IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF WYNBERG
HELD AT WYNBERG

CASE NO. B 2601/59

R E G I N A

versus

RONALD MICHAEL SEGAL

On the 4th August, 1959 I convicted the accused for (a) being in possession of a firearm not licensed in his name and (b) for being in Nyanga Location on the night of the 12th of June, 1959, without a permit and sentenced him respectively to £10 or 10 days I.C.L. and £2 or 5 days I.C.L.

The fines have been paid.

A notice of appeal against both convictions and sentences have now been lodged.

FACTS FOUND PROVED.

1. At about 10.25 p.m. on the night of the 12th of June, 1959, the accused was found in Nyanga location without a permit entitling him to be there.
2. Nyanga location is a properly proclaimed area in the district of Wynberg.
3. Any person desiring to enter the location must first obtain a written permit enabling him to do so and facilities for this exist in the location.
4. There are only two roads leading into the location and accused entered by way of one of them.
5. Accused was in a car and with him he had two passengers, a coloured and a native. He had off-loaded another native in a road in the location from which he was seen coming...../

coming by the police. This road is bordered on each side by shanties which could not be mistaken as being native dwellings.

6. In the car the accused also had 3100 leaflets dealing with an economic boycott and he and his passengers were busy distributing these.

7. Where these two roads enter the location there are notice boards informing the public that permits are required to be able to enter the location but these boards are not clearly distinguishable at night and the words thereon not easily readable in the lights of a car.

8. The accused must have been aware of the fact that they were going to visit the location that night.

9. When found by the police the accused was prepared to pay admission of guilt.

10. At the same time and place the accused was found in possession of a pistol not licensed in his name but in the name of one Mrs.Hillary Flegg, whom the accused know.

11. Accused had reasonable grounds for wanting to be in possession of a firearm and on application by him for a licence to possess one had been refused by the Magistrate of Cape Town.

12. The witness Eric Flegg is the executor in the estate of his late brother to whom Mrs.Hillary Flegg had been married out of community of property. She left for overseas in December, 1958.

13. Eric Flegg holds Mrs.Hillary Fleggs General Power of Attorney to assist her in her business. He was not the owner of the pistol in question.

14. Eric Flegg who had allegedly as executor in his late brother's estate handed the pistol to accused, could not identify the pistol found in accused's possession.

15...../

15. On Monday 15.6.59 accused was specifically asked by Detective Head Constable Sauermann whether he had any authority entitling him to be in possession of the pistol but then, as on the previous Friday night, he refused to disclose the name of the person from whom he said he borrowed it and at no stage informed the police that the lender had, as he said in Court for the first time, given him a statement with the pistol.

16. Before the night of the 12th of June the accused had never been pestered by the police.

17. Both as regards his entry into the location and as regards his possession of the pistol the accused displayed a most irresponsible attitude.

18. Accused is a B.A.Honours and had studied in different countries and in court created the impression that he was a highly intelligent person.

19. Accused was unlawfully in the location and must have known it and he was unlawfully in possession of the firearm and must have known it.

J U D G M E N T

In this case the accused is charged firstly with contravening section 4(1) read with section 30 of Act 28 of 1937 in that on the 12th of June, 1959 he was in possession of a firearm not licensed in his name and secondly that on this night he contravened the provisions of section 9(9)(b) read with section 2(1)(a) of Act 25 of 1945 by being in Nyanga location without a permit entitling him to be there.

I do not propose going through the evidence as the salient facts are referred to in my judgment.

The accused who was represented by Mr. Advocate Forman, pleaded not guilty to both counts but admitted in evidence (a) that on the night in question he was in Nyanga location after 10 o'clock at night

without...../

47.

without a permit entitling him to be there; (b) that he was then in possession of a pistol not licensed in his name; (c) that when found in the location he offered to pay admission of guilt, and accused's legal representative admitted that this firearm before court is licensed in the name of one Mrs.Hillary Flegg and that the terms of a Power of Attorney cannot supercede the provisions of a legal enactment. His defence, however, was based on the following broad issues:

1. That he had no knowledge and had no reason to suspect that he was in fact in Nyanga location;

2. That by virtue of the note given him by Flegg he was legally entitled to be in possession of the pistol; and

3. That in the circumstances the element of mens rea as regards both counts was absent.

As regards his presence in the location the accused's story is that he picked up the three non-europeans and the pamphlets in Cape Town and was directed all over the Peninsula by one of his passengers. He, however, did not know and did not particularly care to know where the leaflets were to be distributed and no itinery had been arranged. He just drove his car and stopped as directed. In this manner, when one of the passenger's said he wanted to go home,he, the accused, was directed into Nyanga location without his knowledge as he had seen no notice boards at the place where he entered the location. His car's lights were not giving trouble but he saw no such notice boards as described by the Assistent Superintendent, Mr.Scheepers. Subsequently he viewed these notice boards and his opinion was that one would require a magnesium flare to be able to read them on a dark night. He did not know where he had entered the location and questions directed at the

crown...../

crown witnesses suggested that he might have entered at a place other than the only two entrances mentioned by Scheepers. No evidence about such a possibility was however tendered by the defence and the person namely the one who directed the accused, who could have deposed to the fact that other entrances do exist, if such were a fact, was not called. As therefore Scheepers' evidence in that respect was in no way rebutted, the court must accept the fact that there are only two entrances into the location and that the accused must have entered the location by way of one of them.

