ATTORNEY-GENERAL OF NORTHERN RHODESIA v SMART LYAMPALI AND EDWARD MUNGONI LISO (1963 - 1964) Z and NRLR 121 (CA)

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COURT OF APPEAL

[Before the Honourable the Chief Justice SIR DIARMAID CONROY, the Honourable Mr. Justice BLAGDEN and the Honourable Mr. Justice CHARLES on the 18th August, 1964.]

Flynote

Possession of an offensive weapon - lawful authority and reasonable excuse for possession - whether possession initially lawful and reasonable can later cease to be so - section 72A (1) of the Penal Code, Cap. 6.

Headnote

The two respondents to the present appeal had been convicted *inter alia* in the magistrate's court of the possession of offensive weapons in a public place contrary to section 72A (1) of the Penal Code, i.e. a bow and arrow and a bicycle chain. They had had them in a car in which they had been travelling, but had removed them from the car and used them to attack a group of political opponents. The magistrate found that their original reason for possessing them was lawful and reasonable, since he accepted that they had them for the purposes of self-defence. He decided, however, that the possession ceased to be lawful and reasonable when the respondents got out of the car to attack their opponents. He therefore convicted them, but on appeal to the High Court, the judge allowed the appeal on the grounds that the originally lawful and reasonable possession could not change, on the authority of *R v Jura* [1954] 1 All ER 696.

Held:

(a) That *R v Jura* was distinguishable from the present case.

(b) The magistrate's decision was correct and should be restored.

Appeal allowed.

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Cases cited:

(1) *R v Jura* [1954] 1 All ER 696.

(2) W*ong Pooh Yin v Public Prosecutor* [1955] AC 93; [1954] 3 All ER 31.

(3) *Mwangi s/o Wambugu v R* (1954) 21 EACA 246.

(4) *Evans v Wright (Times Newspaper*, 11th April, 1964).

P H Counsell, Director of Public Prosecutions for the Crown

[*Editorial Note*:] *Section* 72A (1) *has now been replaced by section* 72A (4) *but the wording of the new subsection is the same as the old.*

Judgment

Conroy CJ: This is an appeal by the Attorney-General under section 12 (3) (a) of the Federal Supreme Court Act.

The respondents were each convicted by the Resident Magistrate at Broken Hill: the first respondent of unlawful wounding contrary to section 208, and possessing an offensive weapon contrary to section 72A (1), of the Penal Code; the second respondent of assault occasioning actual bodily harm contrary to section 220, and also of possessing an offensive weapon contrary to section 72A (1), of the Penal Code. From

those convictions the respondents appealed to the High Court, and the first and second respondents' appeals against the convictions for possessing offensive weapons were allowed and the conviction set aside. From that decision the Attorney-General now appeals on the ground that the High Court misdirected itself in law in allowing such appeals.

The following facts were found by the learned resident magistrate. On 17th January, 1964, i.e. immediately before the last general election, the two respondents, who were members of the African National Congress, were in a motor car travelling along the Mumbwa Road. They came upon a large crowd of people, supporters of the United National Independence Party, awaiting transport to take them home after attending a political meeting convened by that party. The respondents drove past the crowd and then stopped. The first respondent and the second respondent (who was the driver) got out of the car, the first respondent having with him a bow and arrow, and the second respondent having with him a bicycle chain attached to a handle. They both went back towards the crowd of U.N.I.P. supporters. The first respondent fired his arrow into the crowd and hit Peter Yeleli in the forearm, the arrow head penetrating to a depth of two or three inches, and having subsequently to be extracted by a doctor. The second respondent struck two members of the crowd with his bicycle chain, inflicting bodily harm on them.

Both respondents gave evidence before the magistrate. The first respondent said that he kept a bow and arrow to scare away monkeys which ate his crops, and when there was a fight at a place he carried it for defence. He admitted that when in Lusaka he had hidden it from the police because he knew that no one would assault him in town, and he had collected it from its hiding place on the return journey, before the incident.

The second respondent said that as it was election time he carried the bicycle chain for protection, and he " learned the habit " after an incident to one of his party's candidates on the Great North Road. He thought he was entitled to do so in order to defend himself.

