

HYDEN DINGISWAYO BANDA v THE PEOPLE (1981) Z.R. 69 (S.C.)

SUPREME COURT

GARDNER, AG. D.C.J., CULLINAN, J.S. AND MUWO, AG. J.S.  
14TH AND 28TH JULY, 1981  
(S.C.Z. JUDGMENT NO. 12 OF 1981)

Flynote

Forfeiture - Firearms and ammunition - Forfeiture of under National Parks and Wildlife Act and Firearms Act- When made.

Forfeiture - Appeal - Firearms and ammunition - Forfeiture of under National Parks and Wildlife Act and Firearms Act -Whether order for forfeiture could be made on appeal.

Headnote

The appellant was convicted on two accounts of contravening the Firearms Act and one count of contravening the National Parks and Wildlife Act, Cap. 316. On appeal to the Supreme Court his appeal was allowed in respect of the counts under the Firearms Act, but conviction under the National Parks and Wildlife Act was upheld. When he was convicted before the Subordinate court, the Magistrate ordered that his firearm be forfeited under s. 54 of the Firearms Act. The appellant on appeal applied for the return of his firearm. The State Counsel contended that in view of the fact that the appellant was convicted under the National Parks and Wildlife Act, the State was in a position to request the court to make an order for forfeiture of the firearm.

p70

**Held:**

- (i) Under the Firearms Act, a magistrate has a discretion as to whether or not a firearm should be forfeited but under the National Parks and Wildlife Act an order for forfeiture can only be made on the request of the Public Prosecutor and the Magistrate has no discretion but to order accordingly.
- (ii) An order for forfeiture cannot be made in the case of an appeal to a higher court.
- (iii) Since the appellant was acquitted in respect of the counts under the Firearms Act, the order for forfeiture under that Act cannot stand.

**Legislation referred to:**

National Parks and Wildlife Act, Cap. 316, ss. 77, 138, 145.

Firearms Act, Cap. 111, s. 54

For the appellant: L. P. Mwanawasa; Mwanawasa and Company.

For the respondent: N. Sivakumaran; State Advocate.

---

Judgment

**GARDNER, AG. D.C.J.:** delivered the judgment of the court. The appellant was convicted on two

counts of contravening the Firearms Act, and one count of contravening the National Parks and Wildlife Act, Cap. 316. On appeal to this court his appeal was allowed in respect of the two counts relating to the Firearms Act, but the conviction in respect of contravening ss.77 and 138 of the National Parks and Wildlife Act, Cap. 316, was upheld.

When he was convicted before the subordinate court the magistrate as ordered that his firearm should be forfeited under the terms of s.54 of the Firearms Act. At the time of his conviction the Public Prosecutor had power under s.145 of the National Parks and Wildlife Act to request an order for forfeiture of the firearm, in which event, in terms of that section, the magistrate would have had no alternative but to order the forfeiture of the firearm. Under that section, in the case of a firearm, there is no discretion for the magistrate to make a decision in the matter. The discretion is left entirely to a Public Prosecutor, however junior he may be. In this case no such request was made.

The appellant appears before us today to apply for the return of his firearm which was ordered to be forfeited under the terms of the Firearms Act. As he was acquitted in respect of the two charges under the Firearms Act, the order for forfeiture under that Act cannot stand.

Mr Sivakumaran, for the State, has argued that in view of the fact that the appellant was convicted under the National Parks and Wildlife Act he is in a position to request this court to make an order for forfeiture of the firearm. We have considered this argument carefully and regret to say that it cannot be upheld. Section 145 of Cap.316 specifically states that upon conviction, if the prosecution makes a request for for-

p71

feiture of a firearm, the trial court has no alternative but to accede to that request. The same does not apply in the case of an appeal to a higher court. In our view, the situation is completely anomalous. Under the Firearms Act a magistrate has a discretion as to whether or not a firearm should be forfeited. Under the National Parks and Wildlife Act only the prosecution has that discretion. We would draw the attention of the legislature to this anomaly and hope that the matter may be corrected.

In this case the appellant was found guilty of having allowed someone else to use his firearm without the necessary authority. It would be a most appropriate case for that firearm to be forfeited to the State. Unfortunately, as we have said, we have no power to make such an order. The appeal is allowed; the order for forfeiture is set aside and the firearm will be returned to the appellant.

It has been drawn to our attention that the trial court also made an order for forfeiture of ammunition. That order is also set aside and the ammunition will be returned to the appellant.

Order for forfeiture set aside

---