SUPREME COURT OF QUEENSLAND

CITATION:	*Fanna v Leavy; Rue v Leavy* [2005] QCA 378
PARTIES:	**SHANE DOUGLAS FANNA** (appellant/applicant) **v** **ASHLEY LAWRENCE LEAVY** (respondent/respondent) **MITCHELL JAMES RUE** (appellant/applicant) **v** **ASHLEY LAWRENCE LEAVY** (respondent/respondent)
FILE NO/S:	CA No 149 of 2005 CA No 150 of 2005 DC No 475 of 2004 DC No 474 of 2004 MC No 11607 of 2004 MC No 11608 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	7 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2005
JUDGES:	McMurdo P, McPherson JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Each application dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where applicants convicted in the Magistrates Court of taking protected fauna – where applicants appealed to the District Court under s 222 of the *Justices Act* 1886 (Qld) – where appeal to District Court unsuccessful – where applicants sought leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld) – whether leave to appeal should be granted ANIMALS – VARIOUS STATUTORY PROVISIONS – PROTECTION OF FAUNA AND GAME LAWS –

OFFENCES – QUEENSLAND – TAKING OR KEEPING FAUNA – where applicants submitted they had no case to answer – where applicants argued that s 88 of the *Nature Conservation Act* 1992 (Qld) did not create an offence known to law – where applicants argued that since the offences occurred on private land s 88 did not apply since s 69 of the *Constitution of Queensland* 2001 (Qld) only provided power to the State to make power with respect to waste lands – where applicants contended that s 392(1) of the *Criminal Code* 1899 (Qld) was inconsistent with s 88 of the *Nature Conservation Act* and 'ousted' the latter section – where applicants argued that the Governor-in-Council lacked authority under s 175 of the *Nature Conservation Act* to make any regulations prescribing classes of wildlife – whether applicants had committed an offence under s 88

Acts Interpretation Act 1954 (Qld), s 45
Constitution of Queensland 2001 (Qld), s 69
Criminal Code 1899 (Qld), s 22(2), s 392(1)
District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 222
Nature Conservation Act 1992 (Qld), s 79, s 80, s 83(1), s 88(1), s 149, s 175
Nature Conservation (Wildlife) Regulation 1994 (Qld), Sch 4, Sch 5

Gideona v Nominal Defendant [2005] QCA 261; CA 1235 of 2005, 29 July 2005, cited
John v Federal Commissioner of Taxation (1989) 168 CLR 417, cited
Phillips v Spencer [2005] QCA 317; CA 3292 of 2005, 26 August 2005, followed
R v Stewart [1896] 1 QB 300, followed
R v Waine [2005] QCA 312; CA 70 of 2005, 26 August 2005, cited
Walden v Hensler (1987) 163 CLR 561, followed

COUNSEL: The applicants appeared on their own behalf
A R Girle (sol) for the respondent

SOLICITORS: The applicants appeared on their own behalf
Environmental Protection Agency for the respondent

[1] **McMURDO P:** I agree that these applications for leave to appeal should be refused with costs for the reasons given by Douglas J.

[2] **McPHERSON JA**: I agree with what has been written by Douglas J in this application for leave to appeal. It raises no question of law or fact that merits the grant of leave in this case.

[3] Having said that, I nevertheless propose to refer briefly to the proposition that, in some imprecisely defined way, s 22(2) of the Criminal Code afforded an answer to the offence of taking by killing the birds that were the animals the subject of the

complaint in this matter. In *Walden v Hensler* (1987) 163 CLR 561, 574 - 575, Brennan J said that s 22(2), or its numerical equivalent in the Code at that time, applies only to offences "in which the causing of another to part with property or the infringing of another's rights over or in respect of property is an element".

[4] It is not an element of the offence charged here under s 88(1) of the *Nature Conservation Act* 1992 that it involved causing anyone to part with property, or that it infringed rights over or in respect of property. The applicants' employer owned the land on which the birds were shot and taken; but it did not follow that the employer owned the birds. Any claim the applicants may have supposed they had, and any mistake they might have made, as to their right on behalf of their employer to take those birds was therefore not one that fell within the ambit of s 22(2) of the Code. The employer had no proprietary right in the birds that they could have supposed they were vindicating in taking the birds.

