

JONATHAN MWIINGA v THE PEOPLE (1981) Z.R. 243 (H.C.)

HIGH
MUWO,
15TH
(HPA/77/79)

COURT

JUNE,

1981

G.B.J.

Flynote

Sentence - Forfeiture - Being in possession of firearms without licence- Penalty - National Parks and Wildlife Act, (Cap. 316) s. 145 (1) - Firearms Act, (Cap.111) s. 54 (2) - When applicable.

Forfeiture - Firearms belonging to another person other than accused and used without owner's consent and knowledge - Whether order for forfeiture proper when owner not given right to be heard.

Headnote

The appellant was convicted in the subordinate court of the Senior Resident Magistrate of three offences on his own plea of guilty and

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fined a total sum of K115 and in default 75 days imprisonment. In addition the learned Senior Resident Magistrate made an order of the forfeiture of the firearm used in the commission of the offences. The appeal is against the order of forfeiture of the shot gun Greener No. 57650 on the ground that the said firearm was not the property of the appellant but that of Joseph Jaulani.

At a re-hearing the Senior Resident Magistrate found that Joseph Jaulani was the true owner of the gun in question and that he had full knowledge of the fact that the appellant had taken his gun for illegal hunting of game animals in contravention of the National Parks and Wildlife Act and the Firearms Act and held that the order of forfeiture of the firearm was correct.

The issue before the court was whether in ordering the forfeiture of the gun in question, the Senior Resident Magistrate exercised his powers under the National Parks and Wildlife Act, Cap. 316 or under the Firearm Act, Cap. 111.

Held:

- (i) Under the National Parks and Wildlife Act, Cap. 316 forfeiture of a gun used in the commission of any offence is mandatory when the prosecution makes a request.
- (ii) Under the Firearms Act, Cap. 111 the prosecution is not obliged to request for an order of forfeiture but the court has a discretionary power to make such order.
- (iii) The order for forfeiture of the firearm was improper since the owner was not given a right to be heard before the order was made, *The People v Mwalilanda* (1) followed.

Legislation referred to:

National Parks and Wildlife Act, Cap. 316 s. 145 (1)
Firearms Act, Cap. 111 s. 54 (2).

Case referred to:

(1) The People v Mwalilanda (1971) Z.R. 166.

For the appellant: Gani.

For the respondent: Balachandran, State Advocate.

Judgment

MUWO, J.: The appellant was convicted in the subordinate court of the Senior Resident Magistrate at Lusaka of three offences on his own plea of guilty and fined a total sum of K115 and in default 75 days imprisonment. In addition the learned Senior Resident Magistrate made an order of the forfeiture of the firearm used in the commission of the offences. Two offences committed fell under the National Parks and Wildlife Act, Cap. 316, and one under the Firearms Act, Cap. 111.

The appeal is against the order of forfeiture of the gun, a shot gun Greener 12 bore serial No. 57650 on the ground that the said firearm

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was not the property of the appellant but that of one Joseph Jaulani; further that although the prosecution knew all along or ought to have known this fact before the trial the statement of facts were silent in relation thereto.

On the 8th of June, 1979, I delivered an interim judgment in this appeal in which I confined myself to two preliminary issues. This being an application for leave to appeal out of time and a determination by this court of the question the matter should be sent back to the trial court for re-hearing with a view to establish who the true owner of the firearm is, the issue having been raised by the appellant. I allowed both applications and sent the case record back to the Senior Resident Magistrate with the direction that he re-hears the case regarding the ownership of the firearm in question and to find out how it came into the hands of the appellant. And further to call Mr Joseph Jaulani who claims to be the true owner of the gun and to determine whether or not he was a party to or had connived with the appellant in connection with the commission of the three offences. In compliance with my directive the Senior Resident Magistrate heard evidence from Messrs Jonathan Mwiinga and Joseph Jaulani. His findings were that Joseph Jaulani was the true owner of the gun in question and that he (Jaulani) had full knowledge of the fact that the appellant (a renowned hunter) had taken his gun for illegal hunting of game animals in contravention of the National Parks and Wildlife Act and the Firearms Act and held that the order of the forfeiture of the firearm was correct.