At an inspection in loco held at the location on 22.7.59 the court established that the notice boards referred to by Mr.Scheepers are not so clearly visible in the lights of a car that the words thereon could be read without getting out of the car and going up to the boards.

The accused is charged under the provisions of section 9(9)(b) of Act 25 of 1945 as inserted by section 29 of Act 36 of 1957 and Mr.Forman argued that because of the manner in which the introductory words to this section is framed, the accused is subject to the provisions of regulation 11(1) of Provincial Notice No.455 of 1958 dated 11th July, 1958. In order to get his meaning clear, it is necessary to quote these provisions: The relevant section of the Act reads: " Save as provided in this Act or any other law or when acting in the performance of his functions under any law or in the course of his duty as an employee of the State or on urban local authority ....

No person shall enter or remain in any location, native village or native hostel without the permission of an officer appointed or assigned for the management of that location, native village or native hostel."

Regulation ...../

Regulation 11(1) reads: "Any person who desires to enter, be or remain in the location temporarily shall obtain a permit, [hereinafter called a visitor's permit.] Any person found within the location without a visitor's permit may be ordered by the Superintendent or any official authorised by him, to leave the location forthwith".

Regulation 37(f) reads: "Any person who fails, neglects or refuses to obey any order made in terms of sub-regulation 1 of regulation 11 or having complied therewith, re-enters the location without a visitor's permit or enters the location in defiance of a refusal by the Superintendent to permit him to enter .... shall be guilty of an offence and liable on conviction to the penalties prescribed in section 44 of the Act".

Section 44 of the Act reads: "any person who contravenes any provision of this Act or of any proclamation promulgated or regulation made thereunder shall if no penalty is specifically prescribed in this Act or such proclamation or regulation, be liable on first conviction to a fine not exceeding £10 or 2 months I.C.L.".

Mr.Forman quoted section 3 of Act 5 of 1910 - which act, incidently was repealed by Act 33 of 1957 - but the words re-enacted as follows: "Law means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law", and contended that because the regulation quoted above is also a law and therefore "any other law" as referred to in section 9 of Act 25 of 1945, therefore the accused should have been charged under the regulation and not section 9 of the Act, His argument is that the words "Save as provided in this act or any other law ..." in section 9 should be construed as referring inter alia to the regulation quoted and that because of this wording in section 9 the provisions of regulation 11 should be regarded as in effect supplementing those of section

9 for ...../

9 for purposes of offences of this nature.

I am afraid I cannot follow this line of reasoning. In the first place an offence is created in the statute and I do not think the provisions of a Provincial Notice could usurp those of a statutory enactment unless in the latter such was clearly indicated to be the intention and I have not been referred to any such indication in Act 25/of 1945. In the second place section 9 of the Act refers to persons entering or remaining in the location without permission and in section 44 stipulates penalties for any infringements of any provisions of the Act whereas regulation 11(1) read with regulation 37(f) makes provision for the punishment of persons who fail, neglect or refuse to obey an order by the Superintendent or other official of the location. Section 9 of the act clearly lays down that no person shall enter or remain in the location whilst on the other hand the regulation empowers the superintendent to do certain things when a person is found in the location by him and prescribes penalties for failure by that person to observe that official's orders. Clearly then there are two distinct offences - one for entering or remaining in the location and the other for disobeying the Superintendent's orders, as in this case therefore the accused had entered or remained in the location without a permit and was found there by the police prior to any intervention on the part of the superintendent, he could not be charged with having failed to observe orders not given by the latter and he was therefore, in my opinion, correctly charged.

If Mr.Forman's interpretation had to be adopted, it would mean that notwithstanding the prohibition contained in section 9(9)(b) of the act namely that with certain exceptions, "no person shall enter or remain in any location...." and that notwithstanding the specific injunction contained in regulation 11(1) namely that "any person

who desires to enter, be or remain in the location temporarily shall obtain a permit....", a person would lawfully be entitled to enter or remain in a location without a permit so long as he manages to escape the vigilant eye of the location officials and has not by those officials been ordered to leave the location - in other words that he would be committing an offence only if he had been ordered to leave the location and does not do so or having done so, re-enters the location without a permit or enters the location in defiance of a refusal by the superintendent to permit him to enter.