The learned magistrate found as a fact that the weapons were offensive weapons, and were carried in a public place, namely the Mumbwa Road. He accepted the respondents' reasons for carrying the weapons in question, and said this:

"Now with regard to the possession of offensive weapons I accept the first accused's and the second accused's evidence that as a result of violence between the parties they carried their weapons to defend themselves.

Crown counsel has argued that no one has the right to carry about such a nasty weapon as a cycle chain unless the danger is immediate. It is true that a cycle chain is a very unpleasant weapon, usually associated with thuggery at its worst.

But the fact remains that in time of trouble people in the territory have driven about the roads armed. I suppose that about half the European population have driven about in their cars in time of trouble in recent years armed with pistols. In my view it was a perfectly proper precaution. How then can one object to an A.N.C. candidate in a troubled election driving about armed

with a cycle chain? How can one object to an A.N.C. supporter travelling with a bow and arrow? It must be remembered that there was a lot of violence just before the election.

But there is rather more to this case than that. So long as the two accused carried their weapons in the car in case they were attacked, they were in my view within the law. But in this case the two accused did not remain in a position of armed readiness to repel attack. They got out of the car, and for some reason set about perfectly peaceful people with their weapons. The moment they took their weapons out of the car, and advanced to the attack with those weapons they lost their reasonable excuse for possessing the weapons."

He convicted the respondents on all counts. The respondents appealed to the High Court, and the learned judge dismissed the appeals against the convictions for unlawful wounding and assault occasioning actual bodily harm. In regard to the convictions for possessing offensive weapons, the learned judge held that he was bound by the decision in *R v Jura* [1954] 1 All ER 696, to which I shall refer later. He held that as the respondents had possessed a reasonable excuse, i.e. self-defence, for having the weapons with them in the car, that reasonable excuse was not vitiated by the subsequent unlawful use of the weapons after the respondents got out of the car and went back to attack the U.N.I.P. crowd.

The wording of section 72A (1) and the definition of "offensive weapon " in section 5 of the Penal Code were, for all material purposes, the same as those in section 1 (1) of the United Kingdom Prevention of Crime Act, 1953. At the time, the relevant parts of section 72A (1) read as follows:

Any person who without lawful authority or reasonable excuse, the proof whereof shall lie upon him, has with him in any public place any offensive weapon shall be guilty of a misdemeanour.

In order to prove the offence charged against the respondents it was for the Crown to establish that each of them had with him in a public place an offensive weapon. When this burden had been discharged, the respondents would be guilty of the offence unless they were able to satisfy the court, on a balance of probabilities, that they had either a lawful authority or a reasonable excuse for having the weapons with them.

The only ingredient of the offence in issue before us is whether on the facts as found, the respondents had a " reasonable excuse " for having these offensive weapons with them. Some confusion seems to exist as to the terms "lawful authority " and "reasonable excuse ", and in many of the English cases they are treated - incorrectly in my view - as interchangeable. For example, in *Jura's case*, Lord Goddard patently fails to distinguish between them in the illustration he gives of the man going to the shooting party. Much assistance on this point can be obtained from the line of cases on Emergency Regulations in various parts of the commonwealth, which created the capital offence of being in possession of arms or ammunition without " lawful authority or lawful excuse ". I need only refer to two of these cases: they are W*ong Pooh Yin v Public Prosecutor* [1955] A.C. 93, and *Hwangi s/o Wambugu v R* (1954)

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CONROY CJ

21 EACA. 246. The effect of these two cases may be summarised as follows. The distinction between lawful authority and lawful excuse lies in the state of mind of the accused person, the former being objective and the latter subjective. A lawful authority is always referable to a specific provision of the statute law. Thus a licence under firearms legislation entitling a man to carry a firearm is a lawful authority. It is primarily a question of law whether a lawful authority exists. Lawful excuse is an explanation which justifies a possession by putting forward or seeking to put forward, an intention to deal with the arms in a public - spirited way (as, for instance, to hand them in to a police authority) instead of in a subversive or unlawful way. The Judicial Committee of the Privy Council has expressed doubt as to whether it is possible to define the expression " lawful excuse " in a comprehensive or satisfactory manner, and considered it would be undesirable to do so because each case requires to be examined on its individual facts. No specific intent is necessary (ignoring that in the definition) to constitute the offence of possession of the arms.

