STANISLAUS NYAMBUYA
and
GOLIATH FITIZALIMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 6 August 2015 & 18 May 2016

Criminal Appeal

I Mureriwa, for the appellant
Mrs S Fero, for the respondent

HUNGWE J: Both appellants were both convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. They were sentenced to 24 months imprisonment which were suspended on condition of both good behaviour as well as performance of community service. Four grounds of appeal were raised against the propriety of the conviction and only one ground against the propriety of the sentence imposed. The question which ought to be answered in this appeal is whether, in a case of a double sale, the seller can properly be charged and convicted of fraud.

The facts upon which the court *a quo* convicted the two appellants can be summarised as follows. In the mid 1980's the first appellant was the registered owner of Stand 1055, Makomo, Epworth, Harare, ("the stand"). It was administered by the Epworth Local Board as State land. Individuals allocated the stands at that time were not permitted to "sell" these as the Local Board could not legally effect cessions to the "would be" buyers. But as is the norm in the world of commerce, the urge to sell arose and the commercial imperative took over. People began commercialising their rights in the stands. The local authority was aware of how the "sellers" went round the difficulty placed in the business arrangement of this section of the real estate industry. The registered lessee who intended to sell would cause the prospective "buyer" and himself/herself, as "seller", to appear before the Board and indicate to the authorities that he was giving up physical possession and occupation of the stand. He/she was leaving this person in occupation to look after their stand because he/she is a

relative. Because of the known practice in circumventing the prohibition against selling of rights in land, the local Board devised a plan. In terms of that plan, an aerial survey was physically conducted so as to map out the developed and undeveloped land. Thereafter, the local authority dispatched its officers who would conduct a physical check on the ground to establish who exactly occupied which stand. The authority then opened two registers; one in which the officially registered beneficiary was recorded, the other in which the actual occupier of the stand was recorded.

In respect of stand 1055, the aerial photograph reflected that the first appellant was the registered owner, but a physical check showed that second appellant's sister was in occupation as "owner" and occupier. How this came about constituted the dispute which the trial court resolved by convicting the appellants for fraud. I will return to the findings by that court later in this judgment. I now proceed to set out the grounds of appeal against conviction and the contention advanced for the same during the hearing.

It was contented by the appellants that the court *a quo* grossly erred and misdirected itself by convicting the appellants in spite of the glaring inconsistencies in the State witnesses' testimony.

Secondly, it was contented that the court *a quo* grossly erred and misdirected itself by not giving the appellants benefit of the doubt when it was common cause that the deceased estate was not represented yet it had suffered prejudice arising from the alleged fraud; that the contract of sale between first appellant and the late Violet Dingolo was illegal and therefore of no force or effect; no evidence that any misrepresentation was made to Joseph Marume, the victim of the fraud or that he was induced by the alleged misrepresentation.

Thirdly, the appellants contend that the court *a quo* grossly erred and misdirected itself by disregarding the evidence of the appellants which was subjected to microscopic examination when the burden of proof lay on the State to prove its case.

The fourth and final ground of appeal put forward by the appellants was that the court *a quo* placed undue weight to minor discrepancies in the appellant's evidence whilst downplaying those in the State case.

Mrs *Fero* filed a notice in terms of s 35 of the High Court Act, [*Chapter 7:06*]. In her view, the conviction was unsafe. She recites three reasons for this position. The first reason she gives for her concession is that it was wrong to convict the appellants when the executor of the estate of the late Violet Dingolo did not testify. Secondly she say that the contract of

sale between first appellant and Dingolo was illegal. She however does not demonstrate the basis of the alleged illegality. I am satisfied that in making this submission Mrs *Fero* misconceived the true nature of the contract between first appellant and the late Violet Dingolo. Finally Mrs *Fero,* for the respondent, contends that there was no evidence placed on record regarding the nature of the misrepresentation made to Joseph Marume and the prejudice he suffered as a result thereof.

In his response to the grounds of appeal against conviction, the learned magistrate pointed out that the grounds of appeal were adequately addressed in his reasons for judgment and sentence. In respect of the first ground, the learned magistrate states that in his assessment, the inconsistencies regarding the date when the sale between the first appellant and the late Violet Dingolo was concluded were minor and immaterial when regard is had to the time which had since passed from the date of the transaction. The contention by the magistrate is that these witnesses were giving evidence some nineteen years after the event. Therefore, taking into account the length of this period, a failure to accurately recall the exact date of the transaction was quite understandable. Any inconsistencies in the State witnesses' evidence, in this regard, was not material.

In respect of the second ground of appeal, the learned trial magistrate expressed the view that because the executor of the estate of the late Violet Dingolo could not swear positively to the facts surrounding the issues central to the determination of the guilt or otherwise of the appellants, he was not called. His evidence would, in any event, have been irrelevant since he would have been unaware of what occurred prior to the death of Violet Dingolo. In his view prejudice was suffered, not by the estate of the late Dingolo as the appellants would like to contend, but by Joseph Marume to whom the misrepresentations were made.

The learned trial magistrate found that the evidence given by the former Epworth Local Board officers established that the Board recognized and acknowledged the informal "sales" of land and prepared a separate register for the purpose of identifying those stands in respect of which this had occurred. That register captured the list of people who had "bought" land from the registered "owners" at the time the land was still State land. These "sales" were more of cessions of rights, title and interest in the land than actual sales of land in question since the land was still State land or at least subject to the approval of some other authority. (See: *Ndhlovu* v *Murandu* 1992 (2) ZLR 341 (HC); *Pedzisa* v *Chikonyora* 1992 (2) ZLR 445

(SC); *Bopoto* v *Chikumbu & Others* 1997 (2) ZLR 1 (HC) and *Jangara* v *Nyakuyamba & Others* 1998 (2) ZLR 475 (HC)). The court *a quo* correctly, in my view, rejected the argument in respect of illegality and correctly found that the parallel process amounted to retrospective ratification of the agreements in an effort to regularise the irregular, but not illegal, land "sales".

