remain in the Commonwealth.”

Thus it was established that these Chinese came to the Commonwealth upon a vessel and landed from that vessel, that the vessel sailed without them, that they remained in the Commonwealth and accepted employment in the Commonwealth without permission to remain in the Commonwealth. Upon these facts it was proved that they were immigrants. It was also proved by evidence of the officer who administered the dictation test that a dictation test of not less than fifty words in English was applied and that they failed to pass the test. Accordingly the offence as charged was established,

unless the view of the magistrate that the defendants were entitled to acquittal by reason of certain provisions of s. 3 (*k*) was correct.

Section 3 of the Act does not itself directly create any offence; it provides that the immigration of the persons described in any of the following paragraphs (hereinafter called "prohibited immigrants") is prohibited. That is the substantial and, indeed, the only affirmative provision of s. 3, but from this provision there are certain exceptions, that is, certain persons are not prohibited immigrants within the meaning of s. 3. One exception is contained in par. *k*: "the master and crew of any other" (i.e. other than a public vessel of any Government) "vessel landing during the stay of the vessel in any port in the Commonwealth" subject to certain provisoes.

The magistrate took the view that the effect of s. 3 (*k*) was to make an exception of the persons therein specified from the category of prohibited immigrants for all the purposes of the Act.

The magistrate also took a particular view of the onus of proof as to the provisoes attached to par. *k* with which it is not necessary to deal.

In my opinion the provisions of s. 5 are unaffected by the provisions of s. 3. Section 3 provides that certain persons are called prohibited immigrants. Section 5 is a further positive substantive provision in these words:—"(6) Any person who is, by virtue of this section, deemed to be a prohibited immigrant offending against this Act shall be guilty of an offence."

In order to determine whether a person is guilty of an offence under that provision it is necessary only to consider whether he is a person who is *by virtue of* s. 5 deemed to be a prohibited immigrant offending against the Act. Reference to the earlier provisions of s. 5 shows that under sub-s. 2 an immigrant who within five years after he has entered the Commonwealth, has been required to pass a dictation test and has failed is deemed to be a prohibited immigrant offending against the Act. The provisions of s. 3 do not modify in any respect, in my opinion, these provisions in s. 5 to which I have referred.

Accordingly, in my opinion the magistrate was wrong in holding that—to use his own words—"s. 5 refers back to s. 3 (*j*) and s. 3 (*k*) as to exemptions."

The question for determination by the Court is whether the determination of the magistrate was wrong in point of law. In my opinion the question should be answered in the affirmative and the case remitted to the magistrate.

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RICH J. I agree.

STARKE J. I agree.

*Question answered in the affirmative. Case
remitted to the magistrate.*

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for
the Commonwealth.

Solicitor for the respondents, *Mackenzie Russell*.

J. B.