

1948

*Present: Howard C.J.*

SIRIMALA, Appellant, and BANDARANAIKE (Range Forest Officer), Respondent.

*S. C. 211—M. C. Kurunegala, 33,005.*

*Fauna and Flora Protection Ordinance—Charge of possessing elephant—Acquittal of accused—Order of forfeiture of elephant irregular—Section 22.*

Where a person charged under section 22 of the Fauna and Flora Protection Ordinance with unlawful possession of an elephant is acquitted, the Court has no power to order the forfeiture of the elephant.

**A** PPEAL from a judgment of the Magistrate, Kurunegala.

*G. E. Chitty, with A. H. E. Molamure, for the accused, appellant.*

*Boyd Jayasuriya, Crown Counsel, for the Attorney-General.*

April 22, 1948. HOWARD C.J.—

In this case the appellant was charged with being in unlawful possession of a tusker under section 22 of the Fauna and Flora

<sup>1</sup> *Maxwell—Interpretation of Statutes, p. 377 (9th Edn.).*

Protection Ordinance (Cap. 325). Section 22 of this Ordinance is worded as follows:—

“ Any person who is in unlawful possession of a tusker or an elephant shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five hundred rupees or to imprisonment of either description for a term which may extend to six months or to both such fine and imprisonment; and the court may on the conviction of any such person make order for the disposal of the tusker or elephant in respect of which the offence was committed, having regard to the rights of any other person who may appear to the court to be lawfully entitled to the possession of such tusker or elephant. ”

The Magistrate acquitted the appellant but subsequently made an order forfeiting the elephant and giving it to the Crown. In my opinion the Magistrate had no power to make the order of forfeiture. Such an order could only be made if the appellant had been convicted.

Now, Mr. Boyd Jayasuriya on behalf of the Attorney-General contends, first of all, that the acquittal by the Magistrate was wrong in law and that I should set aside that acquittal and convict the appellant. The Attorney-General did not appeal against this acquittal nor is there any formal application in revision. In these circumstances I cannot accede to this request. Alternatively, Mr. Jayasuriya says that I should invoke in aid the provisions of section 413 of the Criminal Procedure Code and make an order for the disposal of the elephant under that section. He has also referred me to the case decided by Wijeyewardene J., *Joseph v. The Attorney-General*<sup>1</sup>. I do not consider that that case has any application to the facts of the present case in view of the clear words of section 22 of Chapter 325 that an order for the disposal of the tusker or elephant can only come into operation on the conviction of the accused.

In these circumstances I am of opinion that the order of forfeiture must be set aside.

Mr. Jayasuriya has invited my attention to the terrible consequences of this order of mine inasmuch as it leads to somebody who has not title whatsoever getting away with a wild elephant. All I can say is that I have no desire to be a party to such a heinous crime and even share the consequences of being a party with the Crown Proctor of Kurunegala and those responsible for the prosecution in not realising the mistake they were committing in not appealing against the acquittal of the accused. But I should like to say that the consequences do not appear to be so terrible when section 16 (2) of Chapter 325 is taken into account. Section 16 (2) states that subject to the provisions of subsection (1) every tusker or elephant which is killed or captured shall be the property of the Crown. So if this really is in fact a tusker, the Crown is entitled to bring a civil action to recover the tusker from the person whom the Crown suggests is in unlawful possession of it.

*Order set aside.*

<sup>1</sup> (1946) 47 N. L. R. 446.