IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Appeal number: A160/2016

In the matter between:

PIETER VAN HEERDEN Appellant

and

THE STATE

CORAM: DAFFUE, J *et* GELA, AJ

HEARD ON: 10 OCTOBER 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 OCTOBER 2016

I INTRODUCTION

[1] Appellant was arraigned in the regional court held at Hertzogville on a charge of stock theft in that on or about 5-7 June 2013 he unlawfully and intentionally stole sixty cattle valued at R450 000, the property of, or in the lawful possession of Pauline De Bruyn.

[2] Notwithstanding his plea of not guilty, he was convicted on 1 April 2016 as charged and eventually sentenced on 21 April 2016 to 6 years' imprisonment.

[3] He unsuccessfully applied to the court *a quo* for leave to appeal against conviction and sentence, but on 21 June 2016 leave to appeal was granted by Van Zyl J and Gela AJ.

II APPELLANT'S PLEA EXPLANATION AND ESSENCE OF HIS DEFENCE

[4] A plea explanation was tendered on behalf of appellant indicating his defence in no uncertain terms. He relied on two stock removal certificates issued in terms of the Stock Theft Act, 57/1959 and duly signed by the complainant, Mrs De Bruyn. These certificates were handed in with the consent of the prosecutor as Exhibit A. In fact, it is apparent that the State was at all relevant times in possession of the original certificates and knew all along that appellant would tender these certificates in support of his defence that the sixty cattle, the property of Mrs De Bruyn or which were in her possession, were removed from her

farm with her consent. One of the elements of the offence of theft, to wit unlawfulness, was therefore placed in contention. Appellant's attorney informed the court *a quo* during the plea explanation that in the event of the court finding that the cattle were removed without consent, it would justify a conviction.

III CONCLUSIONS OF THE COURT *A QUO*

[5] After the leading of evidence and oral arguments presented by the State and the defence, the court *a quo* made serious comments regarding the unethical and fraudulent behaviour of appellant and eventually found as follows:

> "Daar is dus geen vereiste vir diefstal dat beskuldigde sonder toestemming die vee uit Me De Bruyn se sorg moes verwyder het nie. Die feit of die blote feit dat beskuldigde homself hier ooglopend hier ook aan bedrog skuldig gemaak het waarvan hy nie aangekla is nie doen geen afbreek (sic) daarvan dat hy onder slinkse en valse voorwendsels Me De Bruyn se beeste by haar verwyder het en glad nie voornemens was om met hulle te handel soos wat hy met haar ooreengekom het nie en alreeds voor hy daardie **BEWYSSTUK "A"** of vervoer- of die verwyderingsertifikaat voltooi het reeds geweet het dat daardie beeste hoegenaamd nie na Philipstown gaan nie, maar direk na Mnr Laas se plaas op pad was, maar (sic) my mening is die feite vanselfsprekend en het beskuldigde hier duidelik ooglopend die klaagster van haar eiendom ontneem en is dit totaal onwaarskynlik dat indien hy enigsins vir daardie beeste hetsy in totaal of gedeeltelik betaal het aan haar of aan haar seun dat hy dit nooit teenoor hulle sou geopper het nie en aanhoudend verskillende verskonings gehad het oor wat die toedrag van sake was voordat hy erken het dat hy

> die geld inderdaad gebruik het, daardie getuienis was op geen stadium in die geringste mate betwis nie."

[6] The court *a quo* found that appellant removed Mrs De Bruyn's cattle from her farm under false pretences and in doing so he intended to permanently deprive her of her property. It appears from the court *a quo's* reasoning as if unlawfulness was not regarded as an element of the crime of theft. I quote the following passage:

> "Daar is namens beskuldigde klem daarop gelê dat hy toestemming gehad het om die beeste te verwyder, of daar toestemming daartoe was is natuurlik nie in geskil nie, dat dit 'n vereiste is dat hy die beeste uit haar (sic) wederregtelik moes verwyder is net so min 'n vereiste vir diefstal."

The court *a quo* then referred to the definition of theft provided by CR Snyman in the fourth edition of Strafreg which definition also appears in Snyman CR, Criminal Law, 5th ed, 483 and reads as follows:

> "A person commits theft if he unlawfully and intentionally appropriates moveable, corporeal property which
> (a) belongs to, and is in the possession of, another;
> (b) belongs to another but is in the perpetrator's own possession; or
> (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."