The construction I place on these two aspects is that whereas the Act prohibits the entry into a location (not a particular one) without a permit and prescribes penalties for contravening this requirement, the regulations, as a natural consequence, prescribes what steps have to be taken by a person desiring to enter Nyanga location, and, without detracting from the prohibitive clause contained in the Act, create penalties for non-observance of the orders of the location officials. The Act is silent about such orders and as indicated earlier, I am of opinion that the Act and the regulations create two different types of offences and that in the circumstances the accused is subject to the provisions of the Act as he had not yet committed an offence in terms of the relevant regulations.

In terms of section 382 of Act 56 of 1955, if an offence is committed under two or more statutes, the offender may be prosecuted under either statute but shall not be liable to more than one punishment and I feel that, unless the contrary is indicated, this principle should also be applied in cases where the provisions of an Act as well as those of a regulation are offended against as otherwise the offender might receive double punishment.

As ...../

52.

As regards the firearm the accused's story is that in consequence of threatening suggestions made to him over the telephone by "thugs", he applied to the magistrate of Cape Town for the issue to him of a licence to possess a firearm. This was refused and the magistrate then advised him that he could borrow a firearm in terms of the law. Accused thereupon consulted his attorney who also told him he could borrow a firearm in terms of the law. He also told accused he knew of a client who would be prepared to lend such a firearm and that he would make the necessary arrangements. This attorney, for whom, according to the accused, he had great respect, however, did not tell him that he could borrow the gun for fourteen days nor that the lender had to give him a note in which the arm is sufficiently described in order to be able to identify it. Accordingly the accused went to the witness Flegg, whom he then saw for the first time, and from him then obtained the pistol in question and the note Exhibit "B". Flegg told him the pistol belonged to the estate of his, Flegg's late brother. Accused did not ask Flegg whether he had a licence to be in possession of the pistol as it would have been insulting to Flegg whom he deemed sufficiently responsible not to lend what was not his to lend. He asked Flegg nothing except the pistol and Flegg then on his own handed accused the note Exhibit "B" and asked accused to sign the receipt thereon. For reasons to be indicated at a later stage I propose dealing very fully with matters affecting Flegg and the pistol.

Flegg said he was just going to lend the revolver to accused, apparently without an accompanying note, but then his attorney advised him of the legal position but he merely mentioned a pistol in the note and thought he had complied with legal requirements. He told accused he wanted a receipt for the pistol because it belonged to the estate of his late brother and he wanted it back after 14 days..../

days. In court he agreed that the pistol before court did not belong to his late brother and accused's legal representative admitted that the pistol before court was registered in the name of that late brother's wife, Mrs. Hillary Flegg who had gone overseas in December 1958. Mrs. Flegg and her late husband, according to him in his capacity as executor of the late brother's estate, were married out of community of property. He, Flegg, then handed into court a General Power of Attorney given to him by Mrs.Flegg, but he could not identify the pistol before court as the one he had handed to accused.

The question is: Did Flegg as executor of his late brother's estate hand the accused a revolver belonging to the estate or did he, by virtue of the General Power of Attorney, hand him a pistol belonging to Mrs.Flegg. He had told accused, and also said so in court, that the pistol belonged to the estate and signed the note in his capacity as executor. As far as I know an inventory of all assets in an estate has to be made so that, as executor, Flegg must know whether or not there was a revolver in the estate. He did not hand accused this revolver belonging to Mrs.Flegg as the holder of her General Power of Attorney and could not in court identify the pistol found in accused's possession as the one he had handed to accused. If Flegg had, in compliance with the provisions of section 35(f) of Act 28 of 1937, sufficiently described the arm so that it could be identified, there would have been no difficulty. In view therefore of all the indication that he had lent the accused a pistol belonging to the estate as specifically stated in Exhibit "b", I cannot now accept his explanation that Mrs. Flegg had also handed him a revolver and that he thought it belonged to the estate. This afterthought of having acted in terms of Mrs. Flegg's

General...../

General Power of Attorney I therefore reject, and the position is that accused was found in possession of a pistol which Flegg could not identify as, and was not sure was, the one he had lent to accused so that accused can now avail himself neither of the protection afforded by virtue of the General Power of Attorney nor of that under the statement handed to him by Flegg - that is, of course, if Flegg did in fact land any arm to the accused. It is in my opinion significant that the accused knew Mrs.Hillary Flegg although he now says he last saw her in 1951 or 1952. She only left for overseas in December 1958.

