REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No: CC 02/2005

In the matter:

THE STATE

and

ABRAHAM JOHANNES ROUX **ACCUSED**

Neutral citation: *S v Roux* (CC 2-2005) [2013] NAHCMD 319 (5 November 2013)

Coram: VAN NIEKERK J

Heard: 27 February 2006; 2 August 2006; 13 September 2006

Delivered: 13 September 2006

Flynote: **Criminal procedure** – Application for forfeiture under sections 34 and 35 of the Criminal Procedure Act.

REASONS FOR JUDGMENT

VAN NIEKERK, J:

[1] The accused in this matter was previously convicted on charges of contravening section 14(c) of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980), section 2(1)(b) of the Combating or Rape Act, 2000 (Act 8 of 2000) and a charge of attempting to defeat or obstruct the course of justice. The accused remained free on bail. Before sentence could be passed, he took his own life. After the bail money was provisionally forfeited, the State, represented by Ms *Herunga*, gave notice that she intends to apply for the forfeiture of certain exhibits which were handed in during the trial. Mr *du Pisani* who defended the accused during the trial, indicated that he held no instructions to oppose forfeiture and withdrew from further proceedings.

[2] The Court requested the State to prepare submissions in support of the application for forfeiture. To this end the matter was postponed to 26 February 2006. At this hearing it became evident that the State would require to present oral evidence in support of its application. The Court was also of the view that certain of the complainants, whose rights were affected by the application, should be heard. The matter was postponed twice to afford the State the opportunity to secure the attendance of all concerned. On 13 September 2006 evidence was led and argument presented. On the same date I made the order which is set out at the end of this judgment and for which I now provide my reasons.

[3] The accused was convicted on the charge of attempting to defeat or obstruct the course of justice on the basis that on 6 April 2004 he gave N$6 000 to each of five complainants with the aim of persuading them not to report him to the authorities about the sexual acts that he had caused them to commit with him. In doing so his intention was to defeat or obstruct the course of justice. During the course of the investigation the police seized various amounts in cash found in some of the complainants' possession. All the charges against the accused were committed in relation to street children who lived in poverty and who normally not have had

occasion to possess such large sums of money. Some of the complainants spent some of the money on *inter alia* clothes, shoes and bicycles. These items were also seized. The application for forfeiture relates to the money seized and the articles bought with the money given by the accused. All these articles were handed in just before the close of the State case without opposition by the defence and without evidence being led.

[4] Ms *Herunga* relied on the provisions of section 34(1)(c) and section 35(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the relevant parts of which read as follows:

> '**34 Disposal of article after commencement of criminal proceedings**
>
> (1) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 33-
>
> (a) Be returned to the person from whom it was seized, if such person may lawfully possess such article; or
>
> (b) If such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
>
> (c) If no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.'
>
> '**35 Forfeiture of article to State**
>
> (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) .....
>
> and which was seized under the provisions of this Act, forfeited to the State.....'

[5] It should be noted that in terms of section 35 the Court has discretion to declare an article forfeit, whereas the Court 'shall' declare forfeit an article which falls within the provisions of section 34. I shall first proceed to consider whether any of the exhibits fall under section 34. This will require tracing back several provisions in the Criminal Procedure Act. Section 34 states that the Court may forfeit 'any article referred to in section 33'. It is therefore necessary to consider section 33, the relevant part of which states:

> '**33 Article to be transferred to court for purposes of trial**
>
> (1) If criminal proceedings are instituted in connection with any article referred to in section 30(c) and such article is required at the trial for the purposes of evidence or for the purposes of an order of court, the police official concerned shall, subject to the provisions of subsection (2) of this section, deliver such article to the clerk of the court where such criminal proceedings are instituted.'

[6] Section 34(1) in turn mentions 'any article referred to in section 30(c)', which provides:

> '**30 Disposal by police official of article after seizure**
>
> A police official who seizes any article referred to in section 20 or to whom any such article is under the provisions of this Chapter delivered –
>
> (a) .....
>
> (b) .....
>
> (c) shall, if the article is not disposed of or delivered under the provisions of paragraph (a) or (b), give it a distinctive identification mark and retain it in police custody or make such other arrangements with regard to the custody thereof as the circumstances may require.'

