THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 532/07

In the matter between :

IAN EUGENE STOKES Appellant

and

THE STATE Respondent

Before:	**STREICHER, FARLAM, CACHALIA JJA, LEACH & KGOMO AJJA**
Heard:	**19 MAY 2008**
Delivered:	**30 MAY 2008**
Summary:	Extradition – s 19 of Act 67 of 1962 – only offences disclosed to requested state and fugitive constitute offences in respect of which extradition was sought – 'sought' to be interpreted to mean 'successfully sought'.
Neutral citation:	**Stokes v The State (532/07) [2008] ZASCA 72 (30 May 2008)**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The appellant, after having been extradited by the United States of America to South Africa, was served with an indictment in terms of which he is charged with theft (count 1) and three counts of fraud alternatively theft (counts 2, 3 and 4) committed before his extradition. He contends that, in terms of s 19 of the Extradition Act 67 of 1962, he may not be charged in respect of these offences in that they are not the offences in respect of which his extradition was sought. His application, on this ground, to the Durban and Coast Local Division (the court a quo) failed in respect of counts 1 and 2 but succeeded in respect of counts 3 and 4. With the leave of the court a quo he now appeals against the finding in respect of counts 1 and 2.

[2] Section 19 provides as follows:

'No person surrendered to the Republic by any foreign State in terms of an extradition agreement . . . shall, until he or she has been returned or had an opportunity of returning to such foreign . . . State, be detained or tried in the Republic for any offence committed prior to his or her surrender other than the offence in respect of which extradition was sought or an offence of which he or she may lawfully be convicted on a charge of the offence in respect of which extradition was sought, unless such foreign . . . State or such person consents thereto: Provided . . .'

[3] The only issue to be determined is whether the appellant's extradition was sought in respect of the offences alleged in counts 1 and 2. These counts read as follows:

Count 1

'[D]uring the period 14 September 1998 to 02 November 2000 and at or near La Lucia Ridge in the district of Durban the accused unlawfully and intentionally took and stole from the persons referred to in column 2 the monies reflected in column 3 totaling the amount of R6 877 215,60 . . .

and the accused thus created a general deficiency of R6 877 215,60 . . . in respect of these monies so deposited, the property or in the lawful position of the persons listed in column 2 of Annexure 'A'.'

Count 2

'On or about August 1998 and at or near Durban in the regional division of KwaZulu/Natal the accused did unlawfully and with intent to defraud, misrepresent to Robert Sevel that:

1. He had submitted numerous claims to the RAF,
2. That the claims submitted by him had been processed,
3. That the RAF had paid out on the claims submitted by him,
4. He had made a substantial profit out of the processing of the claims submitted by him to the RAF.

And did thus induce Robert Sevel to his prejudice or potential prejudice to:

1. Believe that by depositing money with the accused for investment in the business of discounting RAF claims a substantial profit was to be made.
2. Enter into a partnership with the accused and form the close corporation known as R & I Promotions CC.
3. Deposit an amount of R2 000 000,00 (TWO MILLION RAND) into a bank account of the accused.

Whereas when the accused made the said misrepresentation he knew that

1. He had submitted no claims to the RAF.
2. The RAF had not paid out in respect of any claims submitted by him.
3. No profits had been made out of the processing of claims against the RAF submitted by him.
4. And that any or all representations and or information made to or supplied to Robert Sevel was false.

And therefore the accused is guilty of fraud.

In the alternative

Theft

The accused is guilty of the crime of theft in that on or about 14 September 1998 and at or near Durban in the Regional Division of KwaZulu-Natal, the accused did unlawfully and intentionally steal cash money in the sum of R2 000 000,00 . . . the property or in the lawful possession of Robert Sevel.'

[4] The appellant practised as an attorney in South Africa until 2 November 2000 when he left the country and took up residence in the United States of America. Shortly after he had left South Africa several people laid criminal charges against him as a result of which the Government of South Africa ('the RSA') initiated steps to have him extradited to South Africa. These steps led to a warrant for the appellant's arrest being issued by The United States District Court for the Northern District of Georgia Atlanta Division. The warrant was issued on the strength of an affidavit by one Candiss L Howard an Assistant United States Attorney.

[5] In the affidavit by Howard, she stated that there is an extradition treaty in force between the United States and the Republic of South Africa and that she was acting on behalf of the RSA who had asked the United States through diplomatic channels for the provisional arrest of the appellant with a view to his extradition. She stated that according to information provided by the RSA a warrant had been issued for his arrest in respect of charges of theft, contravention of s 78(4) of the Attorneys Act 53 of 1979 and contravention of the Insolvency Act 24 of 1936. She stated, furthermore, that sworn statements had been obtained from -

(i) various people who allege that money had been entrusted to the appellant in his capacity as an attorney and that he had misappropriated the money so entrusted to him;

(ii) Mr Gregory Noel Kruger to the effect that he is the president of the Kwa Zulu Natal Law Society, and that the appellant's name had been struck from the roll of attorneys due to complaints that he had misappropriated trust moneys; and

(iii) Mr Hendrik Lourens Martinus Du Plessis, stating that he is the claims director of the Attorneys Fidelity Fund, a fund whose main purpose is to reimburse members of the public who suffered pecuniary loss as a

result of theft of trust monies, which had been entrusted to an attorney in the ordinary course of his practice; and that the fund had received claims totalling R26 842 972,99.

