IN THE HIGH COURT OF SWAZILAND

APP. CASE NO.9/86

In the matter of

GEORGE M. MSIBI Appellant

and

THE KING Respondent

CORAM: HANNAH, C.J.

FOR THE APPELLANT: MR. FINE

FOR THE RESPONDENT: MR. DONKOH

JUDGMENT

Hannah, C.J.

On 2nd June 1986 the appellant was convicted of unlawfully being in possession of a firearm, namely a revolver, on 8th February 1986 contrary to section 11(1) and 11(8)(a) of the Arms and Ammunition Act 1964 and of unlawful possession on the same day of forty-four rounds of ammunition, for use with the revolver, contrary to section 11(2) and section 11(8)(c) of the Act. He now appeals against both conviction and the fine of E100.

The facts of the case, as found by the learned Senior Magistrate, were as follows: On 8th February 1906 police officers visited the appellant's home in Manzini and informed him that they wanted his firearm together with his documents. The appellant told them that he only had a revolver which he then produced together with forty-four rounds of ammunition. When asked if he had a licence for the revolver the appellant replied affirmatively and said that he would produce it to the police when he had found it. The police took possession of both revolver and ammunition.

On 10th February the appellant was again seen by the police and was asked again about the licence. He said that he had since remembered that a licence had not been issued as the revolver had been issued to him as a member of Liqoqo. The appellant was then informed that he would be charged with the unlawful possession of the revolver and the ammunition.

On 10th February 1986 the appellant handed to the police a letter dated 12th October 1983 and informed the police that pursuant to that letter he had been issued with a special permit for a firearm. The letter is signed by Prince Sozisa, the Authorised Person at that time, and is addressed to the Chairman of the Firearms Licensing Board. It reads as follows:

"Dear Sir,

ISSUE OF SPECIAL FIRE-ARMS PERMITS

Taking into regard the present security position in the country and in appreciation of the need to protect the persons of certain individuals in the Kingdom, I give consent for the immediate issue of firearms permits for the following:

1. Prince Mfanasibili

2. Mr. M. M. P. Mnizi

3. Dr. G.M. Msibi

4. Chief Mfanawenkhosi Maseko

5. Mr. R.M. Mabila

6. Hon. D. S. H. Nhlabatsi

7. David J. Matse

Grateful for your urgent consideration.

Yours faithfully,

(Sgd) (PRINCE SOZISA)

AUTHORISED PERSON"

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There is no dispute as to the authenticity of this letter or as to the weight which the signature of the Authorised Person carried. The letter signified the consent of the Head of State to the issue of "firearm permits" to those persons named, one of whom was the appellant, and clearly if any of those named wished to have a "firearm permit" no difficulty would lie in their way of obtaining one.

I pause here to set out certain parts of the Arms and Ammunition Act which deal with the acquisition of and continued possession of firearms and ammunition and to make some comment upon the use in the letter of the expression "firearms permit" and the reference to "special" firearms permits. The Act describes itself as "An Act to regulate and control arms and ammunition and to that end it established the Firearms Licences Board and charged that Board with the duty of advising the licensing officer:

"as to the issue of licences to import, purchase or otherwise acquire firearms ....." (Section 4(2)) The licensing officer is the Commissioner of Police and any police officer deputed by him to be a licensing officer and, subject to the Act, the licensing officer is required to accept the advice of the Board. It is the licensing officer who actually issues permits or licences in terms of the Act.

Section 9 of the Act makes it an offence to import, export, purchase or otherwise acquire a firearm or ammunition except under and in accordance with the terms and conditions of a permit and section 10 provides for the procedure to be followed by a person wishing to import, export, purchase or otherwise acquire a permit. Although the section does not itself require an application to be placed before the Board it is clear from the Act, when read as a whole, that the licensing officer must deal with individual applications in conformity with general

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advice tendered by the Board or with specific advice. Once imported or otherwise acquired the firearm must be delivered to a police station for registration and ultimately details of the firearm and the permit must be entered in a central register and a certificate of registration is issued.

Section 11(1) and (2), in terms of which the appellant was charged, provides:

"(1) No person shall be in possession of a firearm or arms of war unless he is the holder of a current licence to possess it or is otherwise permitted to possess it under this Act.