> The author reminds us at 484 that the elements of the crime of theft are the following: "(a) an act of appropriation; (b) in respect of a certain type of property; (c) which takes place unlawfully (wederregtelik) and (d) intentionally (including an intention to appropriate)." (my emphasis and translation.)

The court *a quo* proceeded and made the further unfortunate remark:

> "Daar is dus geen vereiste vir diefstal dat beskuldigde sonder toestemming die vee uit Me De Bruyn se sorg moes verwyder het nie."

I shall deal with this *infra.*

IV THE UNCONTESTED EVIDENCE

[7] The following evidence is either uncontested and/or common cause and/or is corroborated by objective facts and must be accepted as proven:

1. Appellant attended complainant's farm on about 5 June 2013 and a discussion ensued pertaining to the possible selling of complainant's cattle which were not in a good condition at the time.

2. Appellant, alleging that he was a representative of Karan Beef, indicated that he could arrange for the cattle to be transported to a feedlot in Phillipstown and once the cattle had been fed for a month they could be taken to the local abattoir to be slaughtered where after complainant would receive the proceeds due to her. No price was discussed although complainant mentioned to appellant that the value of the cattle was about R500 000. Appellant indicated that he would arrange vehicles to transport the cattle.
3. The next day appellant arrived unannounced at the kraal on complainant's farm where the cattle were kept. He was accompanied by Mr Laas, ("Laas") the second State witness, the owner of a feedlot and abattoir in Bloemhof. When complainant arrived at the kraal and showed her dissatisfaction pertaining to Laas' attendance, appellant indicated that he was merely brought along to establish how many trucks would be required to transport the cattle.
4. Later that day two trucks arrived and the cattle were loaded and removed from the farm after appellant had filled out two stock removal certificates indicating the required details such as the name and address of the owner, particulars of the trucks and cattle to be transported, the identity of the new owner and the destination of the cattle. Appellant was merely required to sign the documents which she did on 6 June 2013.
5. By the time the stock removal certificates were signed, appellant had already sold complainant's sixty cattle to Laas and obtained payment in the amount of R220 000, being the agreed selling price, by way of a cash cheque issued and

cashed at the bank whereupon the cash was handed by Laas to appellant.

6. Laas was informed by appellant that he acted as agent for complainant who would not consent to the removal of the cattle unless the selling price of the cattle was paid in cash.
7. Contrary to the agreement entered into between appellant and complainant, appellant indicated in the stock removal certificates that he had become the new owner of the cattle and his residential address was given as Phillipstown. The cattle were to be transported from Hertzogville to Phillipstown.
8. Contrary to the oral agreement as well as the “consent” given in the stock removal certificates, the cattle were never taken to Phillipstown, but to Laas who have them slaughtered for his own account.
9. After a month complainant started to make enquiries about the whereabouts of her cattle and appellant directed her to a certain person at the abattoir who informed her that the abattoir was not in business due to faulty machinery. She contacted Karan Beef who told her that appellant did not work for them and that they did not have a feedlot in Phillipstown.
10. She confronted appellant hereafter who proffered several versions, but eventually admitted that he sold the cattle to Laas and that he had spent the money received. Notwithstanding several undertakings by appellant, even with the assistance of an attorney, Mr Jacques le Grange of Warrenton, appellant failed to pay the amount of R403 000 which he admitted was due to her and even offered to pay in two instalments, to wit R250 000 on 23 October 2013 and R163 000 on or before 28 November 2013.

11. Although in dispute, I am prepared to accept the evaluation of the evidence by the court *a quo* to the effect that appellant never paid complainant or her son any amount in respect of the cattle which he had sold to Laas. Appellant's version about payment in cash in the amount of R190 000 to complainant's son was never put to complainant, but in any event appellant contradicted himself in so many instances that his version cannot, even on its own be accepted as reasonably possibly true. No purchase price was ever agreed upon between appellant and complainant and the sale to Laas was not communicated to complainant until much later after appellant had painted himself into a corner.

Notwithstanding the undisputed facts tabulated *supra*, it is necessary to consider certain legal principles where after an evaluation of the court *a quo's* judgment will be undertaken. It needs to be said at this stage that Mr Strauss, appearing for the State, did not support the judgment and submitted that the appeal against conviction should succeed. However, he did not present authorities for the conclusion arrived at, neither in his written heads of argument, nor in oral argument.

