THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 344/07

In the matter between:

MOHAMED JOONAID MIA **FIRST APPELLANT**

RAYMOND HOWELL **SECOND APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Mia v The State* (344/2007) [2008] ZASCA 117 (26 September 2008).

Coram: Heher, Mlambo, Maya JJA

Heard: 19 August 2008

Delivered: 26 September 2008

Summary: Criminal law – theft – competent verdict on robbery charge – theft generic offence encompassing theft by false pretences.
Evidence – discredited evidence of accused – irrelevant regarding guilt or innocence of another accused – where state had produced no inculpating evidence against that accused.

ORDER

On appeal from: High Court, Witwatersrand (Joffe J and Kekana AJ sitting as Full Court).

1. The first appellant's appeal against his conviction for theft succeeds and the order of the Johannesburg High Court is set aside.

2. In its place the following order is substituted:

   'The first appellant's appeal against his conviction is upheld and a finding of 'not guilty and discharged' is substituted therefor.'

3. The second appellant's appeal against his conviction for theft is dismissed.

JUDGMENT

MLAMBO JA (HEHER, MAYA JJA concurring):

[1] The appellants were convicted on one count of theft and sentenced to six years' imprisonment by the Johannesburg Regional Court. Their appeal to the Johannesburg High Court (Joffe J and Kekana AJ) failed but they were granted leave by that court to appeal to this court against their convictions.

[2] The facts are that on 31 October 1990 the first appellant (Mia) had facilitated a meeting between the second appellant (Howell) and a certain Mr Ebrahim to conclude a foreign exchange transaction involving an amount of R1,1m. At that time Mia was an estate agent conducting his business with attorneys Lachporia and Osman with whom he shared premises in Fordsburg. The meeting was at Mia's office and the transaction was in contravention of

foreign exchange regulations. That meeting was preceded by one on the same day at which Howell had to check the money tendered by Ebrahim to satisfy himself that it was genuine and all there. Even though Ebrahim was involved in the transaction, the money he was using was not his but belonged to the Carrim family represented by Enver Carrim. At the meeting in Mia's office Howell masqueraded as Peter Lehman, a German investor, whose interest was to conclude a foreign exchange transaction involving the South African and British currencies. This was Ebrahim's understanding of what was happening when he put the money, in containers, on Mia's desk in the expectation that Howell would then call his contacts in London to effect the transfer of an amount of £200 000 into an agreed bank account which would result in a profit in the region of 30 per cent.

[3] After Ebrahim had put the money on Mia's table, Howell suddenly produced a business card, stating at the same time that he was a policeman from the Commercial Branch of John Vorster Square police station. Ebrahim, thinking he had become entangled in a police sting operation, bolted out of Mia's office and retreated to his warehouse from where he advised Enver Carrim of what had transpired. After Ebrahim's departure Howell spoke into a two way radio, and another man walked into Mia's office and assisted Howell to remove the containers with the money. As Howell was leaving the premises he told the office staff that a police officer from John Vorster Square Police Station would call to take charge of the case.

[4] Later that afternoon after a meeting involving Mia, Ebrahim, the Carrim brothers, Lachporia and certain lawyers who had been consulted, Mia and Ebrahim went to John Vorster Square Police Station to lay a charge of robbery, stating that Howell had robbed Ebrahim of emeralds valued at R1,1m at gunpoint. Mia provided a statement to the police and cooperated with them as a witness in the ensuing investigation and efforts to trace Howell who had vanished without trace. Just over a year later and on a routine visit to a police station Mia saw Howell. This chance encounter prompted Mia to change his version to the police about what had happened on 31 October 1990. He stated that what was robbed was actually an amount of R1,1m and not

emeralds as he had initially reported.

[5] The police charged Howell with robbery but the charge was withdrawn. After representations from the Carrim family to the Commissioner of Police a decision was taken to charge both appellants with that offence. The charge sheet alleged that 'on 31 October 1990 both assaulted Ebrahim, whilst pointing a firearm at him, and removed from his possession, with violence an amount of R1,1m being his property and/or the property of Enver Carrim and thereby took the money'. The ensuing trial spanning some seven years culminated in the appellants being convicted of theft of the amount of R1,1m.

[6] The version presented by Mia during the trial was almost identical to that of Ebrahim especially with regard to the incident in Mia's office on 31 October 1990. This version was that he had facilitated the meeting on that day at Howell's instance, whom he had met for the first time a few days before and who had been referred to him by certain persons he knew from Kwazulu-Natal. He stated that his contacts had assured him of Howell's bona fides. As a result he had believed that Howell was Peter Lehman, a German investor, and had in good faith facilitated the meeting with Ebrahim for purposes of the foreign exchange transaction just like others he had facilitated in the past. He stated that he was taken aback when, at the meeting in his office, Howell suddenly announced that he was a policeman and produced a card. Because he had believed Howell's utterance, he had not tried to prevent him and his accomplice leaving with the money.