(2) No person shall be in possession of ammunition unless he is the holder of a curr current permit or licence to possess the firearm for which such ammunition is intended, or is otherwise permitted to possess such ammunition under this Act."

Section 11(5) makes provision for the grant by a police officer in charge of a prescribed station or a customs or immigration officer of a permit for the temporary possession of a firearm or ammunition and section 11(8) makes contravention of the provisions of the Act an offence.

Section 12 of the Act deals with the issue of licences to possess firearms and ammunition and provides that a licence shall be an annual one renewable in the discretion of the licensing officer and also that a licence shall not be issued unless the applicant produces the certificate of registration and pays the prescribed fee of E2.

The only other section to which I need refer is section 13 which exempts certain categories of persons such as police and prison officers

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from the terms of the Act when acting in the course of duty.

It will be seen from the foregoing that the Act makes no provision for "special firearm permits" and the only reference to a firearm permit as opposed to a firearm licence is to a permit to import, export, purchase or acquire and a permit for temporary possession. The former type of permit does not authorise continued possession but only the doing of the act in question and it seems to me unlikely that the reference in the letter signed by the Authorised Person to special firearms permits was intended to bear this narrow meaning or that it was intended to refer to temporary permits. In my view, the use of the word "permit" was not intended as a term of art but merely as a convenient way of referring to the necessary documentation and the use of the word "special" signified no more than that the necessary permits and licences were to be issued as a result of Royal approval rather than left to the discretion of the licensing officer or the advice of the Board. To my mind a proper and plain reading of the letter discloses an intention on the part of the author that the persons named therein should be enabled to acquire the necessary documentation under the Act to possess a firearm thus overriding any discretion that the licensing officer or the Board might have in the matter. The letter does not in itself contain authority for the possession of a firearm. If that were the intention there would have been no need to address the letter to the Chairman of the Board or to speak in terms of the issue of permits. Therefore, insofar as Mr. Fine's argument rests on the proposition that the letter itself was sufficient authority to possess a firearm I reject it.

Returning to the history of this matter, it would appear that the appellant himself understood the effect of the letter in the manner stated because he said in his evidence:

"By that time the Secretary of the Supreme

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Council had informed us members of the Council that those requiring a licence should go to the licensing officer to receive their permits. I phoned the Commissioner of Police and informed him that I am going to come in and apply for a permit."

The appellant said that he was then given an application form which he completed and was issued with a permit.

The application form in question is headed "Application to Import/ Purchase or otherwise acquire firearm(s)" and was countersigned by the Chairman of the Firearms Licences Board. In the event a permit to import a firearm and ammunition was granted on 23rd May 1984 valid until 23rd August 1984 and it

appears from the customs stamp thereon that on 1st June 1984 the appellant imported into the country the revolver and ammunition the subject of the charge. However, thereafter the appellant took no further step to comply with the requirements of the Act regarding an annual licence to possess. In his evidence he said:

"I was given no instructions. I did not sign a register. Until the police came to my house, I was not aware of any other obligation as far as my firearm is concerned ..... I was not aware of the fact that the possession of my firearm was in any way unlawful. Nobody told me that it was necessary to obtain a licence for a firearm."

He was saying in other words, that he was unaware of the provision in the Act which requires a person in possession of a firearm to have a licence and thought, erroneously, that the permit to import a firearm sufficed. This piece of evidence must be contrasted with something said by the

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appellant during cross-examination. He was asked if he had applied for a licence after importing the revolver and he replied:

"No because I was told that it was not necessary because I was issued with a special permit, as in exhibit A" (letter from the Authorised Person).

This bald assertion that he was acting on advice in not seeking a licence not only first saw the light of day in cross-examination but was never amplified either in cross-examination or in re-examination. It represents a departure from the case advanced in examination-in-chief, namely that he was unaware of the need to have a licence and that no one had informed him of such a need and, in my view, little if any weight can be attached to it. This appeal must, in my opinion, be considered and determined on the basis that the appellant thought that he had done all that was necessary and simply did not know that the Act required a person wishing to possess a firearm not only to obtain a permit to acquire one but also a licence to continue in possession of it. The appellant's mistake or ignorance was not one of fact or even one of mixed fact and law. It was an ignorance of a legal requirement imposed by statute and this state of ignorance continued during the following two years during which time the appellant continued in possession of the revolver and ammunition. It was in these circumstances that the learned Senior Magistrate was of the opinion that the Crown had failed to prove an unlawful intent.