The whole set-up creates the following irresistable impression: Mrs.Flegg had given this arm to accused prior to her departure without the statement in writing referred to in section 35(f) of the Act. If she had handed it to her brother-in-law and he thought it belonged to the estate, it would have figured in the inventary and Flegg as executor would have known that as a fact and would have said so with certainty in court

In terms of section 44 of the administration of Estates Act every executor shall make an inventory showing the value of all property in the estate and if he becomes aware of additional property in the estate, he shall lodge an additional inventory and on failure to do so becomes liable on conviction to the penalties prescribed by section 108. If she had handed her brother-in-law the pistol to keep in custody as her own property, he would have known that as a fact too and would not have told accused that it belonged to the estate. If therefore he now says that he did not know either of these facts then in my opinion he is either a fool or a liar and I do not think the Master of the Supreme Court would appoint fools as Executors in estates. I quote from Howard's Administration of Estates page 289 where the following extract appears

from ....../

from the case of Smith vs. Mybrea 1913 C.P.D. page 929: "If a person undertakes such important duties as those devolving upon an executor of an estate he must not only act in good faith, but he must be careful to act legally. He is supposed to know the law of the land under which he has undertaken his duties, and if he is at all in doubt as to the properway in which to deal with a particular asset, he should consult a legal adviser. But if he gets bad legal advice .... he is liable to such penalties as the law lays down for such false steps as he may take in consequence of such advice". In the witness box this witness Flegg was very shaky and uncertain of his facts and did anything but create an impression of truthfulness. The obvious inference is that the accused, when he was arrested, did not mention Flegg or a written statement because he did not have such a document and he only approached Flegg when he was in this dilemma and it was only then that Flegg gave him this note, and the reason why Flegg could not sufficiently describe the arm so as to be able to identify it is because the police then had possession of the firearm. Is it perhaps possible that Flegg could not identify the revolver because he had never seen it? And is it conceivable that a responsible man would lend the pistol of another to a total stranger and not make a note of such particulars as the name and number inscribed on the arm so as at least to ensure that he got the identical weapon back? What is the object of requiring a receipt for the arm and then handing that receipt back to the accused? These were unfortunately aspects which were not elucidated by means of questions in court and the defence tendered no explanations. Apart from my remarks about Flegg's demeanour in court, I merely mention this inference in passing because I have already indicated why I found it as a fact that the pistol found in accused's possession is not the one allegedly handed to him by Flegg as executor in his

late brother's estate.

Section 4 of Act 28 of 1927 reads:.....
"No person shall have any arm in his possession unless he holds a licence issued under this Act to hold it."
Section 35(f) reads: Notwithstanding any provision of this Act, any person may, without having obtained a permit or licence therefor ... possess any arm lent or let to him by theowner thereof ... and handed over to him with a statement in writing, signed by such owner, wherein the loan or lease is set forth, the arm is sufficiently described to identify it, and the period of the loan or lease is specified ...."

It is clear from the provisions of these two sections that it is the possessor of a firearm and not necessarily the owner thereof who requires a licence unless the possessor falls within the ambit of section 35(f) when he can hold it without a licence provided it is lent to him by the owner thereof - not the possessor - and he obtains a statement in writing by the owner - again not the possessor.

As regards executors section 35(i) reads
".... Any personmay without having obtained a permit or licence therefor ... possess an arm of which he has the custody as executor of the estate of the former owner thereof!
Here the executor possesses the arm on behalf of the former owner but he obviously does not by virtue thereof become the owner of the arm so that a fortiori an executor cannot in terms of section 35(f) lend an arm belonging to an estate of which he is the executor, and neither can he give the written statement referred to in that section.

The note given to accused by Flegg is therefore utterly useless because not only is it not signed by the owner of an arm but it does not sufficiently describe the arm so as to identify it. A mere description like Italian automatic pistol means nothing and this was clearly demon-

strated...../

strated when even Flegg in court could not identify the pistol against his description.

The question arises whether accused should have satisfied himself whether Flegg could lend him an arm and whether he could sign the statement and whether the arm was sufficiently described in the note. Ignorance of the law generally is no excuse and accused himself said that the magistrate of Cape Town had told him and that his lawyer had told him that he could borrow a firearm in terms of the law. Accused with great gusto told the court that he was a B.A. Honours and that he had studied at the Universities of Cape Town, Cambridge and Virginia in the United States of America and thereby no doubt wished to create the impression that he was a very intellectual person as this evidence could not in any way have affected his defence and it is inconceivable that his lawyer, for whom he had great respects, would not have enlightened him as to the legal requirements as it is a serious offence to be in possession of an unlicensed firearm. In his discussions with Flegg - again if indeed he did get an arm from this man - he was most matter-of-fact and not at all concerned about whether he was likely to transgress the law or not. It seems to me from the general context of the Act that it is the possessor who must satisfy himself that he is fully covered in terms of the Act and that unless he does so, he would be looking for trouble. In Rex. vs. Dippenaar C.P.D. 1941 at page 268 the learned judge is quoted as having stated: "The act in question is clearly designed with the purpose of restricting within certain conditions the possession of and the dealing in weapons and stringent provisions are made so that these can be carefully checked by means of licences and registers of licences."

The requirement that the arm be sufficiently described in the written statement is understandable and reasonable. The whole object of the act is to ensure

proper control of firearms and if the arm is not properly described in that statement, that very object could be circumvented and defeated.

