

A **BISHUN DUTT**

v.

REGINAM

B [COURT OF APPEAL, 1966 (Mills-Owens P., Marsack J.A.,
Knox-Mawer J.A.) 21st November, 15th December]

Criminal Jurisdiction

Criminal law—possession of forged passport—passport not issued under Ordinance as specified in relevant section—Immigration Ordinance 1962 s.19(1) (e).

C *Criminal law—appeal—powers of Court of Appeal—conviction on one offence set aside—substitution of conviction of other offence on facts found by magistrate—Court of Appeal Ordinance (Cap. 3) s.17A.*

Interpretation—Ordinance—whether to be construed as exclusively concerned with immigration—Immigration Ordinance 1962 ss.4-21 (incl.).

D The appellant was found at Nadi Airport in possession, without lawful authority, of a British passport (issued in Fiji) which contained a page numbered 7 on which a permit to enter New Zealand was stamped, this page having been pasted into the passport in substitution for the original page 7. It was common ground that the original page contained no such permit. The appellant was charged before a magistrate on two counts, both contrary to section 19(1) (e) of the Immigration Ordinance 1962, of (a) being in possession of a forged passport and (b) being in possession of a forged entry permit.

E The magistrate held that both charges had been proved but entered a conviction on the first count only, imposing a fine of £150 and ordering the appellant to pay £5 towards the costs of the prosecution. An appeal to the Supreme Court was dismissed and the present appeal was then brought.

F *Held:* 1. That the conviction of being in possession of a forged passport (and the penalty imposed) must be set aside, as the word "passport" where first used in section 19(1) (e) of the Immigration Ordinance, 1962, is qualified by the words "issued under this Ordinance" and as it was common ground that the passport was not so issued the conviction and penalty could not stand.

G 2. (per Marsack J.A. and Knox-Mawer J.A., Mills-Owens P. dissenting) That the words "any person" used in section 19(1) (e) without qualification were unequivocal and were not to be read as "any immigrant".

H 3. (per Marsack J.A. and Knox-Mawer J.A.) That the words "passport in which any visa, entry or endorsement has been forged) in the latter part of section 19(1) (e) are not qualified in any way and therefore the findings of fact of the magistrate amply justified conviction of the appellant on count (b); under the powers given

to the Court of Appeal by section 17A of the Court of Appeal Ordinance (as inserted by section 15 of the Court of Appeal (Amendment) Ordinance, 1965) the appellant would be convicted of having in his possession without lawful authority a passport in which an entry had been forged, contrary to sections 19(1) (e) and 19(3) of the Ordinance — in respect of that conviction the appellant would be fined £150 and ordered to pay £5 towards the costs of the prosecution.

4. (*per* Mills-Owens P.) That on an examination of the provisions of the Ordinance as a whole, it would require an express reference to persons leaving the Colony before any part of section 19 could be held to apply to them; the appeal should be allowed and there should be no conviction on the alternative count.

Case referred to: *Coomber v. Berks* JJ. (1882) 9 Q.B.D. 17; 51 L.J.Q.B. 297.

Appeal from decision of the Supreme Court sitting in its appellate jurisdiction on appeal from conviction by the Magistrate's Court. Separate judgments were given in the Court of Appeal, the conviction on the first count being set aside, and (by a majority of the Court) the appellant being convicted on the second count under section 17A of the Court of Appeal Ordinance.

H. A. L. Marquardt-Gray and T. J. McNally for the appellant.

B. A. Palmer for the respondent.

The facts appear sufficiently from the judgment of Marsack J.A.

The following judgments were read:

MARSACK J.A. [15th December, 1966]—

This is an appeal on points of law against a decision of the Supreme Court of Fiji dismissing an appeal from the Magistrate's Court against the conviction of the appellant for the offence of being in possession of a forged passport, and also against the sentence imposed for that offence.

The proved or admitted facts may be shortly stated as follows. On the 1st June 1966 the appellant was found at Nadi Airport in possession, without lawful authority, of a passport in which an entry had been forged. This passport, a British passport issued in the Colony of Fiji under number 30038, was produced as Exhibit A at the hearing in the Magistrate's Court. It contained a page numbered 7 on which a permit to enter New Zealand was stamped, this page having been pasted into the passport in substitution for the original page 7. It was common ground that the original page contained no such permit. The appellant was thereupon charged before the Magistrate's Court on two counts:

(a) being in possession of a forged passport, and

(b) being in possession of a forged entry permit.

A The learned Magistrate held that both charges had been proved but that the proper procedure was to enter a verdict on one count only. He thereupon convicted the appellant on the first count, fined him £150 and ordered him to pay £5 towards the costs of the prosecution. The Magistrate did not enter any verdict on the alternative count.

The appellant thereupon appealed to the Supreme Court which, on the 23rd September 1966, dismissed both the appeal against conviction and that against sentence.

B The appellant then appealed to this Court on the following grounds :

- (1) that the learned Magistrate erred in law when he held that the charge was not bad for duplicity;
- (2) that the learned Magistrate erred in law when he held that on the facts before him the appellant was guilty of an offence contrary to section 19(1) (e) and 19(3) of the Immigration Ordinance No. 2 of 1962;
- (3) that the sentence was harsh and excessive.

In support of the appeal against conviction counsel for the appellant put forward two main submissions :

- D (1) that the words "any person" used in section 19 of the Immigration Ordinance 1962, under which the prosecution was brought, must be taken to mean "any immigrant"; and that as the appellant was at the time of his arrest seeking to leave the country and not to enter it section 19 did not apply;
- E (2) that the part of section 19(1) (e) under which the appellant was convicted applies only to a passport issued under the Immigration Ordinance, and as the passport in question was not so issued no offence had been committed.

F In support of his argument on the first ground counsel refers to the long title of the Immigration Ordinance 1962 which is "an Ordinance to make better provision for the control of immigration". The appellant's contention is that the whole Ordinance should be read in the light of its stated object of controlling immigration; that the word "person", particularly in the penal clauses of the Ordinance, should be strictly interpreted as a person immigrating, or immigrant.

G This submission in my opinion goes a great deal further than what is laid down in the recognised authorities. It is true that what is called the "long title" of a statute is an important part of the Act, and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction: *Maxwell on Interpretation of Statutes*, 11th Edn. p.41. But the title cannot override the clear meaning of the enactment. The full title may, like the preamble, "be looked at in order to remove any ambiguity in the words of the Act": *Coomber v. Berks JJ.* (1882) 9 Q.B.D. at p.33. H Where, however, there is no ambiguity, but the words of the statute or ordinance have a perfectly plain meaning, resort cannot be had

to the long title or to the preamble in order to place a different or limited construction on words the meaning of which is clear. The principle is set out in 36 *Halsbury* 3rd Edn. p.370 para. 544:

"The rule is that it may not be used to control or qualify enactments which are in themselves precise and unambiguous, but that if any doubt exists as to the meaning of a particular enactment, recourse may be had to the preamble to ascertain the reasons for the statute, and hence the intentions of Parliament."

The words "any person" used without qualification are unequivocal and cannot give rise to any doubt as to what they mean. If it had been intended by the Legislature that only persons who are seeking to enter the Colony were to be guilty of an offence under section 19 of the Ordinance it would have been a simple matter to say so. It would be straining the well-known rules of construction too far, in my opinion, to hold that the straightforward and easily understood phrase "any person" should be read throughout the Ordinance as "any immigrant" because the purpose of the Ordinance is stated in the title as being to make better provision for the control of immigration. Accordingly I would not be prepared to accept the contention of the appellant on this ground.

The second branch of the argument of counsel for the appellant does not appear to have been raised before the learned Judge on appeal. Section 19(1) (e) reads as follows :

"19. (1) Any person who—

.....

- (e) unlawfully uses or without lawful authority (the burden of proof whereof shall be upon the accused person) has in his possession any forged or unlawfully altered passport, permit or other document issued or purported to have been issued under this Ordinance or any forged or unlawfully altered birth certificate, marriage certificate or other document purporting to establish status or identity, or any passport in which any visa, entry or endorsement has been forged or unlawfully altered."