Having made his finding that the appellant had no unlawful intent the learned Senior Magistrate went straightaway to a consideration of whether mens rea in the form of culpa was sufficient to warrant a finding of guilt and held that it was. However, in my view, the next logical step was to consider whether mens rea is an element of the offence at all. If it be found that it is then it will only then become necessary to consider whether dolus is required or whether culpa is sufficient and, having

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regard to the facts of this case, whether ignorance of the law or a bona fide claim of right based on a mistaken view of the law can be a good defence.

The general rule or principle of our law is summed up in the maxim "Actus non facit reum, nisi mens sit rea" (the act does not make (the* performer) a criminal, unless there be a criminal intention). Put shortly, the general principle is that to commit an offence a man must have a guilty mind and, as a general rule, a statute will be applied as though that principle is incorporated into the enactment. In Sweet v Parsley 1969 1 All E.R. 347 Lord Morris of Borth-y-Gost put it this way:

"The intention of Parliament is expressed in the words of an enactment. The words must be looked at in order to see whether either expressly or by necessary implication they displace the general rule or presumption that mens rea is a necessary prerequisite before guilt of an offence can be found. Particular words in the statute must be considered in their setting in the statute and having regard to all the

provisions of the statute and to its declared or obvious purpose".

In the same case Lord Pearce said at page 356:

"Before the court will dispense with the necessity for mens rea it has to be satisfied that Parliament so intended. The mere absence of the word "knowingly" is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament

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intended that the act should be prevented by punishment regardless of intent or knowledge".

However, although the test or approach for determining whether a statute has created an offence of strict liability or not is much the same in English and Roman Dutch common law jurisdictions (see State v Arenstein 1964 (1) S.A. 36), even in the case of statutes having the same subject matters the result will depend to a large extent on the wording of each individual statute. Thus in R v Howells 1977 3 All E.R. 417 the Court of Appeal held that the offence of possessing a firearm without a certificate contrary to section 1(1)(a) of the Firearms Act 1968 was an offence of strict liability whereas in State v Appleton 1982 (4) S.A. 829 the Zimbabwe Supreme Court accepted that a similar offence contrary to section 5(1) of the Firearms Act was not. Again, it is implicit in the judgment of Reynolds J.P. in R v Ndema 1954 (4) S.A. 25 that he regarded the relevant South African statutory provision making it an offence to be in possession of a firearm without a licence as being one imposing strict liability whereas in R v Sifundza 1977/78 SLR 69 Nathan C.J. clearly regarded section 11(1) of the Arms and Ammunition Act as requiring mens rea.

One factor which influenced the Court in R v Howells (supra) and R v Ndema (supra) was that the particular enactments there being considered contained very extensive exceptions by virtue of which an innocent possessor of a firearm could avoid criminal liability. The English Firearms Act 1968, for example, permits a defence of possession for a lawful object and a defence of lawful authority or reasonable excuse is permitted to a charge of possession in a public place. Provisions such as these protect members of the public who might otherwise suffer unjust or absurd results in consequence of strict liability. Such provisions would meet the cases instanced by Nathan C.J. in R v Sifundza (supra) - the case of the man who disarms a robber and the case of the man who

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finds a pistol in the street and who is on his way with it to the nearest police station - and the existence of such provisions is plainly a weighty factor when considering whether the general rule that mens rea is a necessary prerequisite has been displaced. As was pointed out by Nathan C.J. no such exception appear in the Arms and Ammunition Act and this, in my opinion, is sufficient reason to distinguish our statute from those considered by the Courts in England and in South Africa. While I accept that there are certain indications that Parliament may have intended to dispense with the necessity for mens rea when creating the offence of possessing a firearm without a licence, and I have in mind in particular the danger to the community resulting from the possession of lethal firearms. I am not persuaded that that was Parliament's true intention. Had it been so I consider Parliament would have alleviated the strictness resulting from such construction by catering specifically for the type of case referred to. I should add that by so finding I do not consider that the Court is placing insuperable difficulties in the path of the law enforcement authorities. As was pointed out by Beadle C.J. in S v Zemura 1974 (1) S.A. 584 statutory offences may be said to fall into three main groups:

"The first group consists of offences where the statute imposes what is usually referred to as "strict liability", and I will refer to this group as the "strict liability group". In offences falling within this group the State has to do no more than prove that the accused committed the acts constituting the offence, and, notwithstanding the fact that the accused might satisfy the court that he had no mens rea when he committed these acts, he is nonetheless guilty.