Assuming for the sake of argument that Mrs.Flegg had handed the revolver to her brother-in-law and he had mistakenly lent it to accused as executor instead of by virtue of Mrs.Flegg's General Power of Attorney, then the fact still remains that Flegg was now in the position of possessor of the firearm. He did not say for what purpose she gave him the revolver and he did not necessarily require a licence in terms of section 4(1) of the Act or a statement in writing in terms of section 35(f) because he might have been covered by the provisions of section 35(h) which reads: "... Any persons without having obtained a permit or licence therefor may ... possess an arm entrusted to him by a person entitled to possess it, for conveyance from one place to another or for storage". In the Afrikaans version "or for storage" is translated as "om te bewaar" but the English version was signed by the Governor-General. Would this, wide as the terms of the General Power of Attorney are, entitle Flegg to lend the arm to accused and give him the statement when he, Flegg, is not the owner of the arm? In her Power of Attorney Mrs. Flegg promised to ratify whatever her agent "shall lawfully do" by virtue thereof but it seems to me extremely doubtful whether a person could by means of a power of attorney delegate to another person responsibilities which are of a personal nature. Owner is not defined in the Act and I feel it must therefore be construed in its ordinary grammatical meaning, namely the person in whom the dominium rests. The Act lays down that it is the owner of the firearm who can lend it in terms of section 35(f) and not the possessor. Mr. Forman admitted that the terms of a Power of Attorney cannot supercede the provisions of the Act and if an agent could now as possessor by virtue of a power of attorney do

the ...../

the things which the act permits only the owner to do then the whole purpose of the act would be nullified and it is no doubt for this reason that so many exemptions were incorporated in the Act. In the ordinary course of events an agent can deal with and dispose of the property of his principal in accordance with the terms of a power of attorney but I do not feel that the owner can delegate responsibilities prentio to him as owner when the Act clearly says that only the owner can do certain things 9 such as the lending of a firearm and no where in the act, with the exception of certain specified exemptions, is power granted to the owner to delegate his powers to an agent. In this connection I quote from The Law of Agency in South Africa by de Villiers and MacIntosh, 2nd Edition; followed, where necessary by my comments: Page 27: "An act which is of such a nature that it could be done by a person himself may be done on his behalf by an agent except (1) where the Act is of a personal nature in the sense that the identity and personal attributes of the performer of the Act are of material importance in the circumstances to another who has a legal interest in its performance and (2) where the person is required by his office ~~as~~ or by statute to perform the act in person."

In this case, with certain exceptions which do not cover Flegg, the Act stipulates that the owner is the person who should hand over the arm and he is the person who shall sign the statement.

Page 49: "General words in a power of attorney which follow upon clauses authorising specific acts are construed, in the absence of indications to the contrary, as being the sum total of the specific acts let out. Similarly, when specific words follow upon more general terms the latter must probably be read as limited by the former".

Flegg admitted under cross-examination that Mrs.Flegg's Power of Attorney was given to him in order that he should assist her in her business but I doubt whether this would include the lending of her firearm.

Now, in the power of attorney, certain specific acts are delegated to Flegg and these are preceded by the words "... appoint... to be my true and lawful attorney and agent, to generally manage and transact all my business and affairs in the Union of South Africa with full power and authority, for me and in my name and for my account and benefit". In page 51 of the treatise the following quotation is reported as flowing from the case of Abdullah vs. Levy 1916 C.P.D. at page 302:
"A principal cannot give his agent power of attorney to enable him thereby to do acts in contravention of the Law". For Flegg to lend her arm to a total stranger and to sign the statement which she alone could do as owner was a transgression of the law and cannot, in my opinion, be regarded as for her "account and benefit". The terms of a power of attorney cannot lawfully authorise the commission of an offence and these general words in Mrs. Flegg's power of attorney must, therefore, in my opinion, be read as being qualified to that extent and that Flegg could not therefore in the conduct of his sister-in-laws business lend accused Mrs.Flegg's pistol.

Now, if the explanations given by the accused could reasonably and possibly be true it should in the ordinary course of events be accepted even though not believed by the court. - that is unless other considerations intervene. It therefore becomes necessary to examine the explanations given by the accused as regards both counts.

The accused has told us how he came to be in possession of the pistol and I have pointed out why, in my humble opinion, Flegg had no legal authority to hand this arm to him. It has been suggested that accused acted bona

fide...../

fide in that, even though Flegg did not have the right to hand the pistol to accused, the latter had acted upon legal advice and that of the Chief Magistrate of Cape Town and that therefore he was genuinely under the impression that he was legally entitled to be in possession of the weapon.

In order to test the accused's bona fides regard must be had to subsequent events. He told the court that he borrowed the firearm because of telephonic threats he had received; an attempt had been made to blow up his car; that he had no intention of taking a revolver to a location but that he did so because of the reasons stated above and because he had to return home late that night and " thugs " had already told him that they knew where he lived. If he did not know "or particularly care to know" where he was being directed that night and was moreover, as he said, unacquainted with the area traversed by him that night, how would he have known how to find his way home alone that night? When found in possession of the revolver in the location, he immediately told the police that he had a pistol in his possession which was not licensed in his name. He obviously could not say anything else because, ignorant of the law as he professed to be, he must have know that this could be checked. He however, told the police nothing about Flegg's note because, according to him, he would not disclose the lender's name until he had asked that person for his permission to do so and the reason why he did not want to do so was because other people had been intimidated by the police for being associated with him, the accused.

