

THE STATE
versus
IRVENE KATSANDE
and
MOYANA MUDZIWEPASI
and
THOMAS MUDZIWEPASI
and
FELIX SUNDAY

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 16 March 2016

Criminal Review

MAWADZE J: It is amazing that the trial magistrate managed to comprehend the facts contained in the state outline and let alone to proceed to found a conviction in respect of all the four accused persons on the basis of those facts. The trial magistrate should be reminded of the important need to apply his or her mind to all cases brought before him or her even in plea cases especially where accused persons are not legally represented. The failure to do so may result in miscarriage of justice.

Al the four accused persons were convicted on their own pleas of guilty by the Provincial Magistrate sitting at Harare of contravening s 4 (1) as read with s 4 (2) of the Firearms Act [*Chapter 10:09*], which relates to possession of a fire arm and or ammunition. I note in passing that the charge is improperly cited as;

“Contravening s 4 (1) as read with s 4 (4) (c) of the Firearms Act [*Chapter 10:09*].”

It is always advisable in statutory offences for the trial magistrate to check the relevant statutory provisions before proceeding to deal with the matter to ensure that the charge is properly cited in accordance with the statutory provision.

The charge in respect of all the four accused persons is that on 5 March 2016 at House Number 938 Section 3 Kambuzuma, Harare, all the four accused persons or one of them unlawfully possessed a firearm, namely an FN Browning pistol serial number 482029 with a

magazine charged with 7 live rounds of ammunition without a valid firearm certificate in respect of that firearm.

I find the agreed facts to be very confusing. I shall however endeavour to summarise them as follows;

Accused 1 Irvine Katsande and accused 3 Thomas Mudziwepasi reside at the same house number 938, Section 3 Kambuzuma Harare. As per the charge sheet this is where the offence was committed. However when one refers to the state outline the offence was committed at a different address which is the residence of accused 2 Moyana Mudziwepasi at number 11241, Section 3 Kambuzuma Harare.

Accused 4 Felix Sunday resides at number 963, Section 3, Kambuzuma, Harare.

It is alleged that on 5 March 2016 accused 1's wife informed police at Warren Park Police Station that her husband accused 1 had a firearm in his possession and this led to the arrest of accused 1. Apparently no firearm was found with accused 1. Instead accused 1 on being interviewed indicated that he had given the firearm to accused 2. This led to the arrest of accused 2 and accused 2 revealed that the firearm was in a truck registration number ACL 3394 which was parked outside the gate of accused 2's house. It is not clear who was the owner of this truck.

It is further stated that accused 2 then implicated accused 3, probably as the source of the firearm and this led to the arrest of accused 3. Accused 3 is said to have said he got the firearm from accused 4 but it is not clear as to when he got the firearm from accused 4. Accused 3 said he had been given the firearm by accused 4 so that accused 3 would take it to accused 1 to ascertain if it was a genuine firearm or simply a toy. Apparently accused 3 and accused 1 reside at the same house.

It is then stated that accused 4 was arrested presumably on the same date 5 March 2016. It is said accused 4 was not able to give a satisfactory account regarding how he got the firearm. The unsatisfactory account given by accused 4 is not stated. However in mitigation accused 4 said he got the firearm at a dump site.

The chain of events I have outlined are not specified as to which dates they occurred. The presumption would be that it was on the same date specified in both the charge sheet and the state outline which is 5 March 2016.

In putting the essential elements of the offence to the four accused persons in terms of s 271 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the trial magistrate alleged that all the four accused persons acted in concert and in common purpose in possessing the firearm. I am not clear as to what this means.

The explanation in mitigation by accused 4 that he picked the firearm at a dump site was not controverted. Further the explanation is that accused 4 was not sure if it was a genuine firearm or a toy hence he gave it to accused 3 to take the firearm to accused 1 for purposes of verification. It is not clear why accused 4 had to ask accused 3 to take to accused 1 and not accused 4 himself. It is also not clear why accused 1 had to verify if it was a genuine firearm or a toy or if accused 1 had expertise in firearms. Whatever is the case, can it then be said on such facts accused 4 who was not sure if what he had picked was a genuine fire arm or a toy possessed a firearm in breach of the provision of s 4 (1) of the Firearms Act [*Chapter 10: 09*]? As already said accused 4's explanation was neither probed nor controverted.