The learned trial Magistrate said that the use of a comma between the words "passport" and "permit" establishes a differentiation between the two classes of document covered by the first part of the section; that it is only the "permit or other document" which is qualified by the phrase "issued or purported to be issued under this Ordinance", and that the word "passport" stands by itself without any qualification. With respect I cannot accept this construction. In my view the only possible interpretation of the section is that the word "passport" is similarly qualified. If that had not been intended the section would no doubt have been worded in some such form as this: "any passport, or any permit or other document issued or purported to have been issued under this Ordinance". In its present form I am satisfied that the grammatical construction of the sentence leads only to the one meaning: that the qualifying phrase must be read with the word "passport" as well as with "permit or other document".

A Accordingly I am of opinion that to sustain a conviction for being in possession of any forged or unlawfully altered passport, under this part of section 19(1) (e), it must be shown that the passport in question was issued or purported to have been issued under the Immigration Ordinance 1962. As in fact there is no provision in that Ordinance for the issue of passports, and it is common ground that the passport held by the appellant was not so issued, in my view the conviction on the first count cannot stand.

B No such difficulty arises with regard to the alternative count. There the offence is that of being, without lawful authority, in possession of any passport in which any visa, entry or endorsement has been forged or unlawfully altered. The phrase "any passport" is not qualified in any way. On the findings of fact by the learned trial Magistrate, which in this respect are, in my view, unassailable, the appellant could quite properly have been convicted on the alternative count. The learned Magistrate did not enter a conviction on this charge, but only because he considered that it was proper to enter one conviction and not two. He did not, however, acquit. He contented himself with saying "I therefore do not enter any verdict as to the alternative count". It is to be noted that the alternative charge does not follow the strict wording of the latter part of section 19(1) (e) of the Ordinance, and it would have been better to set it out in the form "having in his possession a passport in which an entry had been forged or unlawfully altered". In any event it is clear that the findings of fact of the learned trial Magistrate are D amply sufficient to justify a conviction for this offence.

E In these circumstances I feel that the proper course is for this Court to use the powers given by section 17A of the Court of Appeal (Amendment) Ordinance 1965 and substitute for the conviction entered by the Magistrate's Court in this case a conviction of having in his possession without lawful authority a passport in which an entry has been forged. I would so convict the appellant accordingly.

F This Court would then also have to pass sentence on that conviction. Although this appeal was brought against sentence as well as against conviction it was not shown in the argument before us that the penalty imposed by the learned Magistrate was excessive or assessed upon a wrong principle. This is so whether the conviction was on the first count as in the Court below, or on the count which in my opinion this Court should substitute therefor. Consequently upon this conviction I am of opinion that the appellant should be fined £150 and ordered to pay £5 towards the cost of the prosecution.

MILLS-OWENS P. :

G The argument before this Court has taken a different course from that in the Court below. It is now the case that if a conviction is to be sustained it can only be by the substitution of a verdict of guilty on the alternative count, that of having possession of a passport endorsed with a forged entry permit. It has throughout the proceedings been accepted that permits for entry into New Zealand are issued by the Immigration Department here as agents for the New Zealand Government under an administrative arrangement, not H under the Immigration Ordinance. It is accepted also that the appellant was not, in fact, an immigrant. The purpose of such

permits is to secure entry into New Zealand, not to authorise departure from the Colony. The question which now arises in this Court is whether section 19(1) (e) of the Immigration Ordinance extends to create the offence in the Colony of possession of a passport endorsed with a forged permit purporting to authorise entry into another territory. The charge is not one of forgery committed in the Colony or of uttering a forged document in the Colony, although analogous. A