[7] Article 30 mentions 'any article referred to in section 20' which yet again must be considered. It reads:

> '**20 State may seize certain articles**
>
> The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-
>
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) Which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) Which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.'

[8] One of my concerns during argument on 26 February was whether it could be proved that the bank notes which the accused handed to the complainants were the actual notes seized by the police and handed in at the trial. It is to this end that the State then presented evidence. This amounted, in summary, thereto that the accused cashed a cheque at his bank and that the money was paid out to him in N$100 notes on 6 April 2004. On that same day the police received reports that some of the complainants, who were known to be street children, were spending large amounts of money. Police Officers Cloete and van Wyk confronted them on suspicion that the money was stolen. N$5800 in N$100 notes and one R100 note were found in EH's possession. CH had N$1200 in N$100 notes and one N$50 note in his possession. TH had N$700 in N$100 notes in his possession. EK had two N$100 notes in his possession. From further evidence led at the hearing of the application it became common cause that all the N$100 notes and the R100 note were the actual notes handed to them by the accused. The N$50 note was change that CH received after he made some purchases. All these notes were seized. Although the police at first thought they had been stolen they soon discovered the true source and reason for the complainants' possession of the money.

[9] It is further common cause that the money received from the accused was partly used as follows:

1. EH bought certain items, but he and EK agreed to first use the latter's money and that he would later repay EK. These items were a Raleigh M380 bicycle (Exh. "1"), a white hat (Exh "2"), three T-shirts (Exh "5", "10" and "11") and one pair of shoes (Exh "7").

2. EK bought a Rocky 5 Trailblazer bicycle (Exh "8"), a pair of khaki pants (Exh "3"), two T-shirts (Exh "4" and "6") and a pair of takkies (Exh "9").

3. CH bought a Rocky 5 Radical bicycle (Exh “12’) and a pair of shoes (Exh “13”),

4. TH bought a bicycle (Exh “14”), a duvet (Exh “15”), two T-shirts (Exh “16” and “17”), and five pairs of pants (Exh “18”, “19”, “ 20”, “21” and “22”).

[10] EH and CH left the matter of forfeiture in the hands of the Court. EK requested that the money and items be handed back to him, while TH requested that the items he bought be handed back.

[11] State counsel submitted that the complainants were not entitled to the articles seized and in terms of section 34(1)(c) these articles could therefore not be handed back. She relied for this submission on *S v Marais* 1982 (3) SA 988 (A) where the following was said (at p1002C-1004C):

> ‘The question whether a person who enters into an illicit diamond transaction, or who attempts to buy unwrought gold, can claim back money which he had paid to a police trap is a question which has come before the Court many times. In the great majority of cases it has been held that the claim is bad and the Courts will grant no relief to the applicant. The case of *Yuras v District Commandment of Police, Durban* 1952 (2) SA 173 (N) is a typical case. The facts in that case were briefly as follows: The applicant bought unwrought gold from a detective sergeant. The evidence showed that the sergeant placed the gold in the cubby hole of applicant's motor-car whereupon applicant handed him £1000 in notes. The sergeant disclosed his identity, took possession of the money and the gold and arrested the applicant. After he had been convicted and sentenced the applicant asked for an order that (1) the money be returned to him, or (2) alternatively that the gold be returned to him in the event of him being lawfully able to possess it. The Court (CARLISLE J) refused both applications. He said:
>
> > 'The legal principles applicable in the case are to be found in *Jajbhay v Cassim* 1939 AD 537 in which there is a discussion of the two legal maxims *ex turpi causa non oritur actio*, and *in pari delicto potior est conditio defendentis*. In the course of his judgement, STRATFORD CJ said that the first prohibits the enforcement of immoral or illegal contracts and the second curtails the right of the delinquents to avoid the consequences of their performance or part performance of such contracts. The learned CHIEF JUSTICE also said that the moral principle which inspired the enunciation of

> those maxims is obvious and has often been expounded. It is to discourage illegality and immorality and to advance public policy.'

Strictly speaking neither of these legal maxims is applicable in a case such as this where the accused is seeking to recover his money.

The claim is not directed at the enforcement of the contract so that the *ex turpi causa* rule has no application and there can be no question of the parties being *in pari delicto*. There is, as was pointed out by DE VILLIERS JP many years ago in *R v Seebloem* 1912 TPD 30, no turpitude necessarily present in the case of the trap.

> 'A trap performs, certainly not a very high function but a function which has been found necessary in certain classes of cases. It is countenanced not only by the police authorities, but also by the Attorney-General and by the Government of the country. And it is so countenanced, I take it, for the reason that it is a method employed by the police to detect crime. Under these circumstances I find it impossible to say that a trap is guilty of *turpitudo* when he engages in a trapping operation. For this reason the *turpitudo* is only on the side of the accused.'

See too the decision in *R v Swanepoel and Van Wyk* 1930 TPD 214 in which FEETHAM J said:

> '... The trap, in whose possession this money was, after he had received it in exchange for the diamond, is not, according to the decision of our Court in *R v Seebloem* 1912 TPD 30, to be regarded as *in pari delicto* with the person trapped.'

Nonetheless the principle which underlies and inspires these maxims has not been overlooked, namely that the Courts will not come to the assistance of a person who approaches them with unclean hands. The Courts have consistently over a period of 50 years and more firmly rejected applications for the repayment of money paid to police traps in illicit gold or diamond transactions. It has long been accepted that the moral turpitude of the convicted person is such that he cannot seek relief by way of civil action and the criminal court which has sentenced him will not come to his aid. In addition to the cases cited above see *R v Gouws* 1960 (1) SA 385 (GW); *R v Glen and Another* 1961 (1) SA 151 (O); *S v Olivier* 1966 (4) SA 668 (W) and *S v Strydom* 1967 (2) SA 712 (O).

In *Ex parte Passano: In re R v Passano and Another* 1958 (2) SA 610 (SWA) two Judges in the High Court of South West Africa ruled that, after his conviction for

dealing in uncut diamonds, the applicant was entitled to repayment of a sum of £695 which he had paid to the police traps. But this judgment was a voice crying in the wilderness. It was not followed in the same Court a few years later in *S v Maritz* 1966 (1) SA 304 (SWA) and has been criticised in other Courts (see for example *R v Glen and Another (supra)* and *R v Gouws (supra)*).

In the face of this phalanx of authority the magistrate had little choice in the matter. He must, if he had given fuller consideration to the question of forfeiture and decided to exercise his discretion under s 35 (1) of the Act, have declared the money forfeit to the State, not in order to impose a heavier fine on the accused, but because the accused was precluded from recovering his money in law by reason of the principles inherent in the maxims to which I have referred.

I have drawn attention to the fact that s 35 (1) is an enabling provision; the magistrate was not compelled to decree forfeiture. If, however, he did not do so, the preceding section in the Act would come into operation. Section 34 (1) provides as follows.....

It will be noted that this section is compulsory. The money cannot be left in limbo. If the court has not exercised its discretion and decreed forfeiture it shall make an order returning the article to some person or forfeiting it to the State. The accused would clearly have no claim to have the money returned to him under para (a) since it was not seized from him; it was in the hands of the police at the time of his arrest. Nor am I persuaded that the accused has any better prospect of success under para (b) of the subsection. To succeed he must show that he is the 'person entitled thereto'. The Courts have always interpreted that phrase to mean 'the person legally entitled thereto' and accordingly he would have to show that he could succeed in claiming the money in a civil action in a court of law. (See, for example, *R v Swanepoel and Van Wyk (supra* at 221); *R v Glen and Another (supra* at 152); *S v Olivier (supra* at 669). That he is unable to show since he was a party to an illegal transaction for the purchase of unwrought gold. He parted with his money in exchange for the gold; no court, civil or criminal, would assist him to recover that money.

Whether an application for repayment was made by the accused to the trial court is, as I have pointed out, not clear, but, if it was made, it must have failed. The magistrate would have been bound to rule that the money must be forfeited to the State in terms of s 34 (1) (c).'

[12] On a consideration of the evidence I agree with the State that the N$100 notes and the one R100 note should be declared forfeit in terms of section 34(1)(c). These notes were clearly concerned in the commission of the offence of attempting to defeat or obstruct the course of justice within the meaning of section 20(a). The notes were also seized on the basis that they may afford evidence of the commission of the offence within the meaning of section 20(c), which they did. Applying the principles as set out in *Marais* it is clear that the complainants, who, after having threatened to expose the accused, accepted the money in return for an undertaking not to report the crimes, were parties to an illegal transaction. As such they would not be legally entitled to claim back the money. I therefore agree that the said notes should be forfeited to the State in terms of section 34(1)(c).

