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MICHAEL
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MICHAELIDES
v.
THE POLICE.

[ZEKIA, P., VASSILIADES AND JOSEPHIDES, JJ.]

MICHAEL HJI HARITOU MICHAELIDES,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 2752)

Firearms Law, Cap. 57 as amended by Law No. 11 of 1959—Possessing a firearm contrary to the provisions of section 3 (1) (d) and an order made by the Council of Ministers thereunder—Conviction and forfeiture of firearm under section 3 (2).

Firearms Law, Cap. 57 and the Constitution of Cyprus—Forfeiture of a gun under section 3 (2) for offences under section 3 (1) (d) of the Law is punishment within Article 12.3 of the Constitution and therefore discretionary and not mandatory.

Forfeiture of gun—Discretion—Exercise of Judicial discretion in accused's favour.

Firearms Law, Cap. 57—Effect of forfeiture order having regard to the provisions of section 12 of the Law and section 38 of the Interpretation Law, Cap. 1—Gun forfeited becomes the absolute property of the Republic and the accused ceases to have rights of ownership—He cannot vindicate such rights of ownership—He cannot vindicate such rights as long as the forfeiture order stands.

Constitutional Law Article 12 (3) of the Constitution—Forfeiture provided under section 3 (2) of the Firearms Law, Cap. 57, for offences under section 3 (1) (d) is punishment within the provisions of article 12 (3) of the Constitution and it is therefore discretionary and not mandatory.

Section 3 (1) (d) and 3 (2) of the Firearms Law, Cap. 57 reads as follows :

“ 3. - (1) No person shall import or attempt to import into the Colony or export or attempt to export therefrom or have under his control or in his possession any—

(d) firearm of a class or type specified by the Governor in Council by an Order to be published in the *Gazette*.

(2) Any person who—

- (a) uses or carries any firearm the importation of which is prohibited under sub-section (1) of this section shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding ten years or to a fine not exceeding eight hundred pounds or to both such imprisonment and such fine ; or
- (b) in any circumstances other than those set out in paragraph (a) of this sub-section acts in contravention of sub-section (1) hereof shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding seven years or to a fine not exceeding five hundred pounds or to both such imprisonment and such fine, and, in any case, any firearm in respect of which the offence has been committed shall be forfeited."

Article 12 (3) of the Constitution provides—

" No Law shall provide for a punishment which is disproportionate to the gravity of the offence."

The appellant was convicted on the 29th November, 1963, on his own plea of guilty, of the offence of possessing a type of firearm, to wit a repeating and semi-automatic shot-gun, the importation or possession of which is prohibited, contrary to section 3 (1) (d) of the Firearms Law, Cap. 57, as amended by Law J.J. of 1959, and he was sentenced to pay a fine of £1 and £6.720 mils costs and it was further ordered that his gun be forfeited.

He appealed against sentence on the ground that " the sentence of confiscation is illegal and/or excessive and/or unjust and/or unconstitutional".

It was argued on behalf of the appellant that the provision for forfeiture in section 3, sub-section (2) of the Firearms Law, Cap. 57, is discretionary and not mandatory in view of Article 12 (3) of the Constitution. The appellant relied on the cases of *Zavos v. The Police* (1963) 1 C.L.R. 57 and *Antonides v. The Police* 1964 C.L.R. p. 139.

The trial Judge in making the forfeiture order did not give any reasons for his decision. Counsel for the respondents submitted that the above cases, as well as the cases quoted in

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Zavos case (*supra*) should be distinguished because in the present case the very possession of this type of firearm is illegal. The trial Judge, therefore, he said, had no choice in the matter and the forfeiture was mandatory and not discretionary in the circumstances. He further submitted that, even if forfeiture is considered to be punishment, in this case it cannot be considered to be disproportionate punishment having regard to the gravity of the offence (cf. Article 12, paragraph 3 of the Constitution). All previous cases he said, in which forfeiture was held to be discretionary and not mandatory, were cases of illegally pursuing game, etc., while in this case the very possession of the gun is illegal.

The aforesaid type of firearm was declared as prohibited firearm on the 24th December, 1960, by virtue of an order made by the Council of Ministers on the 22nd December, 1960, under the provisions of section 3 (1) (d) of the Firearms Law, Cap. 57, and as from the 24th December, 1960, possession of such firearm was contrary to the provisions of section 3 (1) of the aforesaid Law and the punishment provided by that section, as amended by Law 11 of 1959, was a maximum of 7 years' imprisonment and a fine of £500 " and in any case, any firearm in respect of which the offence has been committed shall be forfeited " (section 3 (2) of the Law).