It is interesting to note the reasons advanced by accused for this decision, At first he mentioned three incidents namely (1) a coloured youth Drakes had his passport removed; (2) he, the accused had been pestered by the police, and (3) counsil whom he had briefed in htis

this case had been threatened. He admitted however, under cross-examination, that both the first two incidents took place subsequent to his being found in possession of the firearm and it is obvious that the threats to his counsil uncorroborated, also took place afterwards, so that he was trying to bluff the court, since these incidents could not possibly have influenced his mind when he decided not to disclose Flegg's name and he also later under cross-examination admitted that before this night he himself had never been pestered by the police, and that he was referring to his interrogations by the police after his arrest and after he had been asked for the leader's name. The accused was therefore not truthful when he made these statements under oath and as an intelligent person, when making these statements, he must have known that they could not be true as reasons for his refusal to disclose Flegg's name.

Further, under cross-examination, accused stated he could quote numberless instances of intimidation. When pressed for names he could only mention the name of one, a certain Rhona Baskin but said that if he dredged his mind he could think of others. Intimidation of persons was his specific reason for refusing to disclose Flegg's name yet though he thought hard in court and took quite a while over it, he could think of only one. At the suggestion of his counsel he then undertook to submit a list of names by "documentation". He then, during the course of an inspection in loco held on the night of 22nd July, handed in a list under cover of an affidavit subscribed to by him, and in which he inter alia said:

"...I annex hereto details of the various cases brought to my personal attention relative to the above. 2. Details of these cases were within my knowledge at all relevant times..." He then annexed a list containing not numberless but nine names of persons who had, according

to...../

to him, been intimidated. These cases are purperted to be extracts published in the Cape Times from time to time and not one of them discloses association with the accused or with Flegg. For all I know in all these cases the police has legally acted within the scope of their authority and there is no evidence before me to the effect that they had acted unreasonably. These extracts contain merely opinions and outbursts against the police and in my experience wrongdoers always villify, and bear a grudge against, the police. I fail, therefore, to see how these could be regarded as good or lawful excuses - especially after accused had been asked on the following Monday whether he had any authority to possess the arm. Knowing the predicament he was in, one would have thought that accused would have contacted Flegg on Saturday or first thing on Monday morning. He however still persisted in his refusal and here it is to be noted that although the accused is not charged under section 7 of the Act, the police were fully entitled to demand production of a licence or such an authority. The accused said or intimated nothing further to the police and then unexpectedly produced the note Exh. "B" in court and called Flegg in on an endeavour to prove that if the latter could not hand the arm to accused as executor in his late brother's estate, he could do so as the holder of a power of attorney given by that late brother's wife whom, incidentally the accused knew.

In the last paragraph of the annexure to his affidavit the accused remarks: "There was no doubt in my mind at the time that I was regarded as politically unfortunate by the Security Police..." There is no evidence that at the time of his arrest he was accused by the police of anything suggesting subversive activities so that this opinion must have been formed in his mind either at his subsequent interrogation or on a previous occasion and he had admitted that prior to this night he had not been pestered by the police.

Surely...../

Surely he could not have formed this opinion merely because the police questioned him about his presence in the location without a permit when he had with him some 3000 leaflets dealing with an economic boycott and about his possession of the firearm? They acted within the scope of their duty and would no doubt have questioned anybody they found there that time of night under such suspicious circumstances. If, on the other hand, accused had been of this opinion before this night, why did he not ask Flegg permission in anticipation of what might happen if he is found in possession of the revolver by the police. Even the accused, with his lack of knowledge of the law, must have realised that the first thing the police would ask would be: Who let you the pistol? and that trouble might ensure if he could not say.

Reverting to the questioning of accused by the police on the Monday morning, Detective/H/Constable Sauermann said that he also asked the accused whether he had any authority entitling him to be in possession of the firearm and that accused did not in response thereto produce any such document. In his cross-examination of the Crown witnesses counsel for the defence at no stage suggested or intimated the existence of a statement signed by Flegg which would, as alleged by the defence, entitle the accused to be in possession of the firearm and the accused was not charged with having failed to produce such a document. Neither did counsel put any questions to the crown witnesses in an endeavour to shake them in their evidence to the effect that accused had been asked about such document, but in his evidence accused denied this and unexpectedly produced the note Exhibit "B". As therefore neither the crown nor the court had any indication that this evidence was going to be reputed in this manner, no evidence in corroboration thereof was called and as this document goes to the very root of accused's defence on this charge, it was, I felt, my duty in terms of section 210 of the Crominal Prodedure Act in order to