The question of the true owner of the shot gun Greener No. 57650 having been established by the Magistrate to the satisfaction of this Court an important issue arises as to whether the learned Senior Resident Magistrate exercised his powers under the National Parks and Wildlife Act, Cap. 316 or under the Firearms Act, Cap. 111. This consideration is of vital importance because forfeiture orders under the two Acts are made under different circumstances. The law on the subject of forfeiture orders is quite clear in each Act. Under Section 145 (1) of the National Parks and Wildlife Act, Cap. 316 forfeiture, among other things, of a gun used in the commission of any offence under the Act is mandatory when the prosecution makes a request. Under the Firearms Act the

prosecution is not obliged to request for an order or forfeiture but the court has a discretionary power under section 54 (2) of the Act to make such an order.

In the present case the learned Senior Resident Magistrate did not indicate under which Act he made the order of forfeiture. The appellant was convicted of two offences under Cap. 316 and one under Cap. 111. It would have been easier if the Senior Resident Magistrate had referred to a specific part of the Act under which he exercised his powers of forfeiture. In the absence of any reference to a specific section and Act I will assume in favour of the appellant that the forfeiture order was made under the less rigorous section 54 (2) of the Firearms Act and not the more severe provision of section 145 (1) of the National Parks and Wildlife Act, Cap. 316. This Court would be doing gross injustice to the third

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party Joseph Jaulani the true owner of the gun in question who was not even afforded an opportunity to be heard at the first instance.

The court's power of forfeiture under section 54 (2) of Cap. 111 is, in the discretion of the court. The discretion must be exercised judicially and not capriciously. On the re-hearing of the case regarding the order of forfeiture the learned Senior Resident Magistrate gave no firm reasons why he considered that the order made by his predecessor should stand. No proper reasons were given as to why he discounted Mr Jaulani's evidence that his gun had been removed from Moti Mwiinga's house where he had left it by the appellant without his knowledge or permission; and possibly without the knowledge of the appellant's son Moti. There was no evidence before the court to prove that Jaulani knew the gun was taken by the appellant for illegal hunting of game animals or that he had employed the appellant to hunt for him. With great respect the learned Senior Resident Magistrate's conclusions are figments of his imagination if not surmises based on non-existent facts.

It is my considered view that it would be contrary to established principles of justice to deprive Jaulani of his firearms when it is quite clear that he was an innocent party to all the offences committed by the appellant.

At this point I would like to refer to a judgment of this court in the case of the *People v Francis Mwalilanda* (1). This was a judgment of Silungwe, A.J., as he then was. In this case the accused was charged and convicted of being in possession of firearms and ammunitions without a licence contrary to section 10 (1) of the Firearms Act. When sentencing the accused the Magistrate ordered that the firearms and ammunition be confiscated and be made the property of the Government. The facts revealed that only the ammunition belonged to the accused. The firearms belonged, to another person and the accused had used them without the owner's knowledge and consent. The owner was not given a right to be heard before the order of forfeiture was made. The learned appellate judge held that the order for forfeiture of the firearm was improper since the owner was not given a right to be heard before the order was made, but that the order for the forfeiture of the ammunition was in order.

The facts in this appeal are similar to those in Mwalilanda's case (cited above). Joseph Jaulani the true owner of the Greener shot gun was not given the opportunity to be heard when the case came

before the Senior Resident Magistrate before the order of forfeiture was made. The subsequent forfeiture order by the present Lusaka Senior Resident Magistrate was an afterthought rather a rubber stamp embossed on the erroneous first order made by his predecessor.

For the above reasons the order of the forfeiture of the shot gun Greener Serial No. 57650 is set aside and the firearm must be returned forthwith to the owner - Joseph Jaulani.

Order of forfeiture set aside
