

EZRA FANWELL SIMAMBO v THE PEOPLE

(1979) Z.R. 57 (S.C.)

SUPREME COURT

BARON, D.C.J., GARDNER AND BRUCE-LYLE, JJ. S.

14TH, 16TH NOVEMBER, 1978 AND 9TH JANUARY, 1979.

S.C.Z. JUDGMENT NO. 3 OF 1979

**Flynote**

Criminal law and Procedure - Hunting game animal without licence - Forfeiture of firearm used in crime - Owner third party - Whether an order appropriate - National Parks and Wildlife Act, ss. 145 and 32.

**Headnote**

This was an application to set aside an order made by the Sub-ordinate Court under s. 145 (1) of the National Parks and Wildlife Act (hereinafter referred to as the Act) that a firearm belonging to the applicant be forfeited.

The applicant had given his rifle to one Phiri with instructions to kill an elephant. Phiri went in the bush known as Petauke Open Area and killed a waterbuck. He was arrested and charged with hunting a game animal contrary to s. 37 of the Act and being in unlawful possession of a firearm without a licence contrary to s. 10 (1) of the Firearms Act. He pleaded guilty and was convicted and thereupon the prosecution requested the court in terms of s. 145 (1) of the Act to declare the firearm to be forfeited.

On appeal the applicant challenged the order for forfeiture on the grounds that Phiri was not the owner of the firearm, and that for such order to be made where the property involved belonged not to the person convicted but to an innocent third party, it must be shown that the third party was privy to the commission of the offence.

**Held:**

- (i) Section 146 specifically limits the property in respect of which a conditional order may be made to a vehicle, aircraft or boat and does not apply to firearms. The fact that the true owner

p58

was not privy to the offence in question and the issue of ownership of the property in question would only be relevant with regard to the above mentioned properties.

**Legislation referred to:**

National Parks and Wildlife Act Cap. 316, ss. 32 and 145.

Firearms Act, Cap. 111, s. 10 (2) (a).

For the applicant: In person.  
For the respondent: A.H.O. Oder, State Advocate.

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Judgment

**BARON, D.C.J.:** delivered the judgment of the court.

This is an application to set aside an order made by the Subordinate Court. under s. 145 (1) of the National Parks and Wildlife Act, Cap. 316 (to which we will refer as the Act) that a firearm belonging to the applicant be forfeited. The circumstances giving rise to this application were these. On the 21st July 1977, one Weluzani Phiri and certain other people went into the bush known as Petauke Open area; he had with him a .375 rifle, and whilst in the bush he killed a waterbuck, which is a game animal. Later on the same day he was found by a wildlife guard in possession of the meat and when questioned it transpired that the rifle belonged to the applicant. Phiri was charged on two counts, namely hunting a game animal contrary to s. 37 of the Act, and begin in unlawful possession of a firearm without a licence contrary to s. 10 (2) (a) of the Firearms Act, Cap. 111. He pleaded guilty and was duly convicted, and thereupon the prosecution requested the court in terms of s. 345 (1) of the Act to declare the firearm to be forfeited. It is convenient to set out at this point the relevant subsections of s. 145.

"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, with which the offence was 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.

(2) Where the prosecution requests a declaration of forfeiture pursuant to subsection (1) in respect of any vehicle, aircraft or boat, as the case may be, the court shall make an order (herein after referred to as a conditional order), to the effect that unless any person other than the convicted party claims, pursuant to this section, any right of ownership in the said vehicle, aircraft or boat within three months of the date of the publication of the said conditional order, as provided by subsection (3), the prosecution may apply to the court ex parte for a declaration of forfeiture pursuant to subsection (1), and the court shall make such declaration."

p59

The applicant advanced two arguments. He submitted that there was nothing in the record to show that the firearm had been used in the commission of the offence by Phiri under the Act; he argued that Phiri had admitted killing the waterbuck but said nothing about killing it with the applicant's rifle. This argument is untenable; in our view the only possible inference to be drawn from the record is that the waterbuck was killed with the applicant's rifle.