From the sequence of events narrated accused 3 then took the firearm to accused 1 for purposes of verification. Again it is not clear if accused 3 then knew that what he was taking to accused 1 was a fire arm or a toy. The assumption is that accused 3 did not know that it was a firearm because if he knew it was, one would have expected him to simply advice accused 4 that it was firearm without taking it to accused 1 for purposes of verification. The question which then arises is whether on these facts accused 3 breached the provisions of s 4 (1) of the Firearm Act [*Chapter 10:09*].

The agreed facts do not disclose when accused 1 gave the firearm to accused 2. All what is said is that accused 1 gave the firearm to accused 2. The trial magistrate did not bother to inquire why accused 1 gave the firearm to accused 2 more so as accused 1 in mitigation had said the firearm had been picked by accused 4. Further the trial magistrate did not inquire from accused 2 why accused 2 was given the firearm by accused 1. It was also not established from accused 2 why the firearm was found in a truck parked outside accused 2's house. It is not clear whether by then either accused 1 or accused 2 or both of them knew that it was a firearm and not a toy. It is not even clear why the firearm moved from accused 1 to accused 2 instead of being returned to accused 4 who had picked it. All these issues are not apparent from the agreed facts and the trial magistrate did not seek to clarify them.

The question which has exercised my mind is whether when one considers the chain of events and the facts alleged it can be said there is any basis to allege that the accused persons acted in concert and in common purpose?

It is a settled principle in our law that for a court to return a verdict on a charge of possession both the *actus reus* and the *mens rea* in relation to that possession should be proved.

From the facts outlined in the state outline the only person on 5 March 2016 who was in physical possession of the firearm is accused 2. The question however still remains as to whether accused 2 had the requisite *mens rea* to possess the firearm. Did accused 2 know it was a firearm?

The scenario is even more complicated and confusing in respect of accused 1, accused 3 and accused 4 who were not found in physical possession of the firearm. The question is whether accused 1, accused 3 and accused 4 had the requisite *mens rea* to commit the offence charged. As already pointed out it is not clear on what basis it is said they acted in common purpose.

The inescapable conclusion is that this was a poorly investigated and prosecuted case. The state outline was clumsily drafted without due regard to the necessary elements or averments which constitute the offence alleged. The trial magistrate did not bother to digest the facts to ascertain if they make sense but simply swallowed them hook, line and sinker. In the process the trial magistrate became part of the confusion and failed to apply his or her mind to the essential elements of the offence. This explains why the essential elements of the offence were not properly put to all the four unrepresented accused persons and the requisite questions were not asked.

Trial magistrates should be reminded that a state outline is not simply an incoherent narration of events. It should be drafted in such a manner that it outlines the sequence of events and most importantly captures the essential averments which prove the offence alleged or charged.

I am not satisfied that on the facts outlined in this case all the four accused persons were properly convicted of the offence of contravening s 4 (1) of the Firearms Act [*Chapter 10:05*]. No useful purpose would be achieved by remitting the matter to the trial magistrate on the basis of those same facts which are scanty and confusing. The only option would be to quash the conviction and set aside the sentence in respect of all the four accused persons.

I will conclude by reminding the trial magistrate that despite the pressure of the work one may face, it remains the duty of the trial court in plea matters to ask meaningful questions which assist the court to fully understand the facts of each case it deals with in order to ensure that the essential elements of the offence are properly canvassed and that justice is done to each case.

The only clear issue is that the four accused persons had no right to possess the firearm in issue. It should therefore remain forfeited to the State.

In the result it is ordered that;

1. The conviction in respect of all the four accused persons be and is hereby quashed.
2. The sentence imposed in respect of each of the four accused person be and is hereby set aside.
3. The firearm in issue is forfeited to the State.

Accordingly I have issued a warrant of liberation in respect of each of the four accused persons.

MUREMBA J agrees