V APPLICABLE LEGAL PRINCIPLES

[8] It is an established principle that where an appeal is lodged against a trial court's findings of fact the court of appeal must take into account that that court was in a more favourable position than itself to form a judgment. Even when inferences from proven facts are in issue the court *a quo* may also be in a more

favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore if there are no misdirections on the facts a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings, unless it is convinced that these are wrong. See **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 705-6. Therefore in order to interfere with the court *a quo*'s judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory or where the record shows them to be such. See also **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at para [15] where the SCA stated that it is only in exceptional cases that it would be entitled to interfere with the trial court's evaluation of oral evidence.

[9] It is acceptable in evaluating the evidence in totality to consider the inherent probabilities and the following *dictum* by Heher AJA, as he then was, in **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15] is apposite: "The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[10] An accused's version cannot be rejected merely because it is

improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. See **S v Shackell** 2001 (2) SACR 185 (SCA) at para [30] which I quote:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

See also **Olawale v The State** [2010] 1 All SA 451 (SCA) at para [13].

[11] Section 208 of the Criminal Procedure Act, 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. When it comes to the consideration of the credibility of a single witness a trial court should weigh the evidence of the single witness and consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told, despite any shortcomings, contradictions or defects in the evidence. See **S v Sauls and Others** 1981 (3) SA 172 (AD) at 180E-G.

[12] The failure to call an available witness may not be without consequences, especially where the State relies on the evidence of a single witness. The failure by the State to call such further witness may in particular circumstances justify the inference that, in the prosecutor's opinion, such evidence might possibly give rise to contradictions which could reflect adversely on the credibility and reliability of the single State witness. See **S v Teixeira** 1980 (3) SA 755 (AD) at 764A - B. This aspect will be considered *infra* insofar as complainant's son was not called to testify.

[13] I referred to the definition of theft advanced by Snyman *supra* and do not intend to repeat same. The same applies to the elements of the crime of theft. If the court *a quo* really wanted to indicate that unlawfulness is not an element of the crime of theft, there can be no doubt that he committed a serious misdirection and an error in law. Consent by a person who would otherwise be regarded as the victim of an accused's conduct may in certain cases render the accused's otherwise unlawful conduct lawful. As Snyman clearly indicates at 127, theft is one of those crimes in respect of which consent may operate as a ground of justification excluding unlawfulness.

[14] It is one thing to rely on consent as a defence excluding unlawfulness, but another to succeed with such defence. I indicated in the previous paragraph that consent may operate as

a ground for justification in a crime such as theft. It is important to note that the consenting person must be aware of the true and material facts regarding the act to which he or she consents. It was stated as follows in **Waring and Gillow Ltd v Sherborne**1904 TS 340 at 344 and I quote:

> "It must be clearly shown that the risk was known, that it was realised, and that it was voluntary undertaken. Knowledge, appreciation, consent - these are the essential elements."

Jonathan Burchell holds the following view in South African Criminal Law and Procedure, 4th ed, vol 1 at ch 14, 237: "In the case of theft it is contended that a taking is *invito domino* (without the owner's consent) unless the consent is real and that consent is not real for the purpose of the criminal law if it is induced by fraud whether or not intention to pass ownership is nullified. Where X induces Y to hand to him R200 on the pretext that he will bank it for him and X makes off with the money, it is theft (even though it is also theft by false pretences and fraud) because, although Y consents to hand over the money, he does not consent to X stealing it."

[15] Fraud is defined by Snyman at 531 as follows:

> "Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."

Appellant was not arraigned for fraud and it is also not a competent verdict in respect of a charge of theft, but I shall briefly deal therewith in evaluating the evidence as the court *a quo* opined that appellant's conduct fell within the definition of fraud.

[16] Notwithstanding criticism our law still acknowledges the offence of theft by false pretences which is defined by Snyman at 543 as follows:

> "A person commits theft by false pretences if she unlawfully and intentionally obtains movable, corporal property belonging to another with the consent of the person from whom she obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates it."

The author describes the elements of the crime to be the following:

> "(a) a misrepresentation (b) actual prejudice (c) a causal link between the misrepresentation and the prejudice (d) an appropriation of the property (e) unlawfulness and (f) intention."

