REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/~~NO~~
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: YES/NO
[redacted] SIGNATURE	15/11/24 DATE

CASE №: Rev 150/2024
Court a quo: RCM 76/24

In the matter between:

THE STATE

versus

M.V.M M **FIRST ACCUSED**

K.M N **SECOND ACCUSED**

REVIEW JUDGMENT

MULLER J:

[1] This case came before me on automatic review in terms section 85(1) of the Child Justice Act.[1] Two child offenders were charged in the regional court sitting at Mankweng with robbery in count 1 and in count 2 with robbery with aggravating circumstances.[2] Both enjoyed legal representation throughout the trial.

[2] They pleaded guilty to both charges. Statements in terms of section 112(2) of the CPA were duly presented to court by their legal representative. The various competent verdicts were explained to the child offenders. They were both convicted as charged on the strength of their statements. Each was sentenced in respect of count 1 to 3 years imprisonment wholly suspended for a period of 5 years on condition the child offender is not convicted of robbery committed during the period of suspension. In respect of count 2 they were both sentenced to 5 years imprisonment wholly suspended for a period of 5 years on condition that the child offender is not convicted of robbery with aggravating circumstances committed during the period of suspension. They were, additionally, sentenced to undergo correctional supervision for a period of 3 years in terms of section 276(1)(h) of the CPA in respect of count 2.

[3] The learned regional court magistrate was requested to advance reasons for the convictions of robbery in respect of count 1, as it appeared from the section 112(2) statements that the complainant in count 1 handed his cellular phone to the child offenders voluntarily without any force or threat of force.

[1] Act 75 of 2008.
[2] As defined in section 1 of Act 51 of 1977. Hereinafter called "the CPA".

[4] The regional court magistrate responded that the statement of child offender 1 was to the effect that he borrowed the said phone with the intention to permanently deprive the complainant of his phone. The complainant handed same over voluntarily. It was only at a later stage when the complainant sought to have his phone returned that he was faced with threats of being harmed if he persisted in having his phone back. The regional court magistrate referred to the definition of robbery provided by Snyman[3] and stated that the threat of force could be exercised before, during or after the taking of the item and that this threat of force was at the stage when the complainant sought the phone to be returned to him.

[5] The Deputy Director of Public Prosecutions: Limpopo was requested to provide an opinion. The court is indebted to counsel for their helpful memorandum. The convictions of robbery in count 1 are not supported by the Deputy Director.

[6] To put the facts briefly alluded to above in proper context, reference will be made to the relevant portions of the section 112(2) statements of the child offenders presented to court and accepted by the prosecution in respect count 1. The first child offender stated:

> "Count 1 I plead guilty to the charge of Robbery, while I was acting in the furtherance of Common Purpose.

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[3] Snyman CR *Criminal Law* 6th ed LexisNexis (2014) 508.

In that upon or about the 14 April 2023 and at or near Makotopong in the Regional Division of Limpopo, I unlawfully and intentionally assault Lesedi Makoma Rapelo and did then and with force take the following items to wit Blue A13 Samsung cell phone, her property in his lawful possession.

(I acted in the furtherance of a common purpose during the commission of the offence.)

I admit that I was in the company of my co-offender and two co-perpetrators who are now separated from this trial, we were at Solly's tavern. We saw the complainant standing outside the tavern, myself and my friends then agreed amongst ourselves that we must trick the complainant in borrowing us his cell phone and thereafter keep it permanently so that we can sell it without the complainant's consent.

I approached the complainant and borrowed his phone and told him that I wanted to use it to log in my Face Book account. The complainant borrowed me the phone and I used it to log in my Face Book account and after I was finished going through my account I did not return the phone to the complainant.

Myself and my co-offender as well as co-perpetrators decided to leave, and as agreed the phone was still with me. The complainant followed us. Along the way the complainant requested his phone back and I refused telling him that I will not give him back his phone.

At the time I was refusing to give the complainant his phone back I had the intention to permanently deprive him of his cell phone.

The complainant insisted that he wanted his phone back. My co-perpetrator M[4] then responded and said that he heard what I said, that he was not going to get his phone back. Further that if he so wishes he can go and report to the police but we are not afraid of them. My co-offender told him that if he insists, he will hurt him.

The complainant responded by saying that he heard me but M put his hand in his pocket and approached the complainant who then ran away while M chased after him for a short distance. The complainant was afraid of us because we were four and he was alone. Along the way I gave co-

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[4] His full name is omitted.

perpetrator M the said phone and we all went to sell the phone to a certain guy called Kgabo for R200.00

I knew at that time that I was associating myself with the conduct of my co-offender and as well my co-perpetrators of robbing the complainant of his phone, and that my conduct was wrongful and against the law, but as we have agreed to rob the complainant, I continued with my conduct.

I admit that my intention on that respectful day was to rob the complainant. I further admit that my actions on that respectful day where (*sic*) unlawful and wrongful and that despite knowing that my actions were unlawful and wrongful I elected to proceed with my actions of robbing the complainant and depriving the complainant of his possessions."

[7] The second child offender stated that:

"I plead guilty to the charge of Robbery, while I was acting in the furtherance of Common Purpose.