[5] The application should be refused with costs.

[6] **DOUGLAS J**: These are applications for leave to appeal from a decision of the District Court to dismiss an appeal under s. 222 of the *Justices Act* 1886 (Qld). Leave is necessary under s. 118 of the *District Court of Queensland Act* 1967 (Qld).

[7] The applicants were convicted under s. 88 of the *Nature Conservation Act* 1992 (Qld) of taking protected animals. The facts upon which they were convicted were not challenged before the Magistrate but several arguments attacking the validity of the charges were made on an appeal to the District Court. The applicants had attempted to make those submissions in writing to the Magistrate by offering him a lengthy document not prepared by them arguing that there was no case for them to answer. The Magistrate did not receive that document although he invited the applicants to make oral submissions. The written submissions were dealt with properly on the appeal to the District Court by the learned judge of that Court in her reasons for dismissing each of the appeals.

[8] The first argument of the applicants dealt with by her Honour was that, because the offences occurred on private property and not in a “protected area” as that phrase is defined by the *Nature Conservation Act,* no offences were committed.

[9] Section 88 provides, relevantly:

> “**88 Restriction on taking etc protected animals**
>
> **(1)** Subject to section 93, a person, other than an authorised person, must not take, use or keep a protected animal, other than under -
>
> (a) a conservation plan applicable to the animal; or
>
> (b) a licence, permit or other authority issued or given under a regulation; or
>
> (c) an exemption under a regulation.
>
> Maximum penalty – 3000 penalty units or 2 years imprisonment.
>
> **(2)** Subsection (1) does not apply to the taking of protected animals in a protected area.”

[10] As her Honour said, it is quite clear that s. 88 of that Act applies, with the exceptions expressed in it, to the whole of Queensland and in particular to the protection of native wild life wherever it may be found. The submission appears to have included an argument that s. 69 of the *Constitution of Queensland* 2001 (Qld),

which deals with Parliament's law making power in relation to the waste lands of the Crown, prevented it legislating under the *Nature Conservation Act* in respect of private freehold land. Her Honour was correct in concluding that Parliament's law making power did extend to private freehold land and to prevent the taking of protected animals on that land. That legislation is sufficient to override any common law rights in respect of the taking of animals whether they were domestic or wild.

[11] The next argument dealt with by her Honour related to a misconception of the applicants that s. 392(1) of the *Criminal Code* was inconsistent with s. 88 of the *Nature Conservation Act* and that it, in combination with s. 22(2) of the *Criminal Code*, "ousted" the jurisdiction of the Magistrate. Again for the reasons given by her Honour there is no substance to that argument and no inconsistency between s. 392 of the *Criminal Code*, which deals with the theft of dead wild animals, and s. 88 of the *Nature Conservation Act*, which deals with their "taking", in this context meaning the killing of them. Nor, at least in the view of Brennan J in *Walden v Hensler* (1987) 163 CLR 561, 574-575, is the offence created by s. 88 of the *Nature Conservation Act* an offence relating to property to which s. 22(2) of the *Criminal Code* applies.

[12] Her Honour also pointed out that there was no evidence that the applicants had an honest claim of right to the birds that were taken. Subject to some irrelevant exceptions, protected animals are the property of the State; see s. 83(1) of the *Nature Conservation Act.* There was no evidence that either applicant claimed any property right in the birds nor that their employer did. The most that Mr Rue said in an interview that was put into evidence and referred to by the Magistrate was that, apparently because one of his "bosses" was shooting birds, he "thought it was a thing you could do".[1] That is not enough to enliven the operation of s. 22(2); cf. the recent discussion of that subsection by Keane JA in *R v Waine* [2005] QCA 312 at [21]-[28].