[7] On the other hand, Howell's version was that, from inception, the whole incident was a plan hatched by Mia, who was owed commission from past deals by Ebrahim and/or the Carrim family. He testified that Mia knew his true identity and that he simply played along because he had been promised a share of the spoils. After he removed the money from Mia's office following Ebrahim's precipitate departure he met Mia at the Carlton Centre in Johannesburg during the afternoon of the same day. There Mia paid him an amount of R55 000 and took the rest of the money away with him.

[8] The trial court concluded that on the evidence before it the illegal transaction involved a foreign exchange deal and not emeralds. In so doing it rejected the evidence of Ebrahim, who had testified that the subject of the transaction was emeralds. The trial court also disbelieved Ebrahim regarding the production of a firearm by Howell at the meeting in the office. The court's conclusion that theft and not robbery was committed was informed by this finding. The trial court further found that 'the three versions [of the state and the two accused] are mutually destructive and cannot all be the truth. The true version is probably to be found in a combination of the three versions or possibly in a fourth version which no one deposed to'. The court, however, was specific in labelling Howell as evasive, not credible and unreliable but made no similar finding regarding Mia save that there were improbabilities in his version and that in certain respects his witnesses contradicted his version.

[9] The trial court concluded that the offence of robbery had not been proved but that instead the appellants were guilty of theft[1] in that they had conspired to steal the money from Ebrahim through false pretences. The trial court stated:

'I find that the only reasonable inference which I can come to on the objectively proven facts, is that the two accused have formed the common purpose to trick the witness Ebrahim into believing that the money was genuinely going to be transferred into a foreign account.'

[10] The issue therefore is whether the trial court was correct in concluding that the two appellants had acted in cahoots to hoodwink Ebrahim. This, it will be remembered, was Howell's version, that he took part in the deal simply to assist Mia who was recovering unpaid commission from the Carrims arising

[1] Section 260 of the Criminal Procedure Act 51 of 1977 provides: 'If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but- . . . (d) the offence of theft; . . . the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences.'

from past deals. The court's conclusion that Mia was as guilty as Howell was based on its finding that Mia, who was no small man, did nothing to come to Ebrahim's aid when Howell performed his theatrics in his office and that he could have prevented the unarmed Howell from leaving with the money. The trial court was further of the view that Mia had ample opportunity during the afternoon to leave his office and meet Howell at the Carlton Centre to take his share of the spoils – and return to his office.

[11] Before us, counsel for Mia submitted that the trial court had erred in convicting Mia as no evidence had been adduced by the state incriminating him. Counsel for Howell was content to argue that the trial court had erred in convicting his client of theft as, at most, the evidence disclosed the commission of the offence of fraud. Counsel submitted that as fraud is not a competent verdict of robbery the court should have acquitted Howell. Counsel for Howell further submitted, in the alternative that Howell could not be convicted of theft by false pretences unless the charge sheet had specifically mentioned this which was not the case here.

[12] The proper approach in a criminal case, is that evidence must be considered in its totality.[2] It is only in doing so that a court can determine if the guilt of an accused person has been proved beyond reasonable doubt. Should the trial court, in the course of assessing the evidence before it, find that a particular witness is unreliable and reject his version for that reason, that evidence plays no further part in the determination of the guilt or innocence of the accused in the absence of satisfactory corroboration. Even more so does this apply to evidence tendered by a co-accused incriminating another, especially where the state has not adduced any evidence proving the guilt of that other accused.

[13] The trial court, in convicting Mia, relied on Howell's evidence that they met at the Carlton Centre to share the spoils. That evidence was entirely uncorroborated. Significantly, a reading of all the evidence renders it

[2] *S v M* 2006 (1) SACR 135 (SCA) at 183h-i and *S v Gentle* 2005 (1) SACR 420 (SCA) at 433h-i.

improbable that Mia left his office that afternoon before going to the police station. The evidence of the state established that Mia co-operated with Ebrahim and the Carrim family in trying to locate Howell. He also accompanied Ebrahim when they went to lay charges against Howell on the same day. If anything, this evidence did not incriminate Mia but tended to support his version that he was as flummoxed by Howell's trick as was Ebrahim. The state's evidence fell short of establishing even a prima facie case of robbery or theft by Mia. Reliance on Howell's suspect testimony, uncorroborated as it was, carried the case no further.

[14] Furthermore the trial court ignored Mia's denial of a subsequent meeting with Howell without good reason. It must also be pointed out that the evidence of Howell's massive spending spree involving a residential property and a motor vehicle, for example, a few days after 31 October 1990 (which Howell dishonestly attempted to explain away) without similar evidence against Mia should at least have raised serious question about the credibility of any evidence by him which inculpated Mia particularly the paltry amount he alleged was his share of the spoils.

