

**IN THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE**

APPELLATE JURISDICTION

G U Y A N A

CIVIL APPEAL NO. 120 OF 2000

BETWEEN:

SHEIK ALI

Appellant

- and -

**THE ATTORNEY GENERAL
OF GUYANA**

Respondent

BEFORE:

Hon. Madam Justice Desiree P. Bernard	- Chancellor
Hon. Madam Justice Claudette M.C. Singh	- Justice of Appeal
Hon. Mr. Justice Winston Moore	- Additional Judge

Mr. Rex Mc. Kay, SC with Mr. Hukumchand for Appellant
Mr. A. Chase, SC with Ms. D. Young & Ms. P. Chase for Respondent

2004: December 13, 20

2005: March 4

J U D G M E N T

BERNARD, C.:

Before embarking on a discussion of the issues raised in this appeal it is necessary to analyse and consider the events which preceded it.

The Appellant, Sheik Ali, was an authorised dealer in gold, and in 1997 was the holder of an authorisation from the Guyana Gold Board to possess, sell and export gold until its expiry on 30th April, 1998. In the said month of April he made a report to the police that four gold bars (217 ounces) belonging to him had been stolen on 30th March, 1998. Two persons were later arrested and charged with larceny of the said gold bars, but it does not seem as if the charges were pursued.

During the currency of the investigation the Appellant made an application to the Magistrate's Court under Section 69 of the Police Act, Cap. 16:01 for an order that the gold be delivered to him. From the records on file it seems that this application was filed on 10th June, 1998 and was first called before the Chief Magistrate on 11th June, 1998. A copy seems to have been given to one Inspector Peters who was the Court Prosecutor, and then fixed for 16th June, 1998. There is no record that anyone appeared for the Police on 16th June, and the Chief Magistrate made an order that the Police return 217 ounces of raw gold to the Appellant having been satisfied that it was his property.

On 1st July, 1998 the police filed a notice of appeal against the said Order of the Chief Magistrate, but on 24th July, 1998 this was struck out by the Full Court as having been filed out of time.

The next strand in this fabric of events is that the Appellant filed in the High Court an application for a writ of mandamus against the Commissioner of Police who had not complied with the order of the Chief Magistrate, and on 8th July, 1998 **Ramgopal, J.** granted an order nisi of mandamus compelling the Commissioner of Police to show cause why the said order should not be made absolute. This was made returnable for the morning of 15th July, 1998, but no one appeared for or on behalf of the Commissioner of Police, and despite an adjournment granted to the afternoon of 15th July, no one still having appeared, the learned judge made the order absolute.

On 17th July, 1998 a notice of appeal to the Court of Appeal against the order of **Ramgopal, J.** was filed on behalf of the Commissioner of Police, but was withdrawn on 3rd August, 1998. While the appeal was pending an application was made by the Commissioner of Police on 22nd

July, 1998 to **Ramgopal, J.** for a re-hearing of the writ of mandamus but on 20th August, 1998 this was refused.

However, on 25th August, 1998 a notice of appeal was filed by the Police against the refusal by **Ramgopal, J.** of the order for a re-hearing.

Prior to both the refusal of the order for re-hearing and the notice of appeal against its refusal, the Police through Senior Superintendent Philbert Adams, on 4th August, 1998 filed an application in the High Court for writs of certiorari and prohibition against the original order of the Chief Magistrate, and on 7th August, 1998 orders nisi were granted by **Kissoon, J.** After a hearing the said orders were made absolute on 4th December, 2000, and the order of the Chief Magistrate set aside. We are now required to decide on the appeal from these orders.

One of the main issues in this appeal relates to **Section 69 of the Police Act, Cap. 16:01** as amended by Act No. 15/1983 and as such I shall set it out verbatim:

“Where any property has come into the possession of the police in connection with any criminal charge or as the result of any search carried out by a member of the Force, a court of summary jurisdiction may, on the application either by an officer or by a claimant of the property, make an order for the delivery of the property to the person appearing to the court to be the owner thereof, or, if the owner cannot be ascertained, for the property to be dealt with in the manner provided by Section 68”.

Section 68 provides for sale of unclaimed articles in the hands of the Police to be sold at public auction.

The Section empowers a court of summary jurisdiction to make an order for the delivery of property in the possession of the Police in connection with any criminal charge upon the application of either the Police or anyone whom the Court is satisfied is the owner of the property.

It does not specifically provide that the parties involved be heard at an inter partes trial before the order is made neither does it provide at what stage of a criminal investigation the application can be made, e.g. after a conviction or acquittal of someone under a criminal charge in connection with the property taken by the police in its investigations. The literal wording of the Section seems to suggest that the order can be made at any time after the property has been taken into the possession of the police. Research indicates that a similar provision existed in the English Police (Property) Act 1897 on which I am certain ours was based. On the issue as to whether the application needs to be served on anyone I found a very interesting and instructive passage in the judgment of **Holroyd Pearce, L.J.** in Irving v. National Provincial Bank (1962) 1 ALL E.R., 157 at page 159 which involved a claim under the Police (Property) Act, 1897 though not under identical circumstances. During the course of his judgment **Holroyd Pearce, L.J.** speaking about the said Act observed:

“It provides practical machinery to deal with a practical situation. It does not provide machinery as elaborate as that of interpleader. It does not even provide that the prisoner from whom the goods are taken must be served, though no doubt, the court will always notify him. The Act is not providing a final and scientific decision between conflicting claims ...”
(underlining mine).

Willmer, L.J. in the course of his judgment in the same case observed:

“Although it is not a requirement under the Act, I apprehend that, in any case in which there is a dispute, an order would not normally be made without hearing a person who claims to have an interest in the property in question.”

These excerpts from the case mentioned earlier seem to indicate that there is no absolute requirement for an application made under our **Section 69 of the Police Act** which is similar to the English Police (Property) Act, to be served on anyone. However, service may be necessary where there are competing claims to the property in the possession of the police, and a court ought not to proceed to determine the rights of persons who have interest in the property without a hearing of the competing claims.

The latter excerpt from the judgment of **Willmer, L.J.** was cited by the trial judge in his judgment in support of his opinion that the rules of natural justice should be applied where a statute is silent on the question of service of process. However, in **Irving v. National Provincial Bank** (supra) there seemed to be a dispute as to ownership of bank notes which had been taken out of the possession of a person (the plaintiff) who was later convicted of stealing them from the defendant bank. The plaintiff's conviction was later quashed, and he brought proceedings against the bank for the return of the money. This was in accordance with **Section 4(2) of the English Police (Property) Act, 1897** which provided for any person to take proceedings against anyone in possession of property delivered by virtue of an order made under the Act once the proceedings are brought within six months of the making of the order. The Act in Guyana has no such provision. In **Irving** there clearly was a dispute as to ownership or possession of the money, and the plaintiff seemed to have taken earlier proceedings to recover other specific property taken from him in relation to the criminal charges brought against him.

The Police do not stand on the same footing as someone who claims a right or interest in the property; they are only the stakeholders until the owner's right to the property is determined. Of course, fairness dictates that

the Police be given an opportunity to report to the Court on the progress made in their investigations and whether the goods are required as exhibits. A magistrate can and should order that an application before him be served on the Police in order to ascertain the status of any criminal proceedings involving the property in possession of the Police.

In the instant appeal a copy of the Appellant's application for an order under **Section 69 of the Police Act** (supra) was not formally served on the Commissioner of Police although a copy was given to a police officer who prosecuted matters before the then Chief Magistrate, and Senior Superintendent Philbert Adams who was the applicant for writs of certiorari and prohibition before **Kissoon, J.**, admitted in his affidavit in support of the application that a photocopy of the Appellant's application was served on him; his only concern was that it was not a certified copy from the Magistrate's Court.

Counsel for the Respondent contends that the failure to serve a copy of the application by the accepted method of service has rendered the order made by the Chief Magistrate a nullity, and referred to **Craig v. Kanseen (1943) 1 ALL E.R., 108.** That case involved parties to an action where judgment had been given against the defendant, and bankruptcy proceedings instituted against him. A receiving order was made which he discovered had been improperly made as the summons asking for it had not been served on him.

Lord Greene, M.R. in the course of his judgment reviewed several cases where the distinction between proceedings or orders that are nullities and those that can be regarded as mere irregularities was considered. All of the cases involved parties to actions where relief was claimed and judgment awarded against one of the parties either without due compliance with a rule

of procedure or without notice to the party sought to be condemned. All of the parties had some personal or proprietary interest in the proceedings. The learned Master of the Rolls expressed the view that the cases which he considered appeared to him to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. He opined that it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of the conceptions of the proper procedure in litigation.

From an analysis of all of the cases I come to the conclusion that the core issue in deciding whether a proceeding or an order is a nullity which the person affected is entitled to have set aside, depends on such a person satisfying a court that he is a person who would be affected by the order and has a personal or proprietary interest to protect. As mentioned earlier the Police have no personal or proprietary interest in property which they take into their possession. They have an interest in ensuring that the property is returned to the lawful owner or person entitled to possession of it when their investigations are concluded.

For this reason they can approach a magistrate for a determination of the ownership of goods taken in their possession during the investigation of a crime. After such a determination they are in duty bound to deliver it to the person whom the magistrate considers to be the lawful owner. They have no duty to serve the application on the prisoner or person from whom the goods are taken.