[13] Another issue apparently argued before her Honour was whether the complainant was authorised to swear the complaints against the applicants. He was an authorised officer under the provisions of the *Nature Conservation Act* but no authority was needed for him to swear the complaint; s. 42 of the *Acts Interpretation Act* 1954 (Qld) and *R v Stewart* [1896] 1 QB 300.

[14] The applicants also appear to have argued that the warrant sought by a conservation officer when gathering evidence was invalid because it could not extend to private freehold land. Such a warrant is authorised by s. 149 of the *Nature Conservation Act*. Under that section a conservation officer may apply to a Magistrate for a warrant in relation to a particular place. It does not exclude private freehold land. There was no substance in that argument.

[15] The applicants also raised an issue recently considered by this Court in *Phillips v Spencer* [2005] QCA 317: whether the complaints in matters of this nature should have alleged that the conduct of the applicants did not happen in a protected area.

[16] By a majority this Court in *Phillips v Spencer* decided that such an allegation did not form part of the statement of the offence under s. 88(1). That decision was given very recently, on 26 August 2005. It is not appropriate to revisit it in these proceedings. Such a course is not lightly undertaken. The reasoning of the majority

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1 R.51/50-51.

in *Phillips v Spencer* binds us. There was no difference between the reasons of the justices constituting the majority and the decision has not been shown to lead to considerable inconvenience; see the discussion in *John v Federal Commissioner of Taxation* (1989) 168 CLR 417, 438-439 and cf. *Gideona v Nominal Defendant* [2005] QCA 261 at [23]-[25].

[17] There were also submissions made that were not made before her Honour, namely that the complaints were void for want of certainty and particularity. In each case the complaint set out the material particulars of the offence including the date, the location and that the offence was one of taking animals as defined in schedules 4 and 5 of the *Nature Conservation (Wildlife) Regulation* 1994 (Qld). In the case of Mr Fanna further particulars were provided by alleging that the taking was shooting, the animals were birds and by defining the number and type of the birds and the recording of the details of the shooting in Mr Fanna's employer's log book. Those particulars were sufficient for each of the applicants and Mr Fanna in particular acknowledged that he had been informed "totally" of the charges against him. Mr Rue did not ask for further particulars.

[18] Another argument that appears to be new is that the Governor-in-Council lacked the express statutory authority under s. 175 of the *Nature Conservation Act* to make regulations prescribing any classes of wildlife. The argument appears to arise from another misreading of the legislation. A "protected animal" referred to in s. 88 is defined in the dictionary in the Schedule to the Act to mean "an animal that is prescribed under this Act as ... rare, or common wildlife". Common and rare wildlife mean native wildlife that is prescribed under the Act. Each of those classes of wildlife is dealt with by ss 79 and 80 of the *Nature Conservation Act* as capable of being prescribed by the Governor-in-Council.

[19] The complaints included averments that the protected animals in question were rare and common wildlife specified in schedules 4 and 5 of the *Nature Conservation (Wildlife) Regulation*. Common birds are prescribed by schedule 5 of that Regulation to be birds indigenous to Australia (other than a presumed extinct, endangered, vulnerable or rare bird). The evidence in respect of the birds that were killed by the applicants was that they were common birds although there is a suggestion that one of the species of bird killed, the jabiru, which was referred to in the evidence as a common bird, is a black-necked stork and thus a rare bird under schedule 4.[2] That evidence was not challenged before the Magistrate.

[20] In those circumstances, what appears to be another new argument first raised in this appeal, that there were no relevant "protected animals" of the kind requiring the applicants to obtain a licence pursuant to s. 88(1)(b), is without substance.

[21] The applicants have been unrepresented throughout but have relied upon extensive written submissions not prepared by them that were aptly described by her Honour as "clearly the result of extensive research" but revealing "a lack of appreciation of settled law". There is much contained in those written submissions that I have not traversed in these reasons but nothing that persuades me that this is a case where leave to appeal against her Honour's decision should be granted.

[22] Accordingly I would dismiss each application with costs.

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[2] R.40/50-55.