The Supreme Court in allowing the appeal and setting aside the forfeiture order—

Held. (1) the forfeiture provided under section 3 (2) of the Firearms Law, for offences under section 3 (1) (d) of the Law (as in the present case) is punishment within the provisions of Article 12 (3) of the Constitution and it is, therefore, discretionary and not mandatory.

(2) We have reached that conclusion having regard to the fact that possession of the type of the sporting gun in question was not originally prohibited under section 3 but prohibition was imposed for the first time on the owners of such guns, without any prior notice, by the Order of the Council of Ministers published on the 24th December, 1960, after such owners had possessed them lawfully for many years. In the case of the appellant he had possessed his gun lawfully ever since its registration in 1939, that is, for 22 years, before the prohibition was imposed at the end of 1960.

(3) Having regard to the provisions of section 12 of the Firearms Law, Cap. 57, and section 38 of the Interpretation Law

Cap. i, the effect of the forfeiture order is that the gun forfeited becomes the absolute property of the Crown, now the Republic of Cyprus, and the appellant ceases to be the owner or to have any rights of ownership, and he cannot vindicate such rights so long as the forfeiture order stands.

(4) What is prohibited under section 3 of the Firearms Law and the Order of the Council of Ministers aforesaid is the importation, control and possession of the type of gun owned by the appellant, but the constitutional and legal rights of the citizen regarding his ownership of the gun remain unaffected. It should be stressed that the exportation or ownership of such guns is not made illegal under the provisions of the order of the Council of Ministers made under section 3 of the Law : once it is held (as already held) that forfeiture is discretionary and not mandatory, the very recital of the facts of this case shows clearly that this is a typical case in which the Judge's discretion must be exercised without any hesitation whatsoever, in the appellant's favour.

Appeal allowed. Forfeiture order set aside.

Cases referred to :

Zavos v. Police (1963) 1 C.L.R. 57 :

— *Antoniades v. Police*, 1964 C.L.R. p. 139.

Appeal against sentence.

Appeal against the sentence imposed on the appellant who was convicted on the 29th November, 1963, at the District Court of Limassol (Cr. Case No. 6727/63) on one count of the offence of possessing a type of firearm, the importation or possession of which is prohibited, contrary to section 3 (1) (d) of the Firearms Law, Cap. 57, as amended by Law 11 of 1959, and was sentenced by Stavrinakis, D. J., to pay a fine of £1 and £6.720 mils costs and it was further ordered that his gun be forfeited.

St. Pavlides, for the appellant.

L. G. Loucaides, counsel of the Republic, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court :

ZEKIA, P.: The appeal is allowed and the forfeiture order is set aside as it is regarded as punishment. The reasons for judgment will be given later.

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REASONS FOR JUDGMENT

ZEKIA, P.: Mr. Justice Josephides will deliver the reasons for the judgment of the Court in this case.

JOSEPHIDES, J.: This appeal was allowed and the forfeiture order set aside and we intimated that we would give our reasons later. We now proceed to do so.

The appellant in this case pleaded guilty to a charge of possessing a type of firearm, to wit, a repeating and semi-automatic S.B. shotgun, the importation or possession of which is prohibited, contrary to section 3 (1) (d) of the Firearms Law, Cap. 57, as amended by Law 11 of 1959. He was sentenced to pay a fine of £1 and £6.720 mils costs and it was further ordered that his gun be "confiscated". Presumably what the Judge meant was "forfeited".

He was convicted and sentenced on the 29th November, 1963 and on the 14th January, 1965 he was granted an extension of time to lodge his appeal which he eventually did on the 20th January, 1965. His grounds of appeal are that "the sentence of confiscation is illegal and/or excessive and/or unjust and/or unconstitutional".

We think that it is necessary to go into some detail into the history and facts of this case.

The appellant, who comes from Kyperounda village, was originally registered as the owner of the firearm in question on the 8th January, 1939. He was duly licensed annually paying the licence fee regularly until the 31st July, 1963. In fact, the period of his licence covers the period for which he is charged for possessing this firearm illegally, *viz.* between the 21st December, 1960 and the 20th January, 1963. Until the 24th December, 1960 there was no prohibition against the possession of the type of firearm owned by the appellant. On the 24th December, 1960 an Order made by the Council of Ministers on the 22nd-December, 1960, under the provisions of section 3(1)(d) of the Firearms Law, Cap. 57, declaring the aforesaid type of firearm as prohibited firearm, was published in the Official Gazette of the Republic, Supplement No. 3, No. 105, page 99. As from the 24th December, 1960, possession of such firearm is contrary to the provisions of section 3 (1) of the Law and the punishment provided by that section, as amended by Law 11 of 1959, is a maximum

of 7 years' imprisonment and a fine of £500, " and in any case, any firearm in respect of which the offence has been committed shall be forfeited " (section 3 (2) of the Law).