[13] Although it could be said that the N$50 note fell within the provisions of section 20(c), it was not proved to be among the notes handed by the accused to the complainant CH. It should therefore be returned to him.

[14] As far as the rest of the exhibits are concerned, my view is that anything purchased with the proceeds of crime cannot be forfeited under the Criminal Procedure Act. Although the available authorities hail from a time before the commencement of this Act and deal with cases where an accused bought items with stolen money, the principle remains the same. For example, in *R v Munene* 1956 (3) SA 556 (SR) the following was said (at p557A):

> ‘[In] *Jagersfontein Garage & Transport Co v Secretary, State Advances Recoveries Office*, 1939 OPD 37 at p. 46. ..... the rule stated in Code 4:50:8 was held to apply in our law:
>
> > 'Anyone who has made a purchase with money belonging to another will acquire the right of action on the purchase for himself and not for him to whom the money belongs, together with the ownership of the property, if possession was delivered to him.'
>
> (Scott's translation quoted in Wessels' *Law of Contract*, para. 1753, note 51.)’

(See also *R v Honono* 1955 (2) SA 670 (O); *S v Nazo* 1964 (2) SA 795 (GW)).

[15] In *S v Msikinya* 1966 (4) SA 1 (E) at p2D-E it was held that goods, even though purchased with stolen money, become the property of the accused who bought them, and they ought therefore to have been returned to the accused not only by reason of the fact that they were taken from her possession, but because they belong to her.

[16] There is another basis on which the State's application in regard to the items bought by the complainants should fail. In *S v Smith* 1984 (1) SA 583 (A) the case concerned an amount of money promised by one accused to another to commit a murder. The money was kept aside, but not paid over. Later it was handed over to the police for safekeeping. The Court held:

> 'In terms of s 34 (1) a presiding Judge is empowered to make an order with reference to "any article referred to in s 33". Section 33 relates to the case where criminal proceedings were instituted "in connection with any article referred to in s 30 (c)". No criminal proceedings were instituted in connection with the sum of R10 000.'

[17] Likewise, in the case before me no criminal proceedings were instituted in connection with the items bought by the complainants.

[18] Lastly I should mention for completeness' sake that the N$50 note and the items bought by the complainants' clearly cannot be forfeited under section 35(a) as they are not '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'.

[19] I therefore hold that the items which the complainants bought with the money given to them by the accused should be returned to them.

[20] For the above reasons I made the following order:

1. That in terms of section 35(1)(a) of the Criminal Procedure Act (Act 51 of 1977) , [that] the bank notes, listed in Exhibit "C", "E" and "F" and the N$100 bank notes listed in Exhibit "D" in the application and set out in Annexure "A" of this order are forfeited to the State.

2. That in terms of section 34(1)(a) of the Criminal Procedure Act (Act 51 of 1977) the N$50-00 bank note marked T1237710 listed in Exhibit “D” in the application be returned to the complainant .... [CH].

3. That in terms of section 34(1)(a) of the Criminal Procedure Act (Act 51 of 1977) the exhibits marked “5”, “7”, “2”, “10”, “11”, “1” be returned to the complainant, ... (EH].

4. That in terms of section 34(1)(a) of the Criminal Procedure Act (Act 51 of 1977) the exhibits marked “8”, “3”, “4”, “6” and “9” be returned to the witness, ... [EK].

5. That in terms of section 34(1)(a) of the Criminal Procedure Act (Act 51 of 1977) the exhibits marked “12” and “13” be returned to ..... [CH].

6. That in terms of section 34(1)(a) of the Criminal Procedure Act (Act 51 of 1977) the exhibits marked “14”, “15”, “16”, “17”, “18”, “19”, “20”, “21”, “22” be returned to the complainant, [TH].

7. That a copy of this order be served on [TH].

_____ (Signed on original_____

K van Niekerk

Judge

APPEARANCE

For the State: Ms R Herunga

Office of the Prosecutor-General