I posit the view that an application under Section 69 may be made where the ownership of the goods is uncertain, and for their protection and guidance the Police can apply to a magistrate to have ownership of the goods

ascertained. The magistrate in his/her adjudication is in duty bound to have the application served on persons who appear to have an interest in the ownership of the goods if the circumstances so require. Similarly anyone from whose custody goods were taken into the possession of the Police may, if not returned, apply to a magistrate to have it so returned provided he/she can establish ownership or entitlement to possession to the satisfaction of the magistrate. Invariably such a course is not necessary as property taken by the Police when investigations into a crime are concluded is returned to the known and accepted owner.

In the circumstances I find that the failure to effect service on the Commissioner of Police or on a designated member of the Force did not render the order made by the Chief Magistrate a nullity.

Although this seems to have been the main reason for the trial judge's findings I shall nevertheless comment on other aspects of this appeal. Counsel for the Appellant in his submissions raised the issue of estoppel, i.e. the effect of an issue not raised in earlier proceedings being raised in later proceedings. The issue was that the order made by Chief Magistrate Fung-A-Fat was made in breach of the rules of natural justice in that the Applicant Philbert Adams was not given an opportunity to be heard as neither he nor the Commissioner of Police were served with a copy of the Appellant's application. He alleged that this was not raised in earlier proceedings filed by the Police. Counsel made reference to authorities on the point, e.g. **Henderson v. Henderson (1843-1860) ALL E.R. Reprint, 378, Hoystead v. Federal Taxation Commissioner (1925) ALL E.R. Reprint, 56.**

The principle extracted from these cases seems to be that a court will not permit a party to litigation to reopen arguments in a later hearing on a point which was or could have been raised in the earlier hearing but was not

due to negligence or inadvertence. In the instant appeal a perusal of the affidavit of Philbert Adams, Senior Superintendent of Police, in support of his application for a writ of certiorari indicates that he alleged that neither the Commissioner of Police nor any of his officers were given an opportunity to file any document before the order was made by the Chief Magistrate, and the order was made in breach of the rules of natural justice. This was repeated in his affidavit in reply.

There was an appeal to the Full Court from the Chief Magistrate's order, but this seems to have been struck out on the ground that it was filed out of time according to Mr. Adams' affidavit. The chronology of events in this matter set out in the record by Counsel for the Appellant at page 32 indicates that there was no appearance to the writ of mandamus which was filed by the Appellant to compel compliance with the order of the Chief Magistrate, hence the issue of breach of the rules of natural justice was not addressed. This would have been the appropriate forum to have the issue of right to be heard ventilated, the appeal against the order to the Full Court having been struck out.

More than one opportunity was given by the trial judge, **Ramgopal, J.**, for the Commissioner of Police to appear, but he did not avail himself of it due to negligence on the part of his legal advisers. The next occasion was an appeal filed in the Court of Appeal against the order of **Ramgopal, J.**, but this was withdrawn. The record does not indicate what were the grounds of the appeal, but instead an application for a re-hearing was made to **Ramgopal, J.**, who refused it. The record again does not indicate what were the grounds for the re-hearing or what arguments were advanced on behalf of the Commissioner of Police, but an appeal was filed in the Court of Appeal against the refusal of the re-hearing.

Overall there were earlier opportunities for the Respondent to raise the issue of breach of natural justice, but it was not pursued.

Counsel for the Respondent contended that the authorisation to possess, sell, and export gold issued to the Appellant expired on 30th April, 1998, and at the time the order was made he had no authority to have gold in his possession for the purpose of selling or exporting - the Police therefore would have been acting contrary to law to comply with the order of the Chief Magistrate.

The order which the Chief Magistrate had to make was for delivery of the gold to the person appearing to him to be the owner if so satisfied. The question of whether the owner had authority to have gold in his possession was not the concern of the Magistrate. This is a separate issue affecting the owner himself and the Guyana Gold Board. The Police upon delivering the gold to the person appearing to be the owner would be acting lawfully and in accordance with the order of the Magistrate.

Section 23 of the Guyana Gold Board Act, Cap. 66:01 provides for the imposition of penalties on any person who contravenes or fails to comply with the provisions of certain sections of the Act, one such being **Section 9** which provides for the Board to authorise a person to have gold in his possession, and this seems to be the Section under which the Appellant was issued with an authorisation. **Section 23** is of a penal nature, and does not affect the ownership of gold in the possession of any person.

There is no need to embark on a discussion of the other grounds of appeal raised by Counsel for the Appellant.

For all of the reasons stated earlier the appeal is allowed and the order of the trial judge set aside.

There will be costs to the Appellant to be taxed certified fit for
Counsel.


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Desiree P. Bernard
Chancellor of the Judiciary.

Dated the th day of March, 2005.