[17] Kruger A, Hiemstra's Criminal Procedure, issue 9, summarises the differences of opinion of our courts and authors pertaining to the crime of theft by means of false pretences as follows at 26-23:

> "There is a difference of opinion on whether finding of "theft by means of false pretences" is competent on a charge of theft. The concept was correctly described by Van den Heever J in S v Mofoking 1939 OPD 117 as a deformed legal concept and by De Wet in *Strafreg* 4th ed at 416 as a monstrosity. The offence is nothing other than fraud. Hunt *Criminal Law II* at 754 calls this a "shadowy and ambiguous crime." He says it is fraud, although not called such. The Free State High Court in S v Kudjiwane 1975 (3) SA 335 (0) unambiguously decided that on a charge of theft no finding of theft by false pretences is possible. One consideration in

coming to that conclusion was that theft by false pretences is a more serious crime than theft *simpliciter* because false representations are added. The prosecutor should simply see to it that theft is charged according to the facts or that, if there was misrepresentation, fraud is charged.

In the Transvaal Provincial Division the origin of the view that such finding is possible is in R v Hyland 1924 TPD 336. The correctness of this view was doubted in several cases discussed in R v Levitan 1958 (1) SA 639 (T) where the Hyland principle was grudgingly accepted. In S v Stevenson 1976 (1) SA 636 (T) the designation of the offence was rejected *obiter.* The Natal High Court has not rejected the offence, as either an *eo nomine* offence or as a competent verdict (R v Teichert 1958 (3) SA 747 (N); S v Nkomo 1975 (3) SA 598 (N)). The view in the Natal Provincial Division is that the particulars of the false pretences must be given otherwise the accused would be prejudiced.

It is submitted that the offence *eo nomine* is unnecessary and that it is not a competent verdict on a charge of theft because section 264 does not authorise it, nor does section 270 because it is a wider offence than theft. The charge should simply be fraud."

[18] Snyman at 544 states that the *"(C)riminal law would be none the poorer if this crime were discarded."* The author submitted that it would not be satisfactory to treat all cases of theft by false pretences simply as cases of fraud and that the best way of treating such cases would be to charge the accused with ordinary theft, but to include a specific allegation in the charge sheet to the effect that the accused obtained the property as a result of false pretences. For this submission the author relies on **Levitan** and **Teichert** *supra* as well as **S v Knox** 1963 (3) SA 431 (N) and **S v**

Salemane 1967 (3) SA 691 (O). Snyman's approach is supported by Du Toit *et al,* Commentary on the Criminal Procedure Act, service 56, vol 1 at 26-17.

[19] Having referred to the views of Kruger, Snyman and Du Toit *et al supra*, it is necessary to consider the Free State judgments of **Salemane** and **Kudjiwane** *supra* in more detail. In **Salemane** the court accepted at 692C-F and 694A-E that theft by false pretences as a crime *eo nomine* existed, but stated that theft *simpliciter* was sufficiently wide to include theft by false pretences and that accused persons could be successfully charged with theft even where the State relies on false pretences. Where evidence of false pretences is available, the prosecutor may choose in a judicious manner whether to charge in respect of theft or theft by false pretences. If the prosecutor decides to proceed with a charge of theft, the court must consider with a view to prejudice whether the accused is entitled to further particulars, even if he does not ask therefore.

[20] In **Kudjiwane** the Free State High Court accepted the correctness of the reasoning and conclusions in **Salemane** at 336E-G, but concluded that insofar as theft by false pretences includes an element of falseness, it is a more serious crime than theft and therefore a conviction of theft by false pretences is not permissible on a charge of ordinary theft.

[21] I could not find any judgment on the relevant topic, save for the old authorities quoted, but for the recent judgment of the Supreme Court of Appeal in **S v Mia and Another** 2009 (1) SACR 330

(SCA). In this judgment the SCA found that theft was a generic offence that encompasses theft by false pretences. The court found that although fraud was not a competent verdict on a charge of robbery, it was competent for a court to convict an accused on the competent verdict of theft where the charge is one of robbery. It is apposite to quote the relevant passage of the judgment in full which reads as follows:

> "[16] That is not what happened here. No sooner had Ebrahim voluntarily put the money on the table than the unexpected happened. The 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) 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 239E - 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) S.A. 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 S.C. 421, De Villiers, C.J., 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 E.D.C. 163, Kotze, J.P., 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 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 O.P.D. 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 T.P.D. 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, secs. 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." (emphasis added.)

[22] Notwithstanding some of the old authorities it appears as if the **Mia** judgment is authority for the usefulness of the crime of theft by false pretences. More importantly, when on a charge of theft the evidence shows that the accused committed theft by false pretences, there is no reason why he/she should not be convicted of theft as charged.