[6] It is common cause between the parties that there is indeed an extradition treaty between the US and the RSA in terms of which the parties agreed to extradite to each other, pursuant to the provisions of the treaty, persons whom the authorities in the requesting state had charged with or convicted of an extraditable offence.

[7] In terms of article 9 of the treaty a request for extradition has to be supported by various statements and documents. Article 13, however, makes provision for a provisional arrest. The article provides as follows:

‘1 In case of urgency, the Requesting State may, for the purpose of extradition, request, the provisional arrest of the person sought pending presentation of the documents in support of the extradition request. . . .

2 The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a description of the offence(s);

(d) a concise statement of the acts or omissions alleged to constitute the offence(s);

(e) a description of the punishment that can be imposed or has been imposed for the offence(s);

(f) a statement that a document referred to in Article 9(3)(a) . . . exists; and

(g) a statement that the documents supporting the extradition request for the person sought will follow within the time specified in this Treaty.’

The document referred to in subpara (f) is a warrant or order of arrest issued by a judge or other competent authority.

[8] Upon his arrest the appellant deposed to an affidavit in terms of which he stated that he had been fully informed by his attorney of his rights under the extradition treaty in force between the United States and the Republic of South Africa and that he waived those rights and petitioned the Court to expedite his return, in custody, to the Republic of South Africa. Article 19 of the treaty makes provision for such a waiver. It reads as follows:

'If the person sought consents to be surrendered to the Requesting State, the Requested State may surrender the person as expeditiously as possible without further proceedings.'

[9] As a result of the appellant's waiver he was returned to South Africa and documents which had already been prepared in support of a request to the US to extradite him were never forwarded to the US. The court a quo held that, in the light of the waiver, the provisional arrest application became the source for later determining 'the offence in respect of which extradition was sought' for purposes of the application of s 19 of the Act. The court a quo, thus, in effect, held that the documents prepared in support of the request but not forwarded to the US were irrelevant. Counsel for the appellant submitted that the court a quo erred and that those documents were relevant in order to determine in respect of which offences the extradition of the appellant was sought. He submitted that the appellant's waiver and his surrender by the US on the strength of his waiver are irrelevant as one does not have to determine in respect of which offences the appellant waived his rights and was surrendered, one has to determine in respect of which offences the appellant's extradition was sought.

[10] Section 19 differs from what is known as the doctrine of speciality in terms of which 'the person surrendered shall be tried and punished exclusively for offences for which extradition had been requested and granted' (not sought) except after the fugitive offender has been given an

opportunity to return to the extraditing country.[1] However, the word 'sought' in s 19 could not have been intended to mean anything other than 'successfully sought'. This is so because extradition may have been sought in respect of offences A, B and C and may have been granted only in respect of offence A. To interpret 'sought' so as to mean only 'sought' and not 'successfully sought' would have the anomalous result that, in terms of the section, the fugitive may be prosecuted in respect of offences B and C without the consent of the requested state or the fugitive, whereas the section specifically requires such consent in respect of offences other than offences A, B and C. To interpret 'sought' so as to relate to offences for which extradition was required but not disclosed to the requested state or to the fugitive would have an equally anomalous result.

[11] By the time that the appellant was surrendered to the RSA no document in support of a formal request for extradition had reached the US authorities. Counsel for the appellant submitted that these documents were nevertheless relevant in so far as they defined the offences in respect of which extradition of the appellant was required more narrowly. I do not agree. Not having forwarded these documents to the US the RSA never sought the extradition of the appellant in respect of the offences described in those documents. At best for the appellant the RSA intended to seek his extradition in respect of those offences but never advised the US and the appellant accordingly. The US was advised that the extradition of the appellant was sought in respect of the offences mentioned in the application for provisional arrest, the appellant waived his rights on that basis and the US surrendered him to the RSA on the strength of that waiver. Those are the offences in respect of which he may be prosecuted and neither the US nor the appellant can have any complaint about

[1]Ian Brownlie *Principles of Public International Law* 4 ed p316; *Harksen v President of the Republic of South Africa* 1998 (2) SA 1011 (C) at 1039F-G; *Zoeller v Attorney-General* (Cth) (1987) 76 ALR 267 (Fed C of A); *Halsbury's Laws of England* 4 ed vol 18 para 217; *Harksen v Minister of Justice and Constitutional Development* 2003 (1) SACR 489 (C) at 499 para [39].

such a prosecution. The question that has to be decided is, therefore, as was held by the court a quo, whether the offences alleged in counts 1 and 2 of the indictment are the offences in respect of which the appellant's extradition was sought in terms of the application for his provisional arrest.