Applying this line of reasoning to section 72A (1) and the circumstances of the present appeal, there is no question of a " lawful authority " for the respondents' having the weapons with them. The question was whether the respondents had established, on a balance of probability, that they had a reasonable excuse for having the weapons with them at the time of the offence. As the test to be applied is a subjective one, one has to consider whether the intention of the respondents at the time they committed the offence, coupled with the surrounding circumstances of the case,

were sufficient to create in the minds of the respondents a reasonable excuse for the possession of the weapons.

In this context the court must look at all the evidence. There was not only what the respondents said in evidence as to why they had the weapons with them, but there was also the use to which they put the weapons on this occasion. Actions speak louder than words. Had I been the magistrate I think I should have rejected the explanation of self-defence put forward by the respondents in view of the deliberate attack which they made with these weapons on the U.N.I.P. crowd. The respondents had driven past the crowd, and there was no question, therefore, of them being attacked. They stopped their car and they went back to the U.N.I.P. crowd and launched an attack. I consider, however, that I am restricted by the findings of fact made by the learned resident magistrate. He found that the respondents had originally had a reasonable excuse (of self-defence) when they were carrying the weapons in their car. He found that when they stopped the car, armed themselves, got out and went back to the U.N.I.P. crowd to attack them, the circumstances changed and they then had a different reason or excuse for having the weapons with them, which by reason of its illegal nature was not a reasonable one.

The learned judge on appeal to the High Court held that the magistrate was wrong in this conclusion by virtue of the decision in *Jura's case.* Were it not for *Jura's case* I should have no hesitation in deciding that the learned magistrate was right.

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CONROY CJ

The facts in *Jura*'s *case* were as follows. The accused was lawfully in possession of an air rifle at a shooting booth at a fair when, in a moment of anger, he turned and fired at his woman companion, inflicting a minor injury on her. He was convicted of carrying an offensive weapon without lawful authority or reasonable excuse. On appeal the Court of Criminal Appeal held that the judge was wrong in directing the jury that if the accused turned to fire at the woman, his possession became illegal. Lord Goddard pointed out that his possession did not become illegal by reason of the unlawful shooting. With respect to Lord Goddard, I think the legal position is more accurately stated if one says that while he was at the booth, he had a reasonable excuse for having the weapon with him.

The facts in the instant case are clearly distinguishable from *Jura*'s *case*. The respondents took the weapons with them in the car to defend themselves on a journey: this constituted a reasonable excuse while they were on the journey. When they stopped the car, having passed the crowd of U.N.I.P. supporters, got out taking the arms with them, and went back for the purpose of attacking the crowd, they went off on a different ploy to which the reasonable excuse of self-defence did not apply. If, in *Jura*'s *case*, the appellant had left the booth with the airgun and gone in search of the woman to shoot her, then the cases would have been parallel. On the facts, they are not.

In *Wong Pooh Yin*'s *case* the Privy Council decided that with a change in intention and surrounding circumstances, an accused person could acquire a lawful excuse for a possession

which had hitherto been unlawful. Logically the converse must apply and possession which was lawful because of a reasonable excuse, could become unlawful by a change in the purpose for which the accused was carrying the weapon. I consider that the " reasonable excuse " must be the excuse which exists in the mind of the accused person at the time of the offence. The wording of the section relates particularly to the present. It is significant in this context that it does not create offences of " possession " but of the accused " having with him " - " possessing " and " having with him " are not precisely synonymous. If I take my walking stick and go for a walk, I both possess it and have it with me. If I leave it at home, I possess it but I do not have it with me. The expression " having with him " is particularly apt to describe an exact point in time and was, I consider, chosen by the draftsman for that reason. We are concerned with the reasonableness of the excuse not for possessing the weapons, but for the appellants' taking them with them at the time in respect of which they are charged. As the Court of Criminal Appeal said in *Evans v Wright* (Times Newspaper for 11th April, 1964) -

Reasonable excuse was intended to cover, and did cover, the particular moment at which the dangerous weapon was carried.