me to arrive at a just decision in this case to call Captain van der Westhuizen even though both the Crown and the defence had closed their cases and both had addressed the Court. In his evidence-in-chief the accused had said "I was being charged and I intended on the advice of my attorney to produce this certificate as soon as I was required to do so". The accused had already been informed that he was being charged with having in his possession a firearm not registered in his name and he was convinced in his own mind that he was fully covered by this document so that if Sauermann's statement is correct, namely that accused had been asked about such an authority, then accused knew that he should have produced it to the police as soon as he had, as he says, consulted Flegg and had obtained his permission. This he did not do because hesays he was not asked about such a document. I find support for this action of mine in the case of Rex. vs. Msheshwe 1920 E.D.L.page 198 where the police had in a stock theft case given evidence of the finding of a skin in the hut of the accused. The accused in evidence denied the truth of this and the magistrate was held entitled thereafter to call the evidence on the point of certain persons who were in the hut at the time.

When examined incourt, this morning Captain v.d. Westhuizen, confirmed Sauermann's statement that accused had been asked about such a document and moreover confirmed that Sauermann and not he had questioned accused in his office about his matter. Accused had intimated that/ the captain and not Sauermann had asked him questions pertaining to the revolver.

In his cross-examination of Captain v.d.Westhuizen Mr.Vorman in effect suggested that the police had no right to question the accused after he had been charged but I do feel that the court is at the moment concerned with

that/.....

aspect and accused did not say that that was the reason why he refused to mention Flegg or about any document. The Court is only at this stage concerned with accused's statement in court under oath that he had not been asked about any document which would entitle him to be in possession of the pistol in question. Sauermann's evidence in this respect has now been corroborated by Captain v.d. Westhuizen and this proves that accused had told the court an untruth and I do not feel myself called upon to decide whether or not the police had acted irregularly or not as I am now only dealing with evidence given in court.

Now, could or should the accused have know that he could not be in possession of this firearm and is his explanation that he did not know he was in Nyanga location acceptable? Mr.Forman submitted that by reason of the legal advice he obtained accused was under the bona fide impression that he was entitled to possess the firearm and that he honestly did not know he was in the location and that in both cases it was a mistake of fact for which accused should not be held responsible.

As regards the firearm section 4(1) reads that no person shall be in possession of an arm not licensed in his name, and I do not think this could in any way be construed as permissive. The mere possession of such an unlicensed arm by any person, unless he falls within one of the exemptions of the Act, is an offence and it therefore behaves such a person, in my opinion, to satisfy himself that he is properly covered. He may, inter alia, in terms of section 35(f) have a firearm not licensed in his name in his possession provided it is lent to him by the owner thereof together with a written statement signed by such owner. The severe penalties imposable for non-observance of these requirements seem to indicate that the legislature regarded trangressions of this enactment in a very serious light. This again suggests extreme care on the part of a

person...../

person obtaining possession of a firearm and it seems to me hardly feasible that an accused person could come along and say I was mistaken about my facts, and that he should then without more ado be discharged.

The reasons why accused wanted a firearm are understandable although some of the instances mentioned by him may be purely imaginary. One must not, I feel, lose sight of the fact that the Chief Magistrate of Cape Town had refused to grant him a licence to possess a firearm and also the fact that the accused felt that he was "regarded as politically unfortunate by the Security Police". In these circumstances one would have expected an extraordinary degree of care on his part to ensure that he could legally have this firearm in his possession yet one finds that he merely asked Flegg for the firearm and did not even bother to enquire whether that alone would be sufficient or whether he perhaps required a document of some sort and neither did he even think it necessary to ask Flegg whether the latter had authority to lend him the arm. He was, in other words, completely unconcerned about any legal requirements pertaining to the possession of a fire-arm - and I am still acting under the assumption that he did in fact get the pistol from Flegg. There could there-fore have been no mistake of material facts on his part as he ascertained no such facts - he merely asked for and took the pistol and the statement when handed to him by Flegg. The only fact he did become aware of was Flegg's statement that the pistol belonged to his late brother's estate and this alone, I should think, should have been enough to place any intelligent person on his guard. The magistrate and also his attorney told him that he could borrow the arm in terms of the law yet he took no trouble to find out what the terms of the law were. How then can he now plead mis-take of fact or even, for that matter, ignorance of the law.

As intimated earlier I went very fully into the matter concerning Flegg and I did so because I felt the whole cause was tainted with mala fides. I have indicated why, in my opinion, he had no right whatever to hand the pistol to accused - if, in fact, he did, which I strongly doubt - and if he is at all a man with a reasonable sense of responsibility, he must have known this and so must the attorney who allegedly advised him. In court accused first produced a note signed by Flegg in his capacity as executor and then Flegg again produced a General Power of Attorney but notwithstanding all this he could not identify the pistol in court as the one he had handed to accused. I therefore came to the conclusion that Flegg in fact knew nothing about this pistol which transpired to be registered in the name of his sister-in-law whom accused knew and that the story of his having handed it to accused in terms of the law is a most unlikely one. It is equally unlikely that accused knowing his position and being an intelligent person would not have satisfied himself about the legal requirements if he had in fact acted on legal advice. Flegg, therefore, as already pointed out, was either a fool or a liar, and all the facts point to the latter so that his evidence as an attempt to substantiate accuseds story is worthless. This is no doubt the reason why accused would not mention Flegg or the note to the police and we know that all the accused was interested in was getting a revolver.