It is the appellant's version that he was not aware of the prohibition order and, presumably, even the responsible Government authorities did not realise that the firearm in the appellant's possession was a prohibited one as he continued paying for his annual licence while the District Officer continued receiving the annual licence fee until the summer of 1962 when he last issued to him a firearms licence under the provisions of the law, for the period 1st August, 1962 to 31st July, 1963. The first time that the authorities realized that the appellant was in possession of a prohibited firearm was early in January, 1963 when the Chief of Gendarmerie addressed a letter to him, dated the 8th January, 1963, which runs as follows :

" You are hereby informed that the certificate of registration for the firearm under LL1462 is cancelled by virtue of an order by the Council of Ministers dated the 22.12.1960, published in the official Gazette of 24.12.60 under No. 105.

2. The value of this firearm will be fixed by the Chief Collector of Customs in accordance with section 13 of the Firearms Law, Cap. 57, and another letter will be sent to you on the subject."

Twelve days later the appellant, on being asked by the police, delivered to them his gun on the same day, *viz.* on the 20th January, 1963, and ever since the gun has been in the custody of the police.

While the appellant was awaiting the letter promised to him by the Gendarmerie Chief in paragraph 2 of his letter of the 8th January, 1963 (quoted above), the charge in the present case was filed against him in the District Court of Limassol on the 10th July, 1963, although he had delivered the gun to the police, as already stated, some six months earlier. He was charged with possessing the gun illegally between the 21st December, 1960, and the 20th January, 1963.

The appellant was duly served with a summons, and he appeared before the court in person on the 27th September, 1963 ; he pleaded not guilty to the charge and his case was adjourned to the 8th November, 1963 for hearing. On the 8th November, 1963, the accused appeared before the Court in person and the prosecuting officer applied

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for an adjournment “ due to the fact that the gun in question has not yet been examined by the expert and so he is not ready to give evidence before the Court and to produce exhibits ”, and the case was accordingly adjourned to the 29th November, 1963, for hearing. On that day the appellant changed his plea of not guilty to one of guilty and he was fined and the forfeiture of his gun ordered. On this occasion too the appellant was not represented by counsel.

Following the forfeiture of his gun on the 29th of November, 1963, the appellant, after having waited in vain for nearly 11 months for the letter promised by the Gendarmerie Chief in his letter of the 8th January, 1963, and the valuation of his firearm for the purposes of compensation, decided to consult an advocate and, eventually, a letter was sent on his behalf by his legal adviser on the 3rd December, 1963 to the Gendarmerie Chief complaining, *inter alia*, that he had not received the letter promised by the Gendarmerie Chief. On the 7th December, 1963, receipt was acknowledged of the advocate's letter by the Gendarmerie and a reply was promised in due course. On the 19th February, 1964, that is to say, more than 13 months after the first letter of the Chief of Gendarmerie, the latter addressed the following letter to the appellant's advocate :

“ In continuation of my letter dated 7th December, 1963, I desire to inform you that the reasons which led to the cancellation of the certificate of registration of Mr. Michaelides' firearm is because this firearm is of a type possession of which had been prohibited by order of the Council of Ministers dated 24/12/60 *i.e.* it is semi-automatic. When the letter of the 8th January, 1963 was delivered to Mr. Michaelides he delivered the firearm to the Gendarmerie but he failed to return the certificate of registration saying that he had lost it. *He was told that he would be compensated for his firearm.*

2. After advice however this procedure *i.e.* the cancellation of the certificate and the payment of ‘ *reasonable compensation* ’ was not followed and it was decided to charge Mr. Michaelides for possession of the firearm, possession of which had been prohibited by order of the Council of Ministers in contravention of section 3 (1) (d) (2) (b) of the Firearms Law CAP 57 and the Notification 105/1960 and the Attorney-General gave his consent for Summary trial under section 24 (2) of the Courts of Justice Law 14/1960.

3. On 29th November, 1963, a fine of £1 was imposed on Mr. Michaelides and his firearm was confiscated by the Court."

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It will be seen that the Gendarmerie Chief admits that the appellant had been told by the Gendarmerie that he would be compensated for his firearm but that, after advice, the procedure for the cancellation of the appellant's certificate and payment of "reasonable compensation" was not followed, presumably as a result of the decision in *Sizinos and The Republic*, 4 R.S.C.C. 79 (dated 10th January 1963). Following that reply from the Gendarmerie Chief the appellant filed a recourse (No. 31/64) in the Supreme Constitutional Court on the 3rd April, 1964, praying, *inter alia*, for a declaration that the decision of the respondents (the Republic of Cyprus through the Minister of Interior and the Ministry of Finance) to "confiscate" the appellant's firearm and/or rescind its permit coupled with their failure to pay or tender just compensation is null and void and of no effect whatsoever. The recourse was, *inter alia*, based on Article 23 of the Constitution, and the appellant claimed that the value of his gun is £300.

