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S v HLANGOTHE AND ANOTHER

(BOPHUTHATSWANA SUPREME COURT)

1979 *July* 13 HIEMSTRA CJ

Criminal procedure—Sentence—Facts in mitigation of—When they can be mentioned from the Bar and when they should be tendered by means of evidence.

Criminal procedure—Forfeiture order—Act 51 of 1977 s 35—Accused should first be heard—Other factors which should be taken into account—Stock in trade not capable of being declared forfeit on conviction of trading without licence.

It is so that, where facts in mitigation of sentence are submitted, a few remarks concerning the position of the accused are usually accepted from the Bar. But where a large number of other facts are submitted in this way, the practice is taken too far. The legal representative should in such circumstances testify under oath. It is not desirable for the legal representative himself to testify. He is indeed a competent witness and can testify where it is unavoidable. If there is no objection on the part of the prosecutor, a court will usually accept from the Bar a short statement of facts from the legal representative which are within his personal knowledge. It rests in the discretion of the court and the limits thereof are not clearly circumscribed. The best way of expressing it is probably by saying: The legal representative's submissions must consist of arguments and not of factual evidence for the defence.

In regard to forfeiture orders in terms of s 35 of the Criminal Procedure Act 51 of 1977 the following is laid down as a fixed rule of practice for Bophuthatswana for the future:

1. Before a forfeiture is ordered, the accused should first be heard thereon.

2. There must be evidence on the value.
3. The possibility that the object will again be used in an offence must be considered as a factor in the decision.
4. The effect of the forfeiture on the financial position of the accused must not be left out of account.

Stock in trade is not capable of forfeiture on a conviction of trading without a licence: stock in trade cannot be brought within the terms of s 35 of Act 51 of 1977.

Review.

HIEMSTRA CJ: The two accused were found guilty of trading without a licence in conflict with s 9 of Act 44 of 1962 (RSA). The goods with which they had carried on trade were cigarettes and groceries. They pleaded guilty, were found guilty and were sentenced to a fine of R50 each, or 50 days, suspended for one year on condition that they do not again trade without a licence during this period. In the light of the explanation which was given on their behalf, the sentence is in order.

A remark must however be made concerning the manner in which the explanation was offered. The accused had a legal representative, Mr Breytenbach. He gave a long oral exposition of the steps which the accused had taken to acquire a licence. It was clear that the licence would be granted.

In Hiemstra *Strafprosesreg* 2nd ed at 482 the following appears concerning evidence regarding sentence:

"Strictly speaking facts which only affect the sentence must also, as all other facts, be given under oath (*R* v *Ledalo* 1918 TPD 317 at 319; *S* v *N* 1964 (4) SA 336 (C)). This requirement is nevertheless considerably relaxed in practice and unsworn hearsay statements from the Bar are taken into account on a large scale especially where there was a plea of guilty. This takes place with the consent of the prosecutor. An attempt to stop this tendency appears in *S* v *Van Rensburg* 1968 (2) SA 622 (T) of which the headnote reads: 'Evidence in mitigation must be submitted to the court on oath by mouth of whoever is concerned.' In the judgment itself it is only said however at 624D that it would be 'much better'. The court can still act as it deems fit, but an important qualification is that when a court does not believe a statement *ex parte* which is made from the Bar in mitigation, the court must say so, so that the legal representative can prove this preferably by means of evidence. This appears in an unreported Appellate Division decision *Narsimallo Naidoo* v *The King* AD 10 September 1951. A discussion hereof appears in 1969 *SALJ* 17 and 285. The same is said in *R* v *Hartley* 1966 (4) SA 219 (R AD) at 221G and in *S* v *Mabala* 1974 (2) SA 413 (C)."

It is so that a few remarks concerning the accused's personal position are usually accepted from the Bar. Here, however, this practice was taken too far. There are a large number of facts concerning an agreement of lease, and a letter was read out. The legal representative ought in such circumstances to have led evidence on oath. It is not desirable that the legal representative should testify himself. He is in fact a competent

witness (*Middeldorf* v *Zipper NO* 1947 (1) SA 545 (SR) at 548) and can testify where it is unavoidable. If there is no objection on the part of the prosecutor, a court will usually accept from the Bar a short statement of facts from the legal representative which are within his personal knowledge. It rests in the discretion of the court and the limits thereof are not clearly circumscribed. The best way of expressing it is probably by saying: The legal representative's submissions must consist of arguments and not of factual evidence for the defence.

Section 112 (2) of the Criminal Procedure Act 51 of 1977 (RSA) contains a reference to a statement by the legal adviser, but it must be a written statement and is primarily intended to contain admissions of the accused on the basis of which he pleads guilty and not his grounds of mitigation. That is why it need also not be on oath. The provision reads:

"(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under ss (1) (*b*), convict the accused on the strength of such statement and sentence him as provided in the said sub-section if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

The grounds in mitigation which were raised here could not be contained in such a statement and had to be given in evidence.

The sentence which was imposed, was R50 fine or 50 days, suspended for one year on condition that the accused do not again trade without a licence during this period. The sentence is fair but it was accompanied by the forfeiture of the whole stock in trade, in terms of s 35 of the Criminal Procedure Act. The portion thereof concerned reads:

"35 (1) A Court which convicts an accused of any offence may, without notice to any person, declare —

(*a*) Any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(*b*) (bears reference to offences in Part I of Schedule 2),

and which was seized under the provisions of this Act, forfeited to the State."

The magistrate furnished reasons for the forfeiture, from which further irregularities appeared. It is alleged that the accused were warned by the senior magistrate to stop further sales. Nothing of this sort was given in evidence and the magistrate was not entitled to allow himself to be influenced thereby in respect of the forfeiture order. There was no evidence before the court as to the value or nature of the property, no indication whether it was perishable or not. It is strange for a court to declare the whole stock in trade forfeited without even having an idea of the value thereof.

Representations were forwarded in terms of s 303, and there it is alleged that the property is worth R2 000. A list is attached. The magistrate does not dispute the value.

Here there was therefore in reality not a suspended fine of R50, but a punishment of R2 000 which was immediately enforced. It is incomprehensible how a judicial officer in a new country could fell a citizen

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who wished to participate in the development thereof and who only committed a technical offence, with a sentence which is far worse than is normally imposed upon a stock thief. This Court cannot express its disapproval thereof too strongly.

Moreover the magistrate did not give the accused an opportunity to raise grounds as to why there ought not to be a forfeiture. The words "without notice to anyone" make it apparently unnecessary to warn the accused, but it was rightly said in *R* v *Dedekind* 1960 (4) SA 263 (T) and in *S* v *Matsane and Another* 1978 (3) SA 821 (T) at 828B that the *audi alteram partem* principle should not be overlooked. With "anyone" it is probably meant in the first place third parties who have an interest in the property. Their rights are fully protected in other provisions of s 35.

For the future the following are laid down as fixed rule of practice:

1. Before a forfeiture is ordered the accused should first be heard thereon.
2. There must be evidence on the value.
3. The possibility that the object will again be used in an offence must be considered as a factor in the decision.
4. The effect of the forfeiture on the financial position of the accused must not be left out of account.

When account is taken of points 1, 2 and 4 it is clear that this forfeiture order must be set aside. But before this is done it is necessary to decide the question afresh whether stock in trade is at all capable of being forfeited. In *S* v *Mongale* 1979 (3) SA 669 (B) my Brother in this Court in an *obiter dictum* agreed with *S* v *Matsane* (*supra*) where it was held that stock in trade is capable of being forfeited when trading without a licence is carried on therein. The conclusion in the *Matsane* case is expressed as follows at 825G:

"It must be clear that a person cannot trade *in vacuo:* you must have wares, of whatever nature. If you trade, you trade with those wares; if you trade illegally it is illegal trade with those wares. The wares are therefore an indisposable element of your trading — whether this is now legal or illegal. It can therefore rightly be said that your wares whenever you trade illegally are the instrument or object of which or by means of which you commit the illegal act."

But it is not every *sine qua non* in an offence which is capable of being forfeited. The key word is "use".

In the case of *Mongale* (*supra*) I expressly kept myself from agreeing with *Motsane's* case and I am respectfully not in agreeance therewith. The finding leads to impossible anomalies:

1. If the stock in trade of a small shop can be declared forfeited *in toto* a stock in trade of a million rand can also be susceptible thereto.
2. What stock is "used": only the packet which is sold or also those

displayed on the shelves? And what becomes of the stock in trade which lies out of sight in the storeroom?

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Anomalies do not necessarily prove that a conclusion is wrong. The conclusion must be found to be wrong by another means. It is in my opinion the following: Trading exists out of a series of smaller transactions. The stock which is not sold or seen, play no role therein. They are not used in the transaction. Such stock can already be excluded on this ground. The property which is actually sold is the property of the purchaser and cannot be confiscated. If the property has not passed, because it was a trap, the property is in any case not an aid in the offence — it is the object of the offence and is at the most an exhibit.

In the *Matsane* case at 827H reference is made to the forfeiture of diamonds in illicit trading in diamonds. It does not help to mention the forfeiture of precious stones in an illegal sale transaction as an example because precious stones are expressly capable of being forfeited in terms of s 108 (1) of the Precious Stones Act 73 of 1964 (RSA).

In my opinion stock in trade is not capable of being forfeited in a conviction for trading without a licence. The vehicle which a hawker uses or his scale can be on another basis, but the stock in trade cannot be brought under s 35.

The conviction and sentence are confirmed, but the forfeiture order is set aside. The goods must be returned immediately.