Added to this the accused not only tried to bluff, and actually lied to, the court about incidents which could not possibly have influenced his mind when he was first found in possession of the pistol but he also lied about whether or not on the Monday he was asked by the police if he could produce any authority entitling him to be in possession of the arm.

Now, as regards accused's presence in the location.

The...../

69.

The wording of section 9 of Act 25 of 1945 is prohibitive and not permissive. It says no person shall enter or remain in the location and although, in view of the nature of the signboards as found by the Court, it might not be possible for a person at night to realise he was entering the location, he would still be guilty of an offence once he is inside the location but surrounding circumstances may perhaps be taken into account in mitigation of sentence.

The question is whether the accused knew, or should have known, that he was in Nyanga location on this night. He had with him in the car two natives and a large number of leaflets connected with a particular type of boycott and which the natives asked him to help distribute at night. One of these natives - a person whom accused regarded as a responsible person - was a good acquaintance and it transpired that the other native, whom he says he did not know, lived in Nyanga location - a location the accused said he had heard of, but he told the police that he did not know he required a permit to be in the location.

The natives in the car, whether as promoters or organisers, were distributing these leaflets with the assistance of the accused and he now/ doubtless wants the court to believe that he did not know they were also going to the location although it should have been commonknowledge to him that large numbers of natives live in the location, and that the boycott was being arranged by Natives. Would not any reasonable person under such circumstances have suspected that the location might be visited too? He says he did not know and did not particularly care to know whether he was being directed - in other words, whether he was being directed into prohibited areas or not was of no concern to him - all he was interested in was the distribution of the apmphlets and he was not even interested to know where this had to be done. On the night of the inspecti

in/.....

in loco I gained the impression that accused could not but know before he was accosted by the police that he was in a location because of the type of houses and shanties and natives wandering about. I could also then appreciate why a person would want to be armed with a revolver because the locality there, especially the road from which the accused was seen to come, appeared so sinister that I felt nervous even with a number of other European men present. It is so unlikely as to be ridiculous that accused would not know where they were going to that night and the places to be visited. At some time or another there must have been discussions about the matter. They were acting in concert in what might very well be regarded as a neforious transaction and yet the accused wishes the court to accept his bland statement that he did not know where they were going. He did not call any witnesses to corroborate these far-fetched stories of his. His story that he did not know he had to have a permit to enter the location is so childish that I reject it without further comment.

For these reasons I came to the conclusion that accused knew or should have known that he was illegally in Nyanga Location at 10.25 p.m. on the night of the 12th of June, 1959, and that he knew or should have known that he was illegally in possession of the pistol on the night in question. As regards both counts his explanations were so unreasonable and unacceptable and his attitude on his own statements one of such entire irresponsibility, that I felt the element of wilfulness and consequently a guilty mind, cannot be ruled out. That is why he had to tell lies in court under oath. In fact, I felt that the accused was the biggest and the most glib liar it has ever been my misfortune to listen to in a court of law. In court he showed not the slightest signs of remorse - rather was his attitude throughout that of a braggadacio highly elated at having outwitted the police, and having bluffed and lied to the court.

71

My judgment is that the accused is guilty on both counts.

I did not impose a heavy sentence for his possession of the firearm because on the admissions of Sauermann I was satisfied that accused had good grounds for wanting a protective weapon. As far as I am aware he is not a person debarred from possessing a firearm and there was nothing inevidence to suggest that he had any ulterior motives - although he was found in possession of it under somewhat unsavoury circumstances. At the same time I felt accused deserved punishment.

DATED AT WYNBERG THIS 8TH DAY OF AUGUST, 1959

(Signed) J.J. Slabbert
ADDITIONAL MAGISTRATE
(J.J. Slabbert)

IN THE MAGISTRATE'S COURT WYNBERG (B.COURT)

R. vs. SEGAL

Clerk of the Court,
WYNBERG.

Take notice that an appeal is noted against the judgment delivered in this honourable court on 4th August 1959 on the following grounds:

First Count:

That the magistrate erred in holding:

(a) That there was not a bona fide and lawful agreement in terms of which the accused was entitled to be in possession of the pistol before the court;

Second Count:

That the magistrate erred in holding:

(a) That the Cape Divisional Council Location Regulations promulgated in PN 455/1958 of 11th July, 1958 are not applicable in the present case.

(b) That the accused knew that he was in the location.

Dated the 4th August, 1959.

(Sgd.) L. Forman

(Counsel for Accused)