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IN THE PRIVY COUNCIL

No. 23 of 1970

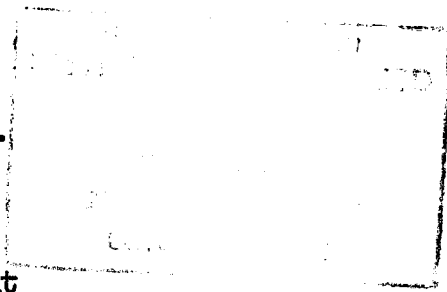
ON APPEAL
FROM THE SUPREME COURT OF CEYLON

BETWEEN :

IDROOS MOHAMED MUCKTAR Appellant

- and -

D.H. WANASINGHE,
Inspector of Police, Gampaha Respondent



CASE FOR THE APPELLANT

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1. This is an appeal by Special Leave from a Judgment of the Supreme Court of the Island of Ceylon, dated the 2nd January 1970, whereby the said Court directed the productions in M.C. Gampaha Case No. 32878/A be confiscated and handed over to the Wild Life Department for disposal, having allowed the Appellant's appeal against his conviction on the 22nd July 1969, by the Magistrate's Court of Gampaha, of an offence under Section 31.(1)(d) of the Fauna and Flora Protection Ordinance, Chapter 469 of the Revised Legislative Enactments of Ceylon, as amended by the Fauna and Flora Protection Ordinance (Amendment) Act No. 44 of 1964.

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2. The main question raised by this appeal is whether the Supreme Court, having found that an accused had not committed any offence under the Fauna and Flora Protection Ordinance, and having acquitted him, it would be open to that Court, by which he had not been convicted, to make an order under the provisions of Section 64.(1) of the

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Fauna and Flora Protection Ordinance and, if not, whether the same Court can act under the provisions of Section 413(1) of the Criminal Procedure Code.

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3. On the 14th May 1969, the Appellant was charged in the Magistrates Court of Gampaha on the following charge: "You did within the jurisdiction of this Court, at Makewita on 8th April 1969 in an area outside a National Reserve or Sanctuary, have in your possession or under your control, skins of beasts included in schedule IV, to wit; two skins of leopards; seven skins of heads of leopards; eight skins of legs of leopards; three pieces of leopard skins and six mounted heads of leopards, all skins which were those of recently killed leopards, in contravention of section 31.(1)(d) of the Fauna and Flora Protection Ordinance, Chapter 469 L.E.C. as amended by Fauna and Flora Protection (Amendment) Act No. 44 of 1964 and thereby committed an offence punishable under section 31 of the said Ordinance read with the said (Amendment) Act."

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4. The relevant provisions of the Fauna and Flora Protection Ordinance (Chapter 469 of L.E.C.) are as follows:-

"Section 31.(1) Any person who in any area outside a National Reserve or Sanctuary -

x x x x x x x

(d) has in his possession or under his control any such reptile or beast recently killed or taken or the skin of any such reptile or beast recently killed or taken, or the recently taken eggs of any such reptile; shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two hundred and fifty rupees or to imprisonment of either description for a term which may extend to three months or to both such fine and imprisonment.

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Provided that no person shall be deemed to have committed an offence under this section in

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relation to any reptile or beast specified in Schedule IV in respect of any action permitted by virtue of a license issued by the Warden.

(2) A person shall not be guilty of an offence under this section if the act which constitutes such offence has been done in the circumstances and subject to the conditions under which such act is authorized or permitted by any regulation made under section 32."

10 5. At the trial the prosecution case against the Appellant was that the said productions that were found in the possession of the Appellant were skins of recently killed leopards and that place was a place outside a National Reserve or Sanctuary.

20 The prosecution mainly relied on the evidence of D.H. Wanasinghe, Inspector of Police, Gampaha, G.G. Gunasekara, P.S.4291 then of Gampaha Police and A.S.A. Packeer, Deputy Warden, Department of Wild Life, to prove that the skins were that of recently killed leopards, and that the Appellant was in possession of the said skins in a place outside a National Reserve or Sanctuary.

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30 The prosecution also relied on a Report of the Director of National Museums certifying that the skins were that of leopards in accordance with Section 35 of the Fauna and Flora Protection Ordinance Chapter 469 and that the skins appear to have been collected recently, which was marked as evidence.

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The only relevant issue was whether the skins were that of leopard recently killed.

6. On 22nd July 1969 the Magistrate's Court of Gampaha (W.P.N.de Silva) gave judgement finding the Appellant guilty of the charge against him and convicted him and sentenced him to pay a fine of Rs.200/-.

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The learned Magistrate did not make any order as to the productions in the said case.

40 7. The Appellant appealed to the Supreme Court

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of the Island of Ceylon by Petition of Appeal dated the 29th day of July 1969.

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8. The said Appeal was argued on the 17th and 18th December 1969, and on the 2nd January 1970 the Supreme Court of Ceylon (Alles J.) allowed the Appellant's appeal against his conviction. Alles J. who heard the appeal based his judgement on the ground that the prosecution had failed to prove that the skins were that of recently killed leopards. He also made the following order in respect of the productions in the case; "I am however satisfied that the Appellant has not obtained these productions by innocent means. I therefore direct that all the productions be confiscated and handed over to the Wild Life Department for disposal."

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9. The Appellant was granted Special Leave to Appeal against the order directing the confiscation of the productions by Order in Council dated the 28th day of April 1970.

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10. It is respectfully submitted that Alles J. did not state in his order under what provisions of the law he had acted.