The second group of offences, which for the sake of a name I will call the "intermediate group", consists of those statutory offences where the onus is on the State to prove that the accused committed the acts constituting the offence, but thereafter an evidential onus is thrust on the accused to disprove the inference that he had the requisite mens rea when he committed these acts.

The third group of offences, which again for the sake of a name I will call the "positive proof group", consists of those offences where the onus is on the State in the first instance to prove not only that the accused committed the acts constituting the offence, but also his guilty state of mind when he committed them. In other words, no inference of mens rea is drawn merely from the fact that he committed the prohibited acts, the State must prove positively that he committed them with a guilty mind. This, of course, may also be proved by inference from facts, but the mere fact that he committed the acts is not sufficient evidence from which to draw such inference".

The offence created by section 11(1) of the Act clearly falls within the "intermediate group" and once it is proved that an accused was in possession of a firearm without a licence an evidential onus is cast on the accused to give an explanation.

I now come to the explanation advanced by the appellant at his trial. The stance he adopted as disclosed by his evidence, can be put in the following way. I wanted to possess a firearm and knew that I would be issued with the necessary papers authorising such possession if I applied. I approached the licensing officer and was given an application form for

an import permit which I completed. I was issued with an import permit which I believed to be all that was necessary to authorise possession of a firearm. Had I been acquainted with the terms of the Arms and Ammunition Act or had the licensing officer advised me of the terms, I would have applied for a licence. However, I was not acquainted with the terms of the Act and as the licensing officer only provided me with an application form for an import permit, I assumed that nothing further was required.

The case for the appellant was, therefore, that he was mistaken in his belief as to the effect of the Arms and Ammunition Act and that his mistaken belief was reinforced by the failure of the licensing officer to give him any more than an application for an import permit. It is important, I think, to point out that it was not his case, at least as I find it to be, that his mistaken belief was caused by any positive act or advice on the part of the licensing officer.

The basic rule is expressed in the maxim "ignorantia juris nemenem excusat" but there has been a tendency in recent times on the part of certain courts applying the Roman Dutch law to admit various exceptions to this rule and, in many instances, to adopt a less rigid and uncompromising attitude than, for example, that of the English Courts. The courts applying Roman Dutch law have, however, not always acted consistently as is illustrated by the discussion on the topic by Burchell and Hunt in South African Criminal Law and Procedure Vol.1 at page 132 et seg. The high water mark in South Africa appears to have been set by the Appellate Division in State v De Blom 1977 (3) S.A. 513 although unfortunately, as the judgment in that case is not available to me in English, I am at a considerable disadvantage in assessing its full impact. According to the headnote in English, the Court held that in the case of a statutory offence where mens rea is required:

"It must be accepted that, when the State has led evidence that the prohibited act has been committed, an inference can be drawn depending on the circumstances, that the accused willingly and knowingly (i.e. with knowledge of the unlawfulness) committed the act. If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful,

and further, when culpa only, and not dolus alone, is required as mens rea, there is also a reasonable possibility that juridically she could not be blamed, i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her (regarding the act in question).

In State v Appleton 1982 (4) S.A. 829 the Zimbabwe Supreme Court expressed reservations concerning the correctness of this decision but, having regard to the facts of the case before it, considered it unnecessary to determine whether to follow it or not. I find myself in a similar position. As was pointed out by Fieldsend C.J. De Blom's case (supra), while apparently extending the exceptions to the general rule ignorantia juris nemenem excusat, still requires that a person must act "with the necessary circumspection to inform himself of what is required Of him" before embarking on a particular course of conduct. An indivi- dual engaging or about to engage in a particular activity such as the possession of a firearm should, therefore, acquaint himself with the law relating to the possession of firearms and his failure to do so will

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normally be regarded as unreasonableness on his part and his ignorance will be of no avail to him.