In that upon or about the 14 April 2023 and at or near Makotopong in the Regional Division of Limpopo, I unlawfully and intentionally did by force take the following items to wit, Blue A13 Samsung cell phone, the property in the lawful possession of Lesedi Makoma Rapelo.

(I acted in the furtherance of a common purpose during the commission of the offence.)

I admit that I was in the company of my co-offender and two co-perpetrators who are now separated from this trial, we were at Solly's tavern. We saw the complainant standing outside the tavern, myself and my friends then agreed amongst ourselves that we must trick the complainant in borrowing us his cell phone and thereafter keep it permanently so that we can sell it without the complainant's consent.

Child offender no 1 approached the complainant and borrowed his phone and told him that he wanted to use it to log in my Face Book account. The complainant borrowed him the phone and he used it to log in his Face Book account and after he was finished going through his account he did not return the phone to the complainant.

We decided to leave, and as agreed the phone was still with my co-offender. The complainant followed us. Along the way the complainant requested his phone back from my co-offender and my co-offender told the complainant that he was not getting it back. The complainant insisted that he wanted his phone back.

At the time of my co-offender refusing to give the complainant his phone back we all had the intention to permanently deprive him of his cell phone.

The complainant insisted that he wanted his phone back. My Co-perpetrator M[5] then responded by saying that he heard what my co-offender said, that he was not going to get his phone back. Further that if he so wishes he can go and report to the police but we are not afraid of them. I then told him that if he insists, I will hurt him.

The complainant responded by saying that he heard him but M put his hand in his pocket and approached the complainant who then ran away while M chased after him for a short distance. Along the way my co-offender gave co-perpetrator M the said phone and we all went to sell the phone to a certain guy called Kgabo for R200.00

I knew at that time that I was associating myself with the conduct of my co-offender and as well my co-perpetrators of robbing the complainant of his phone, and that my conduct was wrongful and against the law, but as we have agreed to rob the complainant, I continued with my conduct.

I admit that my intention on that respectful day was to rob the complainant. I further admit that my actions on that respectful day where (sic) unlawful and wrongful and that despite knowing that my actions were unlawful and wrongful I elected to proceed with my actions of robbing the complainant and depriving the complainant of his possessions."

[8] Robbery is defined by Snyman[6] in the following terms:

"Robbery consists in theft of property by unlawfully and intentionally using:

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[6]Snyman 508.

(a) violence to take the property from somebody else or

(b) threats of violence to induce the possessor of the property to submit to the taking of the property."

[9] Burchell[7] defined robbery as:

"Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another."

[10] It is clear from the definitions that the offence involves two *acti rei*; a threat of force to induce the victim to submit to taking of the property or the application of actual force to the person of the victim to taking of the property. In *S v Dlamini*[8] it was held that:

"The violence (assault) and the theft are joint features of one crime. The key considerations justifying a conviction of this corporate crime are proof that the assault and the theft formed part of a continuous transaction and that the assault was a means by which the unlawful possession was obtained."[9]

[11] This definition of the crime of robbery was accepted by the Appellate Division in *S v Prins en 'n Ander*:[10]

"Dit is duidelik dat roof uit twee afsonderlike wederregtelike handelinge bestaan, nl, geweldpleging, of bedreiging van geweldpleging, en verkryging van die goed. Die geweldpleging is die middel wat dien vir die verkryging van die goed. Dit kan gebeur dat beide handelinge afssonderlik strafbaar as aanranding

[7] Burchell J and Milton J *Principles of Criminal Law* 3rd ed Juta (2005) 817.
[8] 1975 (2) SA 524 (D).
[9] 527A-B.
[10] 1977 (3) SA 807 (A).

> en diefstal kan wees, soos aangetoon in Grobler se saak *supra* te bl 512C-E. Hierbenewens is die opset om te roof ook 'n element van roof as 'n misdaad."[11]

[12] It is clear from the authorities mentioned *supra* that the purpose of the violence must be to overcome resistance or to prevent any resistance, to induce the victim not to offer any resistance to the taking of the property. Put differently; the violence or the threat of violence must casually be connected to the theft of the goods.

[13] It emerged from their statements that the child offenders agreed before approaching the victim that he will be tricked to depart with possession of the phone. There was, therefore, no intention or common purpose to rob the victim; violence was not anticipated to overcome any resistance from the victim. In fact, no violence or threat of violence was indeed brought to bear on the victim to dispossess him of the phone. The common intention of the child offenders had been to obtain possession of the phone with the consent of the victim by making a misrepresentation to him with the intention to permanently deprive the victim of his property, once the phone is handed over.

[14] According to De Wet and Swanepoel[12] the acts of the child offenders in question constitute the offence of fraud:

> "Waar besit van 'n ander se saak verkry word deur middel van wanvoorstellings, het mens met nie met diefstal te doen nie, maar met bedrog."

The authors pointed out that Roman law treated instances where the owner depart willingly with his property as a result of misrepresentation as *stellionatus* or fraud and not theft.[13]

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[11] 815D.