[23] An accused person's right to a fair trial, which rights includes the right to be informed of the charge with sufficient detail to answer it and to have adequate time and facilities to prepare his/her defence as set out in s 35(3) (a) and (b) of the Constitution has not been considered in **Mia** and bearing in mind the constitutional era in which we find ourselves, it is required to consider the rights of accused persons in more depth as was the case in some of the older authorities. The issue of prejudice must be scrutinised in order to come to a just conclusion, bearing in mind the particular facts in *casu*. Criminal trials have to be conducted in accordance with notions of basic fairness and justice. The nature of the right to a fair trial as a comprehensive and integrated right has been emphasised in several judgments. Fairness is obviously not a one way street and the right to a fair trial requires fairness to the accused as well as the public as represented by the State. See **S v Basson** 2007 (1) SACR 566 CC at para 26 and authorities quoted.

VI EVALUATION OF THE COURT *A QUO'S* JUDGMENT AND SUBMISSIONS OF THE PARTIES

[24] As indicated *supra* Mr Strauss on behalf of the State does not support the conviction. Although he did not refer us to any legal principles and/or authority, his conclusion is based on the following two factors:

1. Appellant was in possession of stock removal certificates signed by the complainant.
2. Appellant's version that he paid complainant's son could not be refuted by the complainant.

[25] Appellant's legal representative relied heavily on the signing of the two stock removal certificates and that the State failed to prove beyond reasonable doubt that no payment was made as alleged by appellant, i.e. that appellant's version that he paid the proceeds of the cattle to complainant's son could reasonably possibly be true.

[26] I already alluded to the information contained in the two stock removal certificates. Contrary to the oral agreement entered into between appellant and complainant that the cattle be taken to a feedlot in Phillipstown to be fed and slaughtered once their condition improved, the documents filled out by appellant and signed by complainant indicate quite clearly that appellant immediately became the owner of the cattle which were to be transported to Phillipstown. Complainant's consent was given on the basis that she would remain owner of the cattle which would

be fed for a month at the feedlot of Karan Beef, where after they would be slaughtered and she be paid the proceeds once the costs of feeding have been deducted. There can be no doubt that she would never have signed the stock removal certificates if she knew that appellant had already sold the cattle to the second State witness who had paid him cash in the amount of R220 000 and which information (and payment) appellant withheld from her.

[27] Consent must be real and informed. Fraud vitiates consent. It does not matter whether there was active disclosure or a fraudulent non-disclosure. The example given by Burchell quoted *supra* is apposite, and so also the factual basis on which the one appellant was convicted in **Mia** *supra.* It is highly unlikely and unthinkable that any reasonable person and owner of cattle would sign stock removal certificates indicating that they were to be transported to Phillipstown on the other side of the Gariep River and in a totally different direction than Bloemhof, an aspect that I may take judicial notice of, in order to be fed in a feedlot for a month, if such owner had been informed that the cattle were already sold by the person responsible for their transport, and that they were on their way to an abattoir owner of Bloemhof to be slaughtered and who had already settled the purchase price by paying the person responsible for the transport in cash.

[28] The charge sheet does not reflect a specific allegation to the effect that appellant obtained the cattle as a result of false pretences as suggested by *inter alia* Snyman. However and notwithstanding the views of the author as well as some of the

other views referred to *supra*, I am convinced that appellant had a fair trial and cannot claim that any of his constitutional rights have been infringed. He was represented by an experienced attorney who also argued the appeal before us. Appellant was clearly fully prepared for the case, well-knowing what the complainant's testimony would be. Her witness statement was even put to her during cross-examination. If her version wasn't known before the trial started, which is highly unlikely, it would have become known immediately when the complainant started to give her testimony. There was no objection to her testimony; she was not confronted for providing a different version as that contained in her witness statement and there was at no stage a request for a postponement to consider appellant's rights.

[29] Appellant's version that he paid R190 000 in cash for the cattle to complainant's son is clearly false if his contradictory versions are considered in conjunction with the totality of the evidence. This version was never put to complainant. He made a poor impression on the court *a quo* and as far as I'm concerned, a reading of the record confirms that the court *a quo* was correct. Appellant was a bad witness who changed his version several times and his own version indicates the fraudulent nature of his actions.

[30] Although it might have been prudent in a different situation to make a negative deduction in respect of the State's failure to call the complainant's son to testify pertaining to the alleged payment, I'm satisfied that this was not such a case. The appellant's version is a concoction and his testimony (of which there are

several versions) that he paid complainant's son is so improbable, considered with the totality of the facts that it could not be found to be reasonably possibly true. He is clearly a fraudster who relied on religion and even insisted on praying for complainant's unhealthy son to soft-soap her, a widow faced with a severe drought, a bad harvest and sub-standard cattle as a result, in order to do fraudulent business with her and thereby dispossessing her of sixty cattle to a value in excess of R400 000 which he sold for the meagre price of R220 000, keeping the money for himself.

[31] Having considered the uncontested evidence, appellant's defence of consent never stood any chance to succeed. Although complainant was in many aspects a single witness, the material aspects of her version was not contested and there was no reason why the court *a quo* should not have accepted it. The element of unlawfulness and all other elements of the crime have indeed been proven by the State beyond reasonable doubt. I say this notwithstanding the difficulty I have with the court *a quo's dicta* mentioned *supra*. The allegation that payment has been effected to complainant's son at a later stage is really irrelevant in respect of the offence of theft and the accepted evidence, but in any event the court *a quo* was correct in rejecting appellant's version as false and not reasonably possibly true. It was not necessary to call complainant's son and no negative deduction is called for. Consequently the court *a quo* was correct in convicting appellant of theft as charged.

[32] I have considered the court *a quo* reasons for the sentence of six years' imprisonment, the personal circumstances of appellant as well as the evidence in aggravation of sentence. I have also considered that appellant prayed for a wholly suspended sentence and informed the court *a quo* that he was prepared to judgment being granted against him in terms of s 300 of the Criminal Procedure Act, 51 of 1977 for R220 000, being complainant's alleged damages, the debt to be paid off with the help of his family in an initial amount of R20 000 and monthly instalments of R2 000 each. The amount offered is wholly inadequate. Complainant did not ask for an order in terms of s 300 and she was also unaware of the offer and did not consent thereto. Furthermore appellant's financial position was such that his expenditure exceeded his income at the time and in all likelihood he would not be able to keep up his undertaking. Finally, it would take a diligent debtor more than eight years to settle the capital of the debt, whilst no provision was made for payment of any interest.

[33] Stock theft is prevalent in the Free State and Northern Cape. Farmers suffer thousands of Rands of damages annually and these kinds of crimes have a major negative impact on the economy of our country as a whole and the farming community in particular. Notwithstanding the imposition of heavy sentences, there is little or no evidence of a decrease in crime statistics.

[34] In **S v Oosthuisen en 'n ander** 1996 (1) SACR 475 (O) at 476f-j the court remarked that stock theft had reached epidemic

proportions and that the tide would not be stemmed unless more severe sentences were to be imposed. Also, in the Northern Cape there was during the same year a plea for more severe sentences. See: **S v Seiphoro** 1996 (2) SACR 513 (NC) at 518-9. In **S v Oosthuizen** 1993 (1) SACR 10 (AD) stock theft was committed on three occasions and a total of sixteen ewes were stolen. The Appeal Court found the effective sentence of 4 years' imprisonment to be in order. In **S v Tyres** 1997 (1) SACR 261 (NC) the appellant's sentences were increased on appeal to 24 months each for theft of 15 and 18 sheep respectively. In **S v Velebhayi** 2015 (1) SACR 7 (ECG) sentences of 14 years' imprisonment for two appellants and 16 years' imprisonment for the third appellant were imposed on appeal. A total of 168 sheep were stolen over a period of two months from four farms. Bearing in mind the above sentences and others from our lower courts normally found to be in order on review and appeal, the sentence imposed is not out of kilter with those imposed in this Province, especially if the quantity of the cattle and their value as well as the manner in which the crime has been committed are taken into consideration.

[35] I could not find any misdirections committed by the magistrate and I'm also not convinced that the sentence is disproportionate with the loss suffered by complainant. Therefore the appeal against the sentence should be dismissed as well.

VII CONCLUSION

[36] In conclusion it is my view that the state has proven its case beyond reasonable doubt and that the sentenced imposed cannot successfully be attacked on any grounds. Therefore the appeal against conviction and sentence should be dismissed.

VIII ORDERS

[37] Consequently the following orders are made:

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence imposed by the court *a quo* are confirmed.

_____

JP DAFFUE, J

I concur

_____

N GELA, AJ

On behalf of appellant: M Coetzee
Instructed by: Mario Coetzee Attorneys
Pretoria

On behalf of the respondent: M Strauss
Instructed by: Director of Public Prosecutions

Bloemfontein