

THE PEOPLE v SHIMUNZA (1967) ZR 172 (HC)

HIGH COURT
MALLON AGJ
DECEMBER 1967

Flynote and Headnote

[1] Criminal procedure - Appeal against sentence - Appealability of order of forfeiture.

Pursuant to section 39 (3) of the Fauna Conservation Ordinance (No. 24 of 1962, Cap. 241), an order of forfeiture of any firearm used in the commission of the offence is part of the sentence and therefore subject to appeal

Cases cited:

- (1) *African Loan & Finance Co. (Ltd) v The People*, Court of Appeal, No. 65/1965, unreported.
- (2) *Pongoshi v R* 1962 R & N 1.
- (3) *Patel v R* 1963 R & N 155.

Statute construed:

Fauna Conservation Ordinance (1962, Cap. 241), ss. 20A and 39 (3).

Appellant in person.

Chuula, Director of Public Prosecutions, for the respondent

Judgment

Mallon AG J: The appellant in this case pleaded guilty before the learned magistrate at Choma on 22nd August, 1967, to a charge of hunting a prohibited animal contrary to section 20A of the Fauna Conservation Ordinance, Cap. 241, the particulars of the offence being that on or about 18th August, 1967, at Mbiya controlled hunting area in the Namwala District of the Southern Province, he did hunt two warthogs, protected animals. The statement of facts which he agreed was correct shows that he was found with a gun and meat of warthog. He admitted that he had killed the animals with the gun, and that he knew that it was prohibited to hunt warthog in August. He was convicted on his plea of guilty and he was fined £20 in default four months' simple imprisonment. The learned magistrate also ordered that the gun used by the appellant in the commission of the offence should be forfeited under the provisions of section 39 (3) of the Ordinance.

It is against this order of forfeiture that the appellant now appeals to this court. It is for consideration whether or not an appeal is competent to this court against an order of forfeiture, and I have considered the judgment of the Court of Appeal for Zambia in *African loan & Finance Co. Ltd v The People*, Judgment No. 65 of 1965, in which the wording of section 39 (3) was considered. The last paragraph of the judgment is in the following terms: "As the order of forfeiture is not a sentence (*Jackson Pongoshi v R* 1962 R & N 1 and *Patel v R* 1963 R & N 155) and it was not based on a conviction of the appellant, I am of the opinion that this appeal should be dismissed for want of jurisdiction. It may be of course that the appellant has some other remedy by way of *certiorari* or declaratory judgment depending on whether or not the order of forfeiture is a nullity, that however, is not the concern of this court now."

Section 39 of the Fauna Conservation Ordinance was amended by Ordinance No. 24 of 1962, *inter alia*, by adding a new subsection (3) which provided that " Upon the conviction of any person for any offence against this ordinance or any regulation or rule made thereunder the court may, in addition to any other penalty specified in subsection (1) of this section . . . order that any animal, meat or trophy, or any firearm, or other weapon . . . in relation to, or in connection with which the offence has been committed, or used in, or for the purpose of the commission of the offence shall be forfeited to and become the property of the Government ..."

It would appear that the wording of the above new subsection was not considered by the Court of Appeal in *African Loan and Finance Co. Ltd. supra*, and in any event the paragraph from the judgment to which I have referred above is *obiter*. In many cases the order of forfeiture will amount to a far greater penalty than a fine or even imprisonment, and it is obviously right that this court should have jurisdiction to entertain an appeal against such

an order, and this may well have been the reason for the amendment to section 39 of the Ordinance which I have referred to above. [1] In my view, the words "in addition to any other penalty" were clearly intended to provide that the order of forfeiture should be part of the sentence, and therefore subject to appeal.

I am therefore satisfied that I have jurisdiction to deal with this appeal, and having carefully considered the record of the case, the grounds of appeal, and the representations made by the appellant, I have come to the conclusion that the order of forfeiture made in this case was a proper one. As the learned magistrate pointed out, offences of this kind are difficult to detect, and it is obviously desirable in the public interest that the means of committing this type of offence should be removed. The appeal against the order of forfeiture of the gun in question is therefore dismissed.

Appeal dismissed.