[12] In count 1 it is alleged that the appellant received from each of thirteen persons (individuals or firms) an amount of money, in total R6 877 215,60, to be held in trust by him and that he committed theft in that he stole that amount from the persons mentioned, thereby creating a general deficiency of R6 877 215,60. This is a charge as envisaged in s 100 of the Criminal Procedure Act 51 of 1977 which reads as follows:

'On a charge alleging the theft of money or property by a person entrusted with the control thereof, the charge may allege a general deficiency in a stated amount, notwithstanding that such general deficiency is made up of specific sums of money or articles or of a sum of money representing the value of specific articles, the theft of which extended over a period.'

[13] Relying on *S v Verwey* 1968 (4) SA 682 (A) at 689D-E counsel for the appellant submitted that, notwithstanding the provisions of s 100, each specific theft would have to be proved. As the names of only three of the thirteen persons mentioned in the indictment were mentioned in the application for the provisional arrest, he submitted that a charge of theft in respect of the other ten were to be excluded in terms of s 19 as the appellant's extradition had not been sought in respect of those offences.

[14] Again I do not agree with the submission. The application for the appellant's provisional arrest made it clear that his extradition was sought in respect of the theft of moneys which had been entrusted to him and which he had stolen. In support of the contention affidavits had been obtained from a number of people to the effect that they had entrusted money to the appellant

and that he had misappropriated such money. It is also stated in the application that the Attorneys Fidelity Fund, whose main purpose is to reimburse members of the public who have suffered pecuniary loss as a result of theft of trust monies entrusted to an attorney in the ordinary course of his practice, had received claims totalling R26m. Nowhere is it suggested that the extradition of the appellant is or would only be sought in respect of the monies stolen from the persons whose names are mentioned and from whom affidavits had been obtained. The application does not purport to identify all the people from whom money had been stolen or the exact amount of the theft. If the intention was to charge the appellant with theft only in respect of the money alleged to have been stolen from the persons whose names are mentioned, the reference to the affidavit by Du Plessis would have been irrelevant. I, therefore, agree with the court a quo that 'the factual statements made at the time, at the very least, also did not exclude further banking accounts and/or complainants asserting the loss of money entrusted to the applicant, coming to light and being added to the list of complainants making up count 1'. The extradition of the appellant was sought in respect of the misappropriation of money entrusted to him by the people whose names are mentioned in the application as well as others whose names were not disclosed. It follows that the appellant's application was correctly dismissed in so far as it related to count 1.

[15] The main charge contained in count 2 is one of fraud and the alternative is one of theft. In respect of the fraud charge it is alleged that the appellant made a number of misrepresentations to Robert Sevel and thereby induced him to his prejudice or potential prejudice to deposit an amount of R2 000 000 into a bank account of the appellant. In the application for provisional arrest it is alleged, in so far as Sevel is concerned, that the appellant and Sevel were members of a close corporation. The close

corporation was to purchase road accident claims and pursue the claims against the Road Accident Fund. Sevel provided working capital in an amount of R2 000 000 by paying the amount into the trust account of the appellant. The appellant, however, did not purchase any claims but stole the money. No mention is made of fraud or of any misrepresentations ever having been made by the appellant.

[16] The court a quo held in regard to count 2 that although fraud was not mentioned in the application for the provisional arrest of the applicant 'the allegations though lacking in detail and not always clearly verbalised therein, nevertheless and if accepted at face value, in substance provide an acceptable basis for the formulation of count 2 in its present form'. In my view the court a quo erred in this regard. As stated above, no indication whatsoever was given in the application that the extradition of the appellant was being sought in respect of misrepresentations having been made by him. Fraud is therefore not an offence in respect of which the appellant's extradition was sought.

[17] The appellant did not contend that the alternative charge of theft under count 2 had not been disclosed in the application. It follows that the appeal in so far as it relates to the main charge of fraud under count 2 should succeed and that it should be dismissed in respect of the alternative charge of theft.

[18] The following order is made:

(i) The appeal in so far as it relates to count 1 and the alternative charge of theft under count 2 is dismissed.

(ii) The appeal in so far as it relates to the main charge of fraud under count 2 is upheld.

(iii) The following order is substituted for the order of the court a quo in so far as it relates to counts 1 and 2:

(a) The application in so far as it relates to count 1 and the alternative charge of theft under count 2 is dismissed.

(b) The application in so far as it relates to the main charge of fraud under count 2 succeeds and it is declared that the State may not proceed with the prosecution in respect of this charge.

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P E STREICHER
JUDGE OF APPEAL

CONCUR:

FARLAM JA)

CACHALIA JA)

LEACH AJA)

KGOMO AJA)