[15] The conviction of Mia cannot stand in the light of all the aforegoing considerations. It is correct as submitted by Howell's counsel that fraud is not a competent verdict on a charge of robbery. Fraud is described as 'the unlawful and intentional making of a misrepresentation which causes actual or potential prejudice . . .'.[3] It is correct that in Ebrahim's mind he was to part with R1,1m and to receive £200 000 by way of a deposit into an account in London. In his mind he expected Howell to finalise the transaction by calling his contacts in London to do the transfer. Had Howell pretended to do that and had Ebrahim walked out thereafter believing that the deposit had been effected, fraud would have indeed been committed.

[16] That is not what happened here. No sooner had Ebrahim voluntarily put the money on the table than the unexpected happened. The

[3] C R Snyman *Criminal Law* 5 ed (2008) p 531.

transformation of Peter Lehman, the German investor, into a policeman was not what Ebrahim had bargained for and he immediately made good his escape. He was not induced to hand over the money by the representation; rather he abandoned control of it when the representation was made and thus enabled Howell to take it at his leisure, knowing that he had not yet received the consent of Ebrahim to do so. That the trap was not a genuine police trap did not turn Howell's conduct into fraud. It is also incorrect to suggest, as Howell's counsel attempted to do, that there can be no conviction for theft by false pretences where the charge sheet does not specifically mention this offence. Counsel referred in this regard to an unreported judgment of Stafford J (in which Strydom J concurred)[4] in which it was found that 'fraud in the form of theft by false pretences was not the type of theft contemplated by the legislator as a competent verdict in s 260(d)' [on a robbery charge]. I disagree. No such distinction is implicit in the section. Clearly it is competent for a court to convict on the competent verdict of theft where the charge is one of robbery. Theft is a generic offence that encompasses theft by false pretences. See *Ex parte Minister of Justice: In Re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A) at 239F-H where it was stated:

'If there was deception so fundamental that the will of the victim did not go with the act, there could be a taking and therefore larceny, called larceny by a trick. But if the deception was not so fundamental as wholly to nullify the voluntariness of the act, there was no room for larceny. Yet the deceiver's conduct had to be punished and so the crime of obtaining goods by false pretences was devised. As was pointed out by Ramsbottom J, in *Dalrymple, Frank and Feinstein v Friedman and Another*, 1954 (4) SA 649 (W) at p 664, it is not correct to say that our law's treatment of both types of fraudulent acquisition of another's goods – the larceny by a trick type and the obtaining by false pretences type – as theft by false pretences owes its origin to English practice. On the contrary in 1895 in *R v Swart* 12 SC 421, De Villiers CJ stated that our law differs from the English law and has always treated facts covered by the English crime of obtaining by false pretences as theft. Ten years later in *Rex v Collins* 19 EDC 163, Kotze JP, said that theft in our law has a much wider scope than the corresponding term in English law and that our crime of theft is wide enough to

[4] *William Boeck v The State* Case No A273/91 (Transvaal Provincial Division) delivered on 13 May 1991.

include the obtaining of goods by false pretences. The belief that our law of theft incorporated theft by false pretences under the influence of English law, a belief expressed, for instance, in *Rex v Mofoking* 1939 OPD 117, may have been encouraged by the mistaken notion that there is in English law a crime of theft by false pretences (cf *Rex v Hyland* 1924 TPD 336). It is true that the name of the English crime of obtaining by false pretences may well have suggested the use of the expression "theft by false pretences" (cf Transkeian Penal Code ss 191 to 193), but our law successfully resisted any tendency that there may have been to confine theft within the narrow limits of larceny.'

Howell was in my view correctly convicted of theft and his appeal must fail.

[17] I should express my disquiet at the delay implicit in this matter. The offence was committed in October 1990 and it took nearly three years for the trial to start, against both appellants in May 1993. That trial was concluded in January 1999 nearly seven years later. The subsequent appeal to the Johannesburg High Court was concluded on 22 June 2007, eight years later. The matter has to date taken some 18 years to finalise. This is an indictment on the criminal justice system and the two appellants must take a lions' share of the blame for this state of affairs. They have, as would be expected, not been prejudiced by the delay as they have been on bail since the inception of the trial which was extended when they were convicted in 1999. One hopes that the dilatory manner in which this matter has been handled will not be repeated in other matters.

[18] In the circumstances the following order is granted:

1. The first appellant's appeal against his conviction for theft succeeds and the order of the Johannesburg High Court is set aside.

2. In its place the following order is substituted:

   'The first appellant's appeal against his conviction is upheld and a finding of 'not guilty and discharged' is substituted therefor.'

3. The second appellant's appeal against his conviction for theft is dismissed.

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D MLAMBO

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	1st APPELLANT – B ROUX SC;
	2nd APPELLANT – M R HELLENS SC
INSTRUCTED BY:	MAHMOOD MIA ATTORNEYS; FORDSBURG
	ROSSOUWS; BLOEMFONTEIN
FOR RESPONDENT:	M T NTLAKAZA
INSTRUCTED BY:	THE DIRECTOR OF PUBLIC PROSECUTIONS;
	JOHANNESBURG