[12] De Wet JC and Swanepoel HL *Die Suid-Afrikaanse Strafreg* 2nd ed (1960) 318.

[15] In our law, the crime of theft by false pretences, which occupies a position between the crime of theft and fraud, which was not a crime under our common law, emerged in early Cape decisions as a creation of our courts, as a substantive crime.[14] The crime is defined as:

> "The crime of theft by false pretences is committed by any person who unlawfully, with intent to steal and by means of a misrepresentation appropriates property capable of being stolen."[15]

[16] Snyman disagrees with the view of De Wet and Swanepoel that all such cases constitute fraud. He is of the view that all cases of theft by false pretences are at the same time also fraud but not all cases of fraud constitute theft. In *R v Davies*[16] the accused was charged with fraud and in the alternative with theft by means of false pretences. Stratford JA explained:

> "It is said in effect, that the alternative is also one of fraud. As a general proposition it clearly cannot be said that the crime of fraud and that by means of false pretences are identical. A moment's reflection will show the fallacy of that proposition. Though it is true that in all cases where the latter crime is committed there are present all the elements constituting the crime of fraud, the converse is certainly not true. The essential elements of the *crimen falsi* are a willful perversion of the truth made with the intent to defraud and to the actual or potential prejudice of another. If the prejudice is *actual* and consists in the deprivation of another of his ownership in property capable of being stolen, and further if the accused converts that property to his own use, in such a case only is the crime also of theft by means of false pretences. If the prejudice is "potential" theft is not committed."[17]

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[13] At 428.
[14] In English law there is an offence 'obtaining by false pretences' that closely resembles fraud in our law. See De Wet and Swanepoel 429-430. Burchell J *Principles of Criminal Law* 3rd ed (2005) 797; Snyman 533.
[15] De Wet and Swanepoel refer to the definition by Gardiner and Lansdown II b 1682: "Theft by false pretences is committed by any person who by false pretence obtains anything capable of being stolen, with intent to deprive the owner of his ownership or any person having any special property or interest in the thing of such property interest."; Burchell 797; Also Snyman 535.
[16] 1925 AD 165.
[17] 169-170.

[17] The true distinction lies in the requirement that the crime of theft by false pretences is only completed when the property is handed over as a result of the misrepresentation and the said property is appropriated which is not a requirement in respect of the crime of fraud.[18]

[18] It also bears notice in this regard that neither the crime of theft by false pretences nor the crime of fraud are listed as competent verdicts to a charge of robbery in terms of section 260 of the CPA. The particulars of the charge of robbery put to the child offenders made no reference to any misrepresentation made to the victim. Section 270 of the CPA can therefore not be invoked to secure a conviction of fraud.

[19] Snyman defined theft as follows:

> "A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which
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> (a) belongs to, and is in the possession of another;
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> (b) belongs to another but is in the perpetrator's own possession; or
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> (c) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession
>
> provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property."[19]

[20] Schreiner ACJ in *Minister of Justice: In re Rv Gesa; Rv De Jongh*[20] stated:

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[18] The crime of fraud is completed the moment the misrepresentation comes to the notice of the representee.
[19] Snyman 475 (read with footnote 1).
[20] 1959 (1) SA 234 (A).

"As a result of the wideness of our concept of theft some overlapping with the crime of fraud occurs (*Rex v Davies* 1928 AD 165 at 170). And questions, with which we are not here concerned, may arise as to the sufficiency of the particulars provided by an indictment for theft, where false pretences are involved. But the existence in our law of a partly overlapping crime of fraud provides no reason for doubting that there may be theft even when there is a "voluntarily" handing over of the goods by the victim, if he was fraudulently deceived by the recipient into handing them over."[21]

[21] It follows that theft is committed when possession of property of another is obtained by means of a misrepresentation with the intention to permanently appropriate the said property. This is what occurred in this case. Although reference is made in the statements that the child offenders robbed the victim, the facts do not disclose that possession of the cellular phone was obtained by means of force or a threat of force. The child offenders deprived the victim of possession of his cellular phone by means of misrepresentation (without any violence or any threat of violence) with the intention to permanently appropriate the said cellular phone. By the time that the victim requested that his phone be returned the act to permanently appropriate the phone had been performed and the crime of theft had already been completed. The child offenders, on the facts set out in their statements in terms of section 112(2), ought to have been convicted of the crime of theft in respect of count 1.

[22] The suspended sentences imposed in respect of count 1 should be adjusted accordingly to ameliorate the severity of the sentences to accord with the less serious crimes of theft.

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[21] 240 A-C; *R v Collins* 19 ECD 163, 166.

ORDER:

1.1 The convictions of robbery in Count 1 are set aside and are replaced with convictions of theft in respect of both child offenders.

1.2 The sentences in respect of count 1 are set aside and replaced with the following sentences:

1.3 "Each child offender is sentenced to 15 months imprisonment the whole of which is suspended for a period of 5 years on condition that the child offender is not convicted of theft or fraud committed during the period of suspension."

1.4 The convictions and sentences imposed in respect of count 2 are confirmed.

[redacted]

G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur

[redacted]

S. MATHABATHE

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE