

FOLOKO MULUMBWA v THE PEOPLE (1981) Z.R. 179 (S.C.)

SUPREME COURT  
SILUNGWE, C.J., GARDNER, AG. D.C.J. AND BRUCE-LYLE, J.S.  
10th JUNE AND 6th NOVEMBER, 1980  
(S.C.Z. JUDGMENT NO.25 OF 1980)

Flynote

Criminal law and procedure - Possession - Carrying of firearms or ammunition belonging to another - Whether constitutes possession of.

Criminal law and procedure - Possession - Leaving servant in charge of trophy - Whether servant guilty of the offence of being in possession of trophy without a licence.

Criminal law and procedure - Construction of statute - Need to discern the intention of legislature.

National Parks and Wildlife - Possession of trophy - When legal.

Headnote

The applicant was convicted on counts of being in possession of a firearm and ammunition without licence contrary to s. 10(2)(a) of the Firearms Act, (Cap.111) and of unlawful possession of Government trophy contrary to s. 111(1) and 142 of the National Parks and Wildlife Act, (Cap. 316). PW 2, a game guard, testified that he was on patrol when he discovered a number of people surrounding a dead elephant.

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Amongst the people present was the applicant who produced to the witness an elephant licence, in the name of Evans Mbwili, a rifle and two rounds of ammunition. When asked for a firearm licence in his own name, the applicant was unable to produce one. The applicant gave evidence in his own defence that Evans Mbwili had asked him to act as a guide to hunt elephant, and later Evans Mbwili killed one elephant and then returned to Kitwe in order to obtain a motor vehicle, leaning the elephant, the gun which was dismantled into two parts, and two rounds of ammunition wrapped in an overall.

In his judgment the trial Magistrate found that he did not believe the evidence of the applicant and his defence witness and was of the opinion that the applicant himself had killed the elephant on behalf Evans Mbwili. On appeal:

**Held:**

- (i) A person carrying a firearm or ammunition belonging to another person who holds a firearm licence in respect thereof may have in his possession that firearm or ammunition under instructions from and for the use of that other person for sporting purposes only without himself holding a firearm licence.
- (ii) A licensed hunter may leave a servant in charge of trophy, especially that of an elephant which is too heavy to deal with immediately, and go about business elsewhere without the servant's being guilty of the offence of being in possession of trophy without a licence.
- (iii) In construing statutes regard must be had to the intention of the legislature and the context of the legislation generally.

**Legislation referred to:**

Firearms Act, Cap. 111 ss. 11(4); 10(2)(a).

National Parks and Wildlife Act, Cap. 316 ss.111(1); 142; 145(1).

Supreme Court Act, No. 41 of 1973, s. 15(1). 30

For the applicant: S.M. Malama; Jacques & Partners

For the respondent: L.Nyambele; State Advocate.

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Judgment

**GARDNER, AG.D.C.J.:** delivered the judgment of the court: The applicant was convicted on the following three counts:

- (a) Being in possession of firearm without holding a firearm licence contrary to section 10(2)(a) of the Firearms Act, Cap. 111.
- (b) Being in possession of ammunition without holding a firearm licence contrary to section 10(2)(a) of the Firearms Act, Cap. 111.
- (c) Unlawful possession of Government trophy contrary to sections 111(1) and 142 of the National Parks and Wildlife Act, Cap 316.

He was sentenced to K100 fine on each count making a total of K300 and, on application by the public prosecutor under s.145 of the National Parks and Wildlife Act, an order was made for the firearm found in the

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possession of the applicant to be forfeited. The applicant applies for leave to appeal against conviction, sentence, and the order for forfeiture.

The facts of the case were that PW2, a game guard in the Mansa district, was on patrol when he discovered a number of people surrounding a dead elephant. Amongst the people present was the applicant who produced to the witness an elephant licence, in the name of Evans Mbwili, a rifle, and two rounds of ammunition. When asked for a firearm licence in his own name the applicant was unable to produce one. In cross-examination the witness was asked the position of the gun when he came on the scene and he answered that it was lying down beside the applicant. He also answered that the two rounds of ammunition were produced from the applicant's pocket. PW3, a police officer, said that on the following day he went to the scene where he found the remains of the elephant including two tusks, and received the elephant licence, the gun and rounds of ammunition from PW2. He gave evidence of taking a statement from the applicant, but no enquiry was made of the applicant as to whether he objected to the production of the statement on the ground that it was involuntary and this evidence was therefore inadmissible. In any event no reference was made to the statement by the trial magistrate in giving his reasons for finding the applicant guilty.

The applicant gave evidence in his own defence that Evans Mbwili had asked him to act as a guide to hunt elephant, and later Evans Mbwili killed one elephant and then returned to Kitwe in order to obtain a motor vehicle, leaving the elephant, the gun which was dismantled into two parts, and two rounds of ammunition wrapped in an overall.

Evans Mbwili was called as a witness for the defence and he confirmed that he had himself shot the elephant, having been guided by the applicant. He had then endorsed his elephant licence recording the killing of the elephant, and then dismantled the gun, placed two rounds of ammunition in the pocket of some overalls and left the gun and the ammunition in the care of the applicant before returning to Kitwe to obtain transport. He gave as his excuse for leaving the gun with the applicant the reason that he did not think he would get a lift to Kitwe if he carried it with him. In answer to a question by the applicant he confirmed that he had told the applicant not to touch the gun and had not actually shown him the ammunition he was leaving behind.

This Court has had an opportunity to inspect the elephant licence which was found in the possession of the applicant, and it is significant to note that it is endorsed with an entry that a female elephant was killed in the Mansa district on the 22nd November, 1978, but the column headed "signature of licensee" is blank and unsigned.

In his judgment the trial magistrate found that he did not believe the evidence of the applicant and his defence witness and was of the opinion that the applicant himself had killed the elephant on behalf of Evans Mbwili. In our view this finding was amply supported by the evidence but, except perhaps so far as it related to the possession of trophy, it is immaterial so far as the convictions are concerned.

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the misdirection of admitting the inadmissible statement, which in any event the magistrate ignored, we would apply the proviso to s. 15(1) of the Supreme Court Act find find that there was ample evidence that the gun and ammunition were in the possession of the applicant, and, despite the fact that he denied knowledge of the ammunition, the magistrate was entitled to accept the evidence of the game guard that the gun and ammunition were in the possession of the applicant, and despite the fact that he denied knowledge of the ammunition, the magistrate was entitled to accept the evidence of the game guard that the applicant produced the ammunition from his own pocket.

Section 11 of the Firearms Act provides certain exemptions from the necessity to hold firearm licences, and only one that could possibly apply in this case is sub-. (4) which reads as follows:

(4). A person carrying a firearm or ammunition belonging to "another person who holds a firearm licence in respect thereof may in his possession that firearm or ammunition under instructions from and for the use of that other person for sporting purposes only without himself holding a firearm licence."

In our view this section, in the context of hunting, is designed to cover the case of a person who is carrying a gun on behalf of a hunter at the time of, or preceding, or returning from a hunt and, as the magistrate pointed out, the purpose of the licence for the killing of one elephant had already been carried out and no further hunting could have taken place when the applicant was found in possession of the gun. Furthermore, the owner, the only person who could have used the gun for sporting purposes, was not present. The subsection does not therefore apply.

So for as the possession of the trophy is concerned we can conceive of a situation where a licensed hunter may leave a servant in charge of trophy, especially that of an elephant which is too heavy to deal with immediately, and go about business elsewhere, without the servant's being guilty of the offence of being in possession of trophy without a licence. However, in this case, in view of the magistrate's finding that he did not believe that those were the circumstances, we hold that the applicant was rightly convicted on all three counts.

Mr Malama appeared on behalf of the applicant, and, although in his original grounds of appeal he raised certain of the points which we have dealt with in this judgment, the only argument which he put forward at the hearing was that there should have been no forfeiture order relating to the gun.

Section 145(1) of the National Parks and Wildlife Act reads as follows:

"145. (1) Upon the conviction of any person of an offence under this Act, the court shall, at the request of the prosecution, in addition to any other penalty imposed, declare any wild animal, meat of any wild animal, trophy, firearm or other weapon or any trap, net, poison, material or article, or, subject to the provisions of subsections (2) to (8) inclusive, any vehicle, aircraft or boat,

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with which the offence committed, or which was used in, or for the purpose of, or in relation to, or in connection with, the commission of the said offence, to be forfeited without compensation and shall order the same to be disposed of as the Minister deems fit.

This section is mandatory when, as in this case, the prosecution requests an order for forfeiture, but Mr Malama argued that it did not apply when the conviction referred to was one of possession. His argument was that the forfeiture was ordered only under count 3, which related to possession of trophy contrary to the provisions of the National Parks and Wildlife Act, and that it could not be said that a firearm, which had been admittedly used for obtaining such trophy, was used in, or for the purpose of, or in relation to, or in connection with the actual possession. Mr Malama impliedly conceded that, had the applicant been charged with illegally hunting the elephant, the firearm could then be said to have been in connection with such offence; and he also conceded that a vehicle in which trophy were found could properly be said to be used in connection with possession, but he maintained that a firearm, unlike a vehicle, could never be connected with possession.

This court has on many occasions had occasion to say that in construing statutes regard must be had to the intention of the legislature and the context of the legislation generally. In this particular case we are quite satisfied that it is proper to read the words "or in connection with" as meaning in connection with the obtaining of the possession upon which the conviction was based. To hold otherwise would be quite contrary to the express intention of the legislature.

The application in respect of conviction and forfeiture is therefore refused.

With regard to sentence, had the facts been as stated by the applicant and his witness, we would have regarded the sentences as being too severe. However, those facts were not believed by the trial magistrate and in our view the sentences were appropriate. The application for leave to appeal against sentence is also refused.

Application refused

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