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S v TEELE

(BOPHUTHATSWANA SUPREME COURT)

1979 *August* 6, 13 HIEMSTRA CJ and STEENKAMP J

Criminal procedure—The prosecution—Charge withdrawn by prosecutor without the consent of the Attorney-General in terms of s 6 (b) *of Act 51 of 1977 (RSA)—Accused acquitted as he had already pleaded—Court would on appeal be reluctant to allow the re-opening of the case.*

Criminal procedure—Trial—Plea—Of autrefois acquit*—Accused previously acquited on a charge based on the same facts, to which he had pleaded not guilty, after charge withdrawn by the prosecutor—Prosecutor not having obtained Attorney-General's consent for such withdrawal—Court would on appeal be reluctant to allow the re-opening of the case—Plea of* autrefois acquit *upheld—Act 51 of 1977 (RSA) s 6* (b).

Appellant had been convicted by a magistrate of a contravention of Proc 293 of 1962. From the facts it appeared that appellant had previously been acquitted on a charge based on the same facts. It appeared that the acquittal had followed on the withdrawal of the charge, to which appellant had pleaded not guilty, but that the prosecutor had not obtained the consent of the Attorney-General for such withdrawal in terms of s 6 (*b*) of the Criminal Procedure Act 51 of 1977 (RSA).

Held, that an acquittal which follows on the stopping of the prosecution at any

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time after plea is an acquittal on the merits for the purposes of a plea of *autrefois acquit.*

Held, further, that, if the court and the prosecutor had made a procedural mistake and an acquittal was granted without the instrumentality of the accused, a Court of appeal would be reluctant to allow a re-opening of the case and the leading of further evidence for the State.

Held, accordingly, that the plea of "previous acquittal" was well-founded and that there should not have been a conviction.

Appeal from a conviction in a magistrate's court. The facts appear from the judgment.

G van Coppenhagen for the appellant.

J W Nottingham for the State.

[The Court upheld the appeal and the following reasons for judgment were handed down on 13 August.]

HIEMSTRA CJ: A case of *autrefois acquit* (previous acquittal) is relevant here. The appellant appeared before a magistrate at Thaba Nchu on a charge of contravening s 8 read with s 26 (1) (*d*) of chap II of Proc 293 of 1962, on the grounds thereof that he as a dealer had brought about structural alterations without the written permission of the urban area manager to premises 3086 of Selosesha urban area. He pleaded not guilty but was found guilty and sentenced to a R50 fine or 90 days' imprisonment. In addition he was ordered to demolish the alleged unauthorised building-work on the premises within 15 days.

The State conceded that the accused had previously been before the court on the same charge. The record of the previous case, which commenced on 2 August 1978, was before the court as an exhibit. The numbers of the sections in the charge differ, but the premises are the same and the State conceded that the case concerned the same facts. The magistrate also wrote his reasons on this basis. The record of the previous case reveals that the prosecutor had put the charge to the accused and that the accused had pleaded not guilty. Thereafter further particulars had been requested by the defence. The prosecutor was not in a position to furnish the particulars and the trial was therefore postponed until 17 October 1978. Upon resumption the State was still not in possession of the particulars and the charge was withdrawn. The record only contains the annotation "charge withdrawn" but counsel for the appellant, Mr *Van Coppenhagen,* assures the Court that the magistrate had also said: "Not guilty". This statement, which was made from the Bar, was conceded by Mr *Nottingham,* for the State, and we accept it. A

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formal acquittal was not even necessary, because the legal position is as follows:

Section 6 (*b*) of the Criminal Procedure Act 51 of 1977 provides:

"6. An Attorney-General or any person conducting a prosecution at the instance of the State . . . , may —

(*a*) . . .

(*b*) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge."

There is a proviso which will be discussed in due course. The magistrate was therefore in any event obliged to acquit the accused. Moreover s 106 (4) provides:

"(4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted."

This accused was in any event, when the prosecution was stopped,

entitled to demand that an acquittal be recorded. He was in any event in the position as if there was a formal acquittal. Such an acquittal is an acquittal on the merits. In *S* v *Ndou and Others* 1971 (1) SA 668 (A) the Appellate Division held that when the prosecution is stopped at any stage after plea, whether evidence has been led or not, the accused is entitled to acquittal, and such an acquittal is an acquittal on the merits for the purposes of a plea of *autrefois acquit* (at 671H). The accused cannot again be charged in respect of the same facts.

Reference must now be made to the proviso to s 6 (*b*). It reads:

"Provided that where a prosecution is conducted by a person other than an Attorney-General or a body or person referred to in s 8, the prosecution shall not be stopped unless the Attorney-General or any person authorised thereto by the Attorney-General, whether in general or in any particular case, has consented thereto."

It is common cause that the prosecutor had had no authorization from the Attorney-General to withdraw the charge. The court which had first heard the case, should have asked the prosecutor whether he was authorized to withdraw. Had he answered "no" the court would have been entitled to refuse to allow the withdrawal. In his reasons for judgment the magistrate referred to Hiemstra *Strafproses* 2nd ed at 13, where it is said:

"If he stops the prosecution without permission and the court notwithstanding convicts, the accused will not be able to request acquittal on appeal, because the stopping will be a nullity."

The passage is not applicable here, because there was no conviction. The passage which does in fact relate to this case is at 12 and reads:

"But if he should stop without permission and an acquittal follows thereon, he will not be able to go back thereon."

The statement rests on general grounds of fairness. If the court and the prosecutor have made a procedural mistake and an acquittal is granted without the instrumentality of the accused, a Court of appeal will be reluctant to allow a re-opening of the case and the leading of further

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evidence for the State. The cases of *R* v *Letuli and Another* 1953 (4) SA 241 (T); *S* v *Mokgeledi* 1968 (4) SA 335 (A) at 339; *S* v *Roux* 1974 (2) SA 452 (N) give sufficient authority therefor. Moreover, before a new trial can commence, the previous acquittal would in any case first have to be set aside. The plea of "previous acquittal" was therefore well-founded and there ought to have been no conviction.

Mr *Van Coppenhagen,* who represented the appellant in the lower court and also in the appeal, requested the Court not to limit the judgment to the technical point which has just been decided in favour of the appellant. He pointed out that the charge in any event was unfounded on the merits, since there was in fact the necessary permission to erect the building. The appellant handed in a letter from a certain Van der Westhuizen in which leave was granted. The magistrate apparently adopted the point of view that Mr Van der Westhuizen had had no

authority to give permission. If this was so, the appellant could not have known this and he had no *mens rea*. On the merits the appeal ought also to succeed.

The appeal was already upheld in the open Court and an undertaking was made to furnish written reasons. For completeness' sake the order is repeated here:

> The appeal succeeds and the conviction and sentence are set aside, as well as the order to demolish the building.

STEENKAMP J concurred.

Appellant's Attorneys: *McKechnie, Geldenhuys & Hugo,* Bloemfontein.