On the 22nd September, 1964, the respondent Republic of Cyprus filed an opposition stating that the order of "confiscation" of the appellant's firearm was made by a Court of competent jurisdiction; that it was not made by an executive or administrative organ of the Republic and that it could not, therefore, be made the subject of a recourse under Article 146 of the Constitution. At the "directions" stage of the recourse, after the matter was argued before a Judge, the appellant's legal advisers decided to apply to this Court for an extension of time to file an appeal against the sentence and forfeiture order made by the District Court of Limassol on the 29th November, 1963. The extension for appeal was granted by this Court on the 14th January, 1965, and the appellant withdrew his recourse under Article 146 (No. 31/64) two days later.

From this very long statement of the facts of this case it is apparent that the appellant was originally promised payment of compensation by the Gendarmerie of the Republic and that eventually instead of being compensated he was prosecuted and a forfeiture order was made against him.

Mr. Pavlides for the appellant submitted that the provision for forfeiture in section 3, sub-section (2), of the Firearms Law, Cap. 57, is discretionary and not mandatory, in view

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of the constitutional provisions (Article 12 (3)), and he relied on the cases of *Zavos v. The Police*, (1963) 1 C.L.R. 57 and *Antoniades v. The Police*, (1964) C.L.R. 139.

The trial Judge in making the forfeiture order did not give any reasons for his decision.

Counsel for the respondent submitted that the above cases, as well as the cases quoted in the *Zavos* case (*supra*), should be distinguished because in the present case the very possession of this type of firearm is illegal. The trial Judge, therefore, he said, had no choice in the matter and the forfeiture was mandatory and not discretionary in the circumstances. He further submitted that, even if forfeiture is considered to be punishment, in this case it cannot be considered to be disproportionate punishment having regard to the gravity of the offence (cf. Article 12, paragraph 3, of the Constitution). All previous cases, he said, in which forfeiture was held to be discretionary and not mandatory, were cases of illegally pursuing game, etc., while in this case the very possession of the gun is illegal.

The question whether the provision for forfeiture in a statute is mandatory or discretionary, as a result of the constitutional provisions, has been exhaustively considered in many cases in the past and it is not necessary for us to elaborate on it in the present case. Suffice it to say that, having given the matter our best consideration in the light of the previous cases, we have reached the conclusion that the forfeiture provided under section 3 (2) of the Firearms Law, for offences under section 3 (1) (d) of the Law (as in the present case), is punishment within the provisions of Article 12 (3) of the Constitution and it is, therefore, discretionary and not mandatory. We have reached that conclusion having regard to the fact that possession of the type of the sporting gun in question was not originally prohibited under section 3 but prohibition was imposed for the first time on the owners of such guns, without any prior notice, by the Order of the Council of Ministers published on the 24th December, 1960, after such owners had possessed them lawfully for many years. In the case of the appellant he had possessed his gun lawfully ever since its registration in 1939, that is, for 22 years, before the prohibition was imposed at the end of 1960.

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Mr. Pavlides, in asking this Court to set aside the forfeiture order, submitted that this was the correct course to follow for the appellant to have his hands free to prosecute his constitutional and legal rights as the owner of the gun for the recovery of compensation and, generally, to safeguard his rights. We think that there is substance in counsel's submission. Having regard to the provisions of section 12 of the Firearms Law, Cap. 57, and section 38 of the Interpretation Law, Cap. 1, the effect of the forfeiture order is that the gun forfeited becomes the absolute property of the Crown, now the Republic of Cyprus, and the appellant ceases to be the owner or to have any rights of ownership, and he cannot vindicate such rights so long as the forfeiture order stands.

What is prohibited under section 3 of the Firearms Law and the Order of the Council of Ministers aforesaid is the importation, control and possession of the type of gun owned by the appellant, but the constitutional and legal rights of the citizen regarding his *ownership* of the gun remain unaffected. It should be stressed that the exportation or ownership of such guns is not made illegal under the provisions of the Order of the Council of Ministers made under section 3 of the Law. Once it is held (as already held) that forfeiture is discretionary and not mandatory, the very recital of the facts of this case shows clearly that this is a typical case in which the Judge's discretion must be exercised, without any hesitation whatsoever, in the appellant's favour.

For these reasons we allowed the appeal and set aside the forfeiture order.

*Appeal allowed. Forfeiture
order set aside.*