A case perhaps closer to the facts of the instant case is State v Zemura 1974 (1) S.A. 584, another decision of the Zimbabwe Supreme Court. In that case the appellant's defence to a charge of unlawfully purchasing cattle otherwise than in terms of a permit issued to the sellers by the district commissioner was that he had acted in accordance with the advice of a cadet officer in the district commissioner's office. Beadle C.J. held that where an accused is given advice on an administrative matter by a responsible public official whose duties include the administration of the particular statute to which the matter relates, and where the a accused genuinely believes that the official is sufficiently familiar with the Act his department administers to be competent to give the advice sought, then if the accused bona fide acts on that advice he should be permitted to set up, as an exception to the ignorantia juris rule, the defence of a "claim of right" should that advice prove to be wrong, and this notwithstanding the fact that the claim may involve setting up the defence of a mistake of law. Accordingly, the appeal against conviction succeeded, a result which, I think, would accord with all reasonable person's sense of justice.

The judgment of Beadle C.J. is, if I may respectfully say so, comprehensive and I find the reasons which he gives for his decision compelling particularly if it is accepted that it is a legitimate aim of the law to relate guilt to moral responsibility. On the other hand it may be thought, and it certainly is thought in some jurisdictions, that such an aim must give way to other more weighty considerations of public policy. I am of the view, however, that it would probably be dangerous to extend the exception beyond the very clear limits set by Beadle C.J. and it is for this reason that I have strong reservations as to whether

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De Blom's case (supra) should be followed by this court. I am also of the view that the instant case goes far beyond those limits. In the instant case there is no acceptable evidence that the accused was advised that he required no firearms licence and in a matter so clear cut as the Arms and Ammunition Act I have the strongest doubts whether any responsible officer concerned with its administration would tender such advice even having regard to the unusual background which this case has. In my opinion, the facts of the present case can clearly be distinguished from those in Zemura's case (supra).

In my judgment, even assuming, as I do for the purposes of this appeal, that De Blom's case (supra) correctly lays down the law to be applied, I do not consider that the ignorance of the appellant regarding the need to have a licence was reasonable. He should, in my view, have acquainted himself with the special rules governing possession of a firearm, at very least by making further enquiry of the licensing officer particularly having regard to the fact that the permit issued to him was quite plainly no more than a permission to import a firearm and ammunition into the country within a three month period. In my view, the appellant was rightly convicted.

The sentence does , however, cause me concern. The learned Senior Magistrate correctly pointed out that the appellant had but one further step to take to regularise his possession of the revolver and ammunition and that the authorities knew that he had a firearm. The learned Senior Magistrate then went on to make the point that firearms offences are prevalent and on the increase and concluded that the sentence to be imposed should contain a deterrent element.

Deterrence is, of course, a commendable objective in cases of unlawful possession of firearms particularly in a day and age when firearms are all too frequently used for criminal purposes but sight must

not be lost of the facts of each individual case. The facts of the present case were most unusual. Firstly, the Head of State, through the Authorised Person, approved the appellant's possession of a firearm. Secondly, the appellant did approach the licensing officer for the necessary documentation and genuinely believed that the permit issued to him was sufficient to authorise continued possession. His only fault was his failure to be more circumspect in following up that approach and the licensing officer cannot escape some criticism for his failure, given the particular circumstances, to be more forthcoming. Thirdly, it is not in the least surprising to find that the appellant, having fallen into error in the initial stages, did nothing to rectify the matter in the following years. In these exceptional circumstances I am of the view that the learned Senior Magistrate was wrong in directing himself as to the need for a deterrent element in the sentence. Without such a direction the probabilities are that he would have acceded to the defence request for a discharge and caution.

Accordingly, while the appeal against conviction is dismissed the appeal against sentence is allowed and for the sentence imposed in the lower court I substitute a discharge and caution in terms of section 319 of the Criminal Procedure and Evidence Act. The fine, if paid, must be repaid to the appellant.

N.R. Hannah

CHIEF JUSTICE