Some assistance in this context may be obtained from the common offence of possessing housebreaking implements by night. There the law is that every instrument, which from its nature is capable of being used for housebreaking, is an implement of housebreaking within the statute if the Crown proves from the circumstances at the time when the prisoner was found in possession of it that it was his intention to use it for house - breaking. Therefore it is the intention at the time of the offence. One can test whether the magistrate or the judge was right in this case by

the following simple example. A man finds a firearm and decides to take it to a police station to surrender it to the police. He has no lawful authority for its possession as he has no firearms licence. He has a reasonable excuse because his intention, supported by the surrounding circumstances, is to deal lawfully with the weapon. On the way to the police station he remembers that an enemy of his lives nearby, and he decides to go and shoot him. He then deviates from his journey to the police station and goes to the enemy's house. It is clear that on the way to that house, with the purpose of shooting his enemy, he would no longer have a reasonable excuse for having the offensive weapon with him.

For the foregoing reasons I am of the opinion that the learned magistrate was correct in the conclusion he reached, and that the learned judge was wrong in relying upon the decision in *Jura's case*, the facts of which make it inapplicable to the present issue.

I would allow the appeal.

Judgment

Charles J: I agree that this appeal should be allowed, and I am in substantial agreement with the reasons of the learned Chief Justice for so doing. I do not think, however, that the use of the words " has with him " in section 72A (1) of the Penal Code denotes something different from possession. If a person has a thing with him he has either legal or actual possession of the thing, or both. The purpose of the phrase appears to me to be to make it an offence for a person to have any kind of possession of an offensive weapon in a public place in such circumstances as admits of him readily resorting to its use. It thus covers actual possession by carrying a weapon and legal possession of a weapon which is carried by a companion.

The effect of the section, regarded in the light of the authorities which have been examined by the learned Chief Justice, may be summarised as follows:

(1) A person is guilty of an offence if he carries, or otherwise has possession of, an offensive weapon in a public place in such circumstances which admit of him readily using it, unless it is proved, on the preponderance of probabilities, that, on the particular occasion with reference to which he is charged, he had either lawful authority or reasonable excuse for having possession of the weapon.

(2) Lawful authority exists when the possession is required specifically by law to be authorised and it has been authorised, e.g., by a licence under the Arms and Ammunition Ordinance.

(3) Reasonable excuse is an alternative exculpatory factor. Consequently, it may avail although the accused did not have lawful authority for his possession either because the law specifically did not require it or because of non-compliance with such a requirement. It relates primarily to the purpose of the possession instead of to the possession itself. Hence,

it exists, in my judgment, on any particular occasion when the accused had possession of the offensive weapon for a particular purpose which -

(a) was lawful in the sense that it was not contrary to law, e.g., for self-defence or for delivery to lawful authority; and

(b) was reasonable for the accused to have, having regard to the prevailing circumstances.

The lawfulness of the purpose, in the sense mentioned, is an element of reasonableness, as the law cannot regard a purpose which is contrary to law as being reasonable. The existence of a reasonable excuse, as so defined, is to be determined subjectively in part and objectively in part; subjectively as to the existence of the purpose, and objectively as to its lawfulness and reasonableness.

(4) There may be a reasonable excuse for possession of an offensive weapon on one occasion and no reasonable excuse for possession of the same weapon on another occasion. Whether or not it exists on a particular occasion depends on the reasonableness of the initial purpose of the

possession on that occasion, notwithstanding that the weapon has been used for a different purpose. The occasion, of course, may be short or long in point of time, and one occasion may be immediately succeeded by another occasion. Consequently, provided that there has been both a change of occasion and purpose, the possession of an offensive weapon may quickly change from being excusable to being inexcusable, and vice versa. In *Jura's case* [1954] 1 All ER 696 (CCA) the accused used the weapon, for the possession of which he had a reasonable excuse, namely, shooting at lawful targets, for a different purpose, namely shooting at a woman nearby, but there was no change in the occasion and, consequently his possession, as distinct from his use, of the weapon was excusable. In *Wong Pooh Yin's case* [1954] 3 All ER 31 (P.C.) there was, in the circumstances, a change of both occasion and purpose as a result of which the accused acquired a lawful excuse for his possession at the time in respect of which he was charged. So, in the example given by the learned Chief Justice, that of the man carrying a firearm for the purpose of surrendering it to the police and deviating from his journey to shoot an enemy, there would be both a change of occasion and of purpose; the change of occasion being marked by the deviation from his journey to the police station. If, however, he merely met his enemy unexpectedly on the way to the police station and shot him, no change of occasion would occur and the possession of the rifle would remain excusable, as in *Jura's case*. The determination of whether or not there has been a change in the occasion of the possession, rendering an inexcusable possession excusable or an excusable possession inexcusable, depends, of course, on the evidence in each particular case. Such evidence has to be considered with