11. That the sole charge against the Appellant was one of possession or having under his control skins of beasts included in the Schedule IV to wit:- Two skins of Leopards, seven heads of leopards, eight skins of legs of leopards, three pieces of leopard skins and six mounted heads of leopards, all skins were "of recently killed leopards".

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Section 64.(1) of the Fauna and Flora Protection Ordinance reads as follows:- "Except as is hereinbefore expressly provided in regard to the disposal of any tusker or elephant or the carcass of any tusker or elephant or the tusks of any tusker on the conviction of any person for an offence relating to a tusker or elephant, any animal or any part of any animal in respect of which any offence has been committed and any gun, boat, artificial light, snare, net trap or other instrument, contrivance, appliance or thing used in or for the commission of any offence may be

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confiscated by order of the Court before which the offender is convicted and may be disposed of in such manner as the Court may direct."

Thus it is a condition precedent that the offender must be convicted of the offence with which he was charged for the Court to have jurisdiction to act within the provisions of the Fauna and Flora Protection Ordinance.

10 The Appellant submits that the Supreme Court having found that the Appellant has not committed any offence under the Fauna and Flora Protection Ordinance, and having acquitted him, it was not open to that Court thereafter to make an order under the provisions of Section 64.(1) of the Fauna and Flora Protection Ordinance.

20 12. It is respectfully submitted therefore that the learned Judge in Appeal had no powers under Section 64.(1) of the Fauna and Flora Protection Ordinance, to order the confiscation of the productions referred to above.

13. The only other provisions under which the Court may have purported to act is under Section 413 (1) of the Criminal Procedure Code which reads as follows:-

30 "When an inquiry or trial in any criminal court is concluded the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence."

It is respectfully submitted that where the special provisions of the Fauna and Flora Protection Ordinance gives power for the confiscation of property in relation to which offences have been committed under that Ordinance, the general provisions of the Criminal Procedure Code contained in Section 413 (1) for dealing with property are pro tanto abrogated.

40 In the case of Police Sergeant Vs. Kangany and Others, reported at Page 45 in 3 Ceylon Law

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Weekly, it had been held that Section 413 (1) of the Criminal Procedure Code does not give power to order a confiscation of the gun with which an offence under Section 5 (2) of the Ordinance No. 1 of 1919 was committed.

Ordinance No. 1 of 1919 was the Game Ordinance which preceded the Fauna and Flora Protection Ordinance, and did not contain the provision for the confiscation of property in respect of which any offence has been committed, or used in or for the commission of the offence. 10

Macdonell C.J. who heard the appeal also added to his judgement "We must remember that forfeiture or confiscation is a penal provision and the power to confiscate should clearly be given by law. The offence of which the Appellant has been convicted in this case is not an offence under the Penal Code, but under the special statute. That Statute does not seem to give the power of confiscation and I think it will be best if I follow the opinion quoted of Ennis J. If that is so then the confiscation of this gun was not authorised under Section 413 (1) of the Criminal Procedure Code and I set aside the order appealed from". 20

In the case of Godinden Vs. Nagoor Pitche, reported at Page 115 in 20 N.L.R., Ennis J. stated "Where the property belongs to a person who is not a party to the offence, it would be inequitable in most cases to make any order other than one directing the return of the property to the owner." 30

The Fauna and Flora Protection Ordinance No. 2 of 1937 which superseded the Game Ordinance No. 1 of 1919 now provided for the confiscation of property in relation to which any offence has been committed or used in or for the commission of any offence.

14. It is also submitted that with the acquittal of the accused on the ground that the prosecution has not proved the essential ingredient that the skin was that of leopard 40

recently killed there was no material on which the learned Appellate Judge could have formed an opinion that the leopard skins which he ordered to be confiscated was property regarding which any offence appears to have been committed or has been used in the commission of any offence.

10 It is further submitted that the Appellate Judge had no material before him to come to the conclusion, as he did, to satisfy himself that the Appellant had not obtained these productions by innocent means.

15. The order of confiscation made by the Appellate Judge was made without hearing the Appellant and it is respectfully urged that the said order is not only contrary to law but was also contrary to the principles of natural justice in that the Appellant had not been heard on a matter which was not an issue at any stage of the proceedings whether in the Magistrate's Court or
20 in the Appellate Court.

The order of confiscation of the property on the ground that the Appellant has not obtained these productions by innocent means, contrary to law and contrary to the principles of natural justice, is a penalty in that he had not only lost property, but also his character and standing in society without his being given an opportunity to defend himself.

30 Your Lordship's decision in the case G.R. Daniel Appuhamy Vs. The Queen, reported at Page 481 of 64 N.L.R., is respectfully cited.

16. The Court satisfying itself without material, and the Appellant not being heard, and without giving a chance to defend himself, is an arbitrary exercise of authority which is unwarranted in judicial proceedings.

The Appellant respectfully submits that this appeal should be allowed for the following among other

RecordREASONS

1. BECAUSE Section 64.(1) of the Fauna and Flora Protection Ordinance has no application in that the Appellant had not been convicted under the Fauna and Flora Protection Ordinance.
2. BECAUSE where the special provisions of the Fauna and Flora Protection Ordinance give power for confiscation the general provision of the Criminal Procedure Code is abrogated. 10
3. BECAUSE the power to confiscate is a penal provision and the power to confiscate should clearly be given by law.
4. BECAUSE there is no material on which the learned Appellate Judge would have formed an opinion that the Appellant had not obtained these productions by innocent means.
5. BECAUSE the said order is contrary to law and also the principles of natural justice in that the Appellant has not been given a chance to defend himself. 20

V.E. SELVARAJAH.

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C A S E F O R T H E A P P E L L A N T

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