The applicant's second argument is that the trial magistrate erred in law in that he ordered the forfeiture of the firearm without considering the fact that Phiri was not the owner of the firearm and that the applicant was not privy to the commission of the offence. He submits that before a court may make an order forfeiting property belonging not to the person convicted of the offence in question but to some innocent third party it must be shown that the third party was privy to the commission of the offence. This submission, insofar as it relates to a firearm, is directly contrary to the express provisions of s. 145. Subsection (2) cited above, specifically limits the property in respect of which a conditional order may be made to a vehicle, aircraft or boat, and sub-s. (5) provides that any person who claims any right of ownership in any such vehicle, aircraft or boat may make an application in writing for the discharge of the said conditional order; there then follows sub-s. (6):

"(6) In any proceedings brought pursuant to subsection (5), the onus of proof shall be on the applicant and no order discharging the conditional order shall be made unless the applicant has

adduced evidence and proved to the satisfaction of the court that he was not in any way privy to the offence and that the said vehicle, aircraft or boat was, at the time of the commission of the offence, being used for such purpose without his knowledge or consent and without, on his part, any negligent disregard of its user by the convicted party."

It is thus abundantly clear that the fact that the true owner was not privy to the offence in question is relevant only in the case of a vehicle, aircraft or boat. It is equally clear from the provisions of sub-ss. (1) and (2) that the ownership of the property in question is relevant only in the case of a vehicle, aircraft or boat.

We are bound to observe also that it is difficult for the applicant to suggest that he was not privy in some way to the offence. He lent his rifle to a person who had no licence in respect thereof; on his own showing he requested that person to hunt an elephant (also a game animal) in an open area when that person had no licence to do so, and this certainly was an offence under the Act. It is true that the animal actually shot was a waterbuck which, if the applicant's statement is to be believed, was contrary to his instructions, but it can hardly be argued that, even if the property were a vehicle, aircraft or boat and such property had been used in the commission of the offence in circumstances similar to those in which the firearm was used in the present case, the applicant had brought himself within the words of s. 145 (6).

p60

The only point which is even arguable in this case is that s. 145 of the Act does not apply, and that the matter ought to have been determined according to the provisions of s. 32. This section, so far as is relevant, reads:

"32. (1) Save as is otherwise provided by this Act, any person who, not being the holder of a game licence issued pursuant to Part VI and of a permit issued pursuant to subsection (1) of section thirty three, relevant to such hunting, hunts any game or protected animal in any game management area shall be guilty of an offence:

(2) Save as is otherwise provided by this Act, any person who not being the holder of a permit issued pursuant to subsection (1) of section thirty-three, relevant to such hunting, hunts any wild animal, other than a game or protected animal, shall be guilty of an offence:

Provided that the provisions of this subsection shall not apply to any bona fide resident in a game management area who, within such game management area, hunts any wild animal not being a game or protected animal.

(3) Upon the conviction of any person of an offence against this section, the said person being the owner of, or in lawful possession, of any firearm used or possessed in the commission of the said offence, the court shall, at the request of the prosecution and in addition to any other penalty imposed, declare the said firearm to be forfeited or order it to be destroyed without compensation, or both declare it to be so forfeited and order it to be so destroyed without compensation."

This section appears in Part IV of the Act under the title "Game Management Areas". Although in the first portion of sub-s. (2) there is no reference to hunting in a game management area, it is clear from the proviso to that subsection as well as to the general structure of the Act and to the Part in which this section appears that it must be read as applying to hunting in a game management area. It may be argued that it seems curious that the legislature should have regarded this offence as less serious than, for instance, hunting in an open area, and should have restricted the circumstances in which a forfeiture order could be made to cases where the convicted person was the owner of or in lawful possession of the firearm used or possessed in the commission of

the offence. We confess that we cannot understand why the legislature has taken this view; however, the provisions of the Act are quite clear and do not give rise to any absurdity. The offence in this case was committed in an open areas; we are satisfied that s. 32 does not apply and that s. 145 does, and that, the prosecution having made a request to the court to declare the firearm to be forfeited, the learned magistrate had no discretion in the matter and was obliged to make the declaration requested.

We are bound to comment on the policy of the Act in creating a structure in which the discretion whether or not to request a forfeiture order is vested in the prosecution; in the forerunner to the Act, the Fauna Conservation Act, Cap. 241, the discretion was vested in the court.

p61

It seems to us that this is an undesirable position which could give rise to most unfortunate results. The prosecution might not be aware of the full circumstances in any given case and might make a request which must inevitably result in an order of forfeiture; thereafter, the owner might be able to establish that he was completely innocent in the matter, but the order having been made there is no provision for setting it aside. Discretionary decisions of this kind are, in our view, properly made by the courts and not by prosecutors, who in many cases in relation to offences of this kind might be very junior and inexperienced.

Application refused

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