good sense and not as relating to an abstract metaphysical problem. Further, in approaching subjectively the question of the accused's purpose on a particular occasion, it is necessary to bear in mind' that actions are often more indicative of the truth than subsequent explanations.

I share the learned Chief Justice's doubt whether the respondents in this case had a reasonable excuse for the possession of their weapons in the car. The learned magistrate, however, did find that they had such an excuse. Accepting that finding as being correct, it seems to me to be obvious that, the moment the respondents stepped out of the car with their weapons, a new occasion of their possession arose. As their purpose of having possession of the weapons on the new occasion was not self-defence but attack, their possession on that occasion was without reasonable excuse and they were rightly convicted.

Judgment

Blagden JA: I have had the advantage of reading both the judgments which have just been delivered and I am in full agreement with them.

This appeal concerns the construction to be put upon the provisions of section 72A (1) of the Penal Code as this subsection stood prior to its repeal and replacement by section 4 of the Penal Code (Amendment) Ordinance No. 20 of 1964, which came into force on the 3rd July, 1964, that is, before the hearing of this appeal, but well after the trial of the two respondents.

As affecting this appeal and in its original version, section 72A (1) provided that - " Any person who without lawful authority or reasonable excuse, the proof whereof shall lie upon him, has with him in any public place an offensive weapon shall be guilty of a misdemeanour...."

"Offensive weapon " and " public place " are both defined in section 5 of the Penal Code and their definitions present no problems in the context of this case.

To prove a contravention of section 72A (1), it was necessary for the prosecution to establish beyond reasonable doubt that the respondents -

(i) had with them,

(ii) an offensive weapon, or weapons,

(iii) in a public place.

Once the prosecution had proved these three elements of the offence, the burden then shifted to the respondents to establish on a balance of probabilities that they had " lawful authority " or " reasonable excuse " for having these offensive weapons with them at that time and place. The prosecution clearly established its case against each respondent in this regard; equally clearly the respondents were not authorised by any law to carry the implements they had with them, namely, a bow and arrow and a bicycle chain attached to a stick, in a public place. The only issue which remained, accordingly, was whether they had established on a balance of probabilities that they had " reasonable excuse " for having these implements with them.

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BLAGDEN JA

The simplest way to test whether an accused person has a reasonable excuse for having an offensive weapon with him in a public place is to seek a truthful and honest answer to the question: " Why have you got this weapon with you *now*?" I stress the word " now " to emphasise that it is the point in time at which the offence is alleged to be committed that matters, and not any other time. If this test had been applied in *Jura*'s *case* [1954] 1 All ER 696, the facts of which have already been related by the learned Chief Justice, the truthful and honest answer would surely have been: " I have this air rifle with me now to try my skill at shooting at the targets in this booth. But I must admit I am using it against my girl friend because she has made me very angry ". Jura thus had a reasonable excuse to have the air rifle with him, notwithstanding that he proceeded to make an unlawful use of it.

Applying the test to the instant case, it would seem on the learned trial magistrate's findings, that if the test question were asked in relation to any period of time when the two respondents were in their car, they could have answered it honestly and truthfully by saying: " We have these weapons with us purely for self-defence in case we are attacked, as others have been, by political opponents ". But the periods of time when the two respondents were in their car, are not the relevant periods at which to apply the test. The material time is when, having dismounted from their car, the respondents advanced upon the persons assembled by the roadside at the conclusion of the United National Independence Party meeting and proceeded to assault certain members

among them. If the respondents were then asked: " Why have you got these weapons with you now?" the only truthful and honest answer which they could have given would have been: " We have them with us now because we wish to use them to attack these people ". That would not be a reasonable excuse for their having those weapons with them at that moment; and that was precisely the position that obtained in this case.

I agree that this appeal should be allowed.