The court *a quo* found as a proved fact that the misrepresentations were made to Joseph Marume with regard to the availability for purchase of land which, to both appellant's knowledge, had already been sold to Violet Dingolo previously. As such, this piece of land, to their knowledge was no longer available for sale by the first appellant. Acting on this misrepresentation, Joseph Marume had paid US$2 000,00 as the "purchase price" for land which first appellant had divested his title, rights and interest in. consequently, it follows that by "selling" the stand to Joseph Marume, the appellants duped Marume. They no longer had any lawful right to sell this land notwithstanding the fact that the Board records still reflected first appellant as the "owner". The point is that both appellants knew that the transaction involving the late Violet Dingolo was a sale of the same. The local authority was aware of this.

In respect of the final ground of appeal, the learned trial magistrate's reasoning is well set out in both his judgment and response to the grounds of appeal. He points out that there were no material discrepancies in the testimony given to court by the first, second and third state witnesses. These witnesses were testifying to events which occurred some 28 years previously. It is to be expected that the finer details would have escaped their memories after such a time. In any event they had fared well as witnesses thereby winning the faith of the court into believing them. On the other hand the appellants did not gain the same level of confidence from the court. It did not believe them. The trial court gave its reasons for holding them to be less than honest. It took into account that they also would have forgotten their finer details of the matter but rejected their claim that there was no sale of right title and interest in the state.

The Charge

The defence took exception to the charge after the accused had pleaded to the same. It is instructive to note that the appellants conducted their own defence until the closure of the case for the State. Thus although there were patent defects in the charge preferred, one would

not expect a self-acting accused to be conversant with the procedural rules which permit the taking of an exception to the charge and the point in time such an exception ought to be made. In any event the appellants do not base their appeal on the contention that the charge, as pleaded to, was defective. Their grounds of appeal make no reference to such a defect as permitting the setting aside of the conviction. In fact Mr *Mureriwa*, for the appellants, made an application for discharge when he was instructed by the appellants, mid-trial. The application for discharge at the close of the State case was made in terms of s 198(3) of the Criminal Procedure and Evidence Act, *[Chapter 9:07]*. That application was correctly dismissed as a *prima facie* case had been made out at the close of the case for the State. However, the evidence reflects that it is Joseph Marume, rather than the late Violet Dingolo who was misled and deceived into buying something which had long been sold. By virtue of that misrepresentation, Joseph Marume, altered his position by paying US$2 000, 00 to the first appellant with the connivance of second appellant (who vouched that his late sister Violet had not bought the stand), to his actual prejudice. Thus the evidence cured the flawed reference to the late Violet Dingolo as having suffered prejudice. She did not suffer prejudice, and should not, since the true facts are now known. Since no prejudice will be suffered by the appellants by the proposed amendment of the charge, the charge is therefore amended to read as follows:

> "**Fraud** as defined in section 136 of the Criminal Law (Codification and Reform) Act, *[Cap 9:23]* in that on 9th May 2012 and at 20 Scott Road, Hatfield, Harare, the accused persons Stanislaus Nyambuya and Goliath Fitizalimba or one or other or both of them misrepresented to Joseph Marume, a prospective buyer, that stand 1055 Makomo Extension, Epworth, Harare, belonged to Stanislaus Nyambuya and was available for sale by the said Stanislaus Nyambuya or through an agent on his behalf. On the pretext of this misrepresentation, Joseph Nyambuya paid US$2 000, 00 to the said accused as consideration for the said stand. In fact to their knowledge when they received the said amount from Joseph Marume, they both knew very well that Stanislaus Nyambuya had sold stand 1055 to Violet Dingolo now represented by Shella Mukopa, and as such the said Stanislaus Nyambuya did not have a stand to sell. When they made the representation, the accused intended to induce Joseph Marume to act upon the misrepresentation."

In order to secure a conviction for fraud, the State needed to prove each of the essential elements of the crime charged beyond a reasonable doubt.

It will be clear, from a reading of s 136 of the Criminal Law Code, that the essential elements of the crime of fraud consists in the following elements:

(a) someone must makes a false representation;

(b) that misrepresentation is material to the transaction

(c) the misrepresentation is made with knowledge that it is false; or

(d) realising that there was a real risk or possibility of deceiving another person;

(e) the misrepresentation is made with the intention to cause another person to act upon it or to refrain from acting upon it to his or her prejudice; or

(f) realising that there was a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice; and that

(g) the misrepresentation causes actual or potential prejudice to another person.

In the result therefore the State was obliged to prove the above elements before it could secure a conviction. The incorrect reference to Violet Dingolo in the ultimate sentence of the charge is in any event cured by the evidence. (See *R* v *Gola* 1966 RLR 327). In any event s 157 of the Criminal Procedure and Evidence Act, it would seem, appears to provide that it is not necessary for the charge alleging fraud, to disclose the specific person who has suffered prejudice as a result of the accused's conduct.

The evidence

I now turn to deal with the respective grounds of appeal.

The first ground bemoaned the fact that the learned trial magistrate erred in convicting the appellants in spite of the inconsistencies in the testimonies of the State witnesses. This ground was dealt with by the learned magistrate in the following manner. He was aware of certain inconsistencies which were superficial. He held that this did not detract from the credibility of the witnesses. He ascribed these inconsistencies and discrepancies to normal consequences of testifying after a long period where the event was not documented in a systematic way. Compared to the evidence given by the Local Board officials who had records to rely upon