Section 19(1) (e) is to be construed in the light of the Ordinance as a whole; in the context. In this respect the argument for the appellant is that the Ordinance is concerned with immigration and therefore the section does not extend to the case of the appellant who at the material time was an emigrant. Secondly, it is argued that a question of territorial jurisdiction arises; or, as I would prefer to put it, that in ascertaining the scope of the section the general principles of international law are to be borne in mind, namely that the courts of one territory do not seek to enforce the penal or political laws of another territory. In this respect, it is suggested, a conviction would be a means of indirect enforcement of the immigration laws of New Zealand. It is, of course, open to one territory to give such aid, by means of an appropriate provision in its own penal laws; the suggestion is that section 19(1) (e) is not to be construed as extending unambiguously to the case of a person leaving the Colony. B C D

As has been pointed out, the "long title" of the Ordinance refers to the control of immigration. Paragraph (m) of section 19(1), it may be noted, creates the offence of using any permit issued to or in respect of another person, which is what the appellant in fact did. A prosecution for that offence would not have succeeded because 'permit' is defined as one issued under the Ordinance, that is to say under section 8, 9 or 10, whereas this case concerns a permit issued under an administrative arrangement. I turn to an examination of the Ordinance as a means of ascertaining the context in which section 19(1) (e) is to be construed. Section 4 specifies the powers of immigration officers. It authorises the interrogation and medical examination of persons wishing to enter the Colony; in the case of persons leaving the Colony it authorises only that immigration officers may require such persons to make and sign any internationally recognised form of declaration. This is the only instance in which clear reference is made in the Ordinance to persons leaving the Colony. It is arguable that this means that the Ordinance is not to be taken as restricted entirely to the control of immigration; on the other hand it may be said that wherever it is intended to refer to persons leaving the Colony the Ordinance does so expressly. F G H

It may be noted that section 4, and section 19, provide for offences in the case of immigrants who contravene the provisions of section 4 but not, it appears, in the case of persons leaving the Colony who refuse or neglect to make the required declaration. Part III of the Ordinance is entitled "Entry into the Colony"; the provisions of the sections comprised therein (sections 5 to 14) are in conformity therewith. Part IV is entitled "Removal of unlawful immigrants from the Colony". It comprises sections 15 and 16, which both

A conform to that heading. Section 19 is comprised in the remaining part of the Ordinance, namely Part V, which is headed "Miscellaneous". The first of the sections in this Part, namely section 17, relates to the protection of immigration officers from liability in the performance of their functions. Section 18 provides for appeals from the decisions of such officers. This section makes no reference to persons leaving the Colony. Section 20 authorises the making of regulations; it refers specifically, in three instances, to persons entering the Colony, but not, in any instance, to persons leaving it. The final section, section 21, is a repealing and saving enactment; it refers expressly to persons entering the Colony, but not to persons leaving it.

B Section 19 is an offences and penalties enactment. In subsection (1) it sets out, in some fifteen paragraphs (a) to (o), various offences. Subsections (2) to (5) prescribe penalties, with supplementary provisions. Subsection (6) relates to removal orders, that is in relation to unlawful immigrants. Subsection (7) relates to the case of prohibited immigrants. Subsections (8) and (9) contain supplementary provisions. No single paragraph of subsection (1) refers specifically to persons leaving the Colony. A number of the paragraphs refer expressly to immigrants; for example, paragraphs (g), (h), (i), (l) and (o). Other paragraphs do so by implication, by referring to permits or exemptions granted under the Ordinance; for example, paragraphs (a), (b), (f), (k), (m) and (n). "Permit" is defined, by section 2, to mean a permit issued under the Ordinance, and "exemption", in the context of the Ordinance as a whole, means an exemption from restriction on entry (vide sections 6 and 7). It is particularly to be noted that the earlier part of section 19(1) (e), under which the appellant was charged in the first count, refers to permits and documents issued under the Ordinance, and can thus have reference only to immigrants. The wording of this earlier part of section 19(1) (e), so far as material, is: "... has in his possession any forged ... passport, permit or other document issued ... under this Ordinance ...". It is accepted that the reference to passports issued under the Ordinance is an error, as passports are not so issued. The latter part of the paragraph, under which the second count is laid, creates the offence of possession of "any passport in which any visa, entry or endorsement has been forged...". This may be compared with paragraph (f), which, as in the case of the earlier part of paragraph (e), refers expressly to passports, permits or documents issued under the Ordinance. Although there may be room for doubt, I would be prepared to hold that in the latter part of paragraph (e) "passport" means a passport wheresoever issued, be it a Fiji passport, a United Kingdom passport, or a foreign one. The question then is do the words "visa, entry or endorsement" include permits for entry into some country other than Fiji. It will be observed that to conclude that to be so it would be necessary to hold that what is elsewhere referred to as a "permit" is, for the purposes of departure from the Colony, an "entry" or "endorsement". This change of language may, perhaps, operate both ways; in favour of the construction that as the word "permit" (defined as it is to mean a permit to enter the Colony) is no longer used, the provision in

question is not concerned solely with immigrants; to the contrary, that if that was what was intended it would not have been left to mere implication, and that the words "visa, entry or endorsement" were chosen as words appropriate for reference to whatever form a foreign "permit" might take. Use of the word "visa" suggests entry into the Colony. What is clear is that, ostensibly, full force and effect may be given to the latter part of section 19(1) (e) by the construction that it applies to persons who enter the Colony.

From the foregoing examination of the provisions of the Ordinance it is apparent, in my view, that with the single exception specified in section 4 (relating to international forms of declaration) the Ordinance is exclusively concerned with immigration. The purpose of section 19 is to provide in an "omnibus" form for the offences to which the provisions of the Ordinance give rise, in support of and for the furtherance of the object of the Ordinance. It would, in my view, require an express reference to persons leaving the Colony before any part of section 19 could be held to apply to them; here we have an expression, not in itself equivocal, contained in a portion of a single paragraph of the section. I think this is especially so where the so called "endorsement" is not one sanctioned by the Ordinance but is an administrative act deriving no authority from the Ordinance. There is no reason why such an administrative arrangement should not be made, nor why a penal provision should not, by the use of appropriate language, be extended to such a case. But as the present case stands a penal provision of the Ordinance is sought to be applied to a circumstance, and to a document, which come into existence by reason only of an arrangement which is not contemplated by the Ordinance; in effect, as I see it, a sanction intended by the Ordinance for one purpose is sought to be applied for another purpose; what is, in fact, a forgery intended to achieve entry into another country is sought to be made punishable under provisions designed to control entry into and residence in this country. Were it not for the administrative arrangement referred to, it would never, I feel sure, have been contemplated that section 19(1) (e) refers to persons leaving the Colony. It would not ordinarily be the case that the penal laws of one country are considered as designed to give effect to the immigration policy or requirements of another country. One would look for an express, possibly even a reciprocal, enactment unambiguously to that effect. Nor would it ordinarily be of interest to one country to control entry into another country, least of all to the extent of endeavouring to enforce compliance with the immigration policy of that country. The Ordinance expresses no such interest, either directly or indirectly. In my view the arrangement which has been made in respect of persons wishing to enter New Zealand from Fiji, whilst no doubt good in itself, does not have the necessary legal substratum or foundation whereon to enforce, by penal means, compliance with New Zealand immigration requirements. It is, of course, a situation which can be easily remedied by legislation.

For these reasons I find myself unable to agree that there should be a conviction on the alternative count and would allow the appeal.

KNOX-MAWER J.A. :

- A** I have read the judgment of Marsack J.A. and agree with it. My ultimate conclusion therefore differs, with respect, from that reached by the learned President in this appeal. In my view there must be substituted for the conviction entered against the appellant by the Magistrate's Court a conviction of having in his possession a passport in which an entry has been forged, contrary to section 19 (1) (e) and 19(3) of the Immigration Ordinance No. 2 of 1962. I concur with Marsack J.A. in convicting the appellant accordingly. I further concur with Marsack J.A. in sentencing the appellant, upon this conviction, to a fine of £150, and ordering him to pay £5 towards the cost of the prosecution.
- B**

Appeal against conviction allowed but conviction on alternative charge substituted.