

THE STATE
versus
ELLINGTON MUTOVA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 20 January 2004

Criminal Review

BHUNU J: The accused is a young first offender aged 19 years. He was found guilty on his own plea of guilty to a charge of contravening section 4(4)(b) of the Fire Arms Act [*Chapter* 10:09]. He was found in possession of a CZ pistol serial number 0161122 with a magazine loaded with 7 rounds of ammunition without a valid firearms certificate.

On those facts he was sentenced to 6 months imprisonment of which 5 months imprisonment was suspended for 5 years on the usual conditions of good behaviour.

The net result was that he was sentenced to 1 month effective term of imprisonment.

The learned scrutinizing regional magistrate has now referred the matter to this court for review with the following comments,

"For a contravention of s 4(4)(a) (meant (b) of the Firearms Act [*Chapter* 10:09] the offender was sentenced to a prison term of 6 months with 5 months suspended for 5 years on the usual condition of good behaviour. In my view the serious nature of the offence did not call for the imposition of such an overly lenient sentence in view of the fact that the offender was also found in possession of live ammunition.

- (b) A ballistics report which shows the year the firearm was manufactured which information would enable appropriate sentence was never tendered in evidence.
- (c) Despite the fact that the offender was found in possession of seven rounds, he was never charged for contravening section 4(a) of the Firearms Act neither was any reference made to the seven rounds of ammunition when the trial magistrate canvassed essential elements of the offence.

- (d) The firearms and the rounds of ammunition were not forfeited to the state in terms of section 31 of the Act.

For the above reasons I could not certify these proceedings to be in accordance with real and substantial justice. The record of proceedings is referred for guidance on issues raised."

Section 4(4)(b) as amended by the Criminal Penalties Amendment Act 22 of 2001 now provides as follows:

"(4) If any person-

(a)....

(b) has in his possession any firearm or ammunition otherwise than as authorised by a firearm certificate in respect thereof in force at the time; he shall subject to this Act, be guilty of an offence and liable to a fine not exceeding level six or imprisonment not exceeding one year or to both such fine and such imprisonment."

In terms of the Criminal Procedure and Evidence (Standard Scale of fines) Notice Statutory Instrument 192 of 2003 Level Six provides for a fine of \$200 000,00 to \$400 000,00. What this means is that the worst contravention of the section is punishable by a fine not exceeding \$400 000,00 or one year imprisonment or both such fine and such imprisonment.

Having regard to the current, high prevalence of armed robberies car jackings and poaching of wild animals the learned regional magistrate is undoubtedly correct in taking the view that the offence must be visited with a severe penalty. While the learned regional magistrate may be correct in taking that view, it is clear and a matter of fact that the legislature has trivialised what clearly is a serious crime.

The net result is that although judicial officers are entitled to their opinion they are duty bound to dispense justice according to law not morality. It is not the duty or function of the courts to make an offence more serious than what it has been made by the law maker. It is up to the legislator to respond to social changes and to make the appropriate amendments to suit changing circumstances.

It appears that the law maker has been responding to social changes. An examination of the Act reveal that offences of this nature were punishable by severer penalties, during the times of armed insurrection and conflict in the early eighties.

The current more lenient penalties appear to be the product of the ceasatation of armed hostilities towards the end of the eighties. Having regard to the current upsurge in the number of offences involving firearms there is in my view urgent need on the part of the legislator to revise the applicable level of penalties to suit the exigencies of changing times and circumstances.

In the mean time the courts cannot but operate strictly within the confines of the prevailing law.

In my view having regard to the prevailing law and the level of penalties prescribed for the offence, I am unable to say that the sentence imposed by the trial magistrate is so manifestly lenient as to warrant interference by this court on review. This is by no means the worst contravention of the section.

The learned regional magistrate's observation that a ballistic report stating the year of manufacture of the firearm ought to have been produced, appears to be a misdirection. That report is only required in respect of prosecutions under section 4(2). The accused was however not being charged under subsection (2) but subsection (4).

I find confirmation of my view under subsection (5) which provides that:

"In any prosecution for an offence in terms of subsection (2) it shall be presumed unless the contrary is shown that the firearm in respect of which the offence was committed was manufactured on or after the 1st of January 1990." (my emphasis).

The learned regional magistrate also suggested that the accused ought to have been charged under section 4(a) for the possession of 7 rounds of ammunition. This in my view appears to be a misdirection because section 4(b) of the Act punishes illegal possession of both a firearm and ammunition. Thus charging the

accused separately with illegal possession of ammunition under section (4)(a) would have amounted to an improper splitting of charges.

Section 31 of the Act provides for forfeiture of firearms and cancellation of firearms certificates. It provides that:

"(1)Where any person is convicted of an offence under this Act, the court by which he is convicted may make such order as to forfeiture or disposal of any or all firearms or ammunition found in his possession as the court thinks fit, and may cancel any certificates held by the person convicted."

The learned regional magistrate was therefore correct in saying that the trial magistrate ought to have conducted an enquiry regarding the forfeiture of the offensive firearm and ammunition or the disposal thereof. He was also duty bound to inquire as to whether the accused was the holder of any firearm certificate and if so to consider its cancellation. This the trial magistrate did not do.

Section 31 in my view is cauched in peremptory terms in respect of the holding of the enquiry.

The trial magistrate has however a discretion at the end of the enquiry to determine whether or not to order forfeiture, cancellation or manner of disposal.

In the circumstances I am of the view that the conviction is in order but the sentence is not. I therefore remit the matter to the trial magistrate for him to comply with the provisions of Section 31 of the Firearms Act [*Chapter 10:09*].

It is accordingly ordered:

- (1) That the sentence imposed by the trial magistrate be and is hereby set aside.
- (2) That the matter be and is hereby remitted to the trial magistrate for him to comply with the provisions of section 31 of the Firearms Act [*Chapter 10:09*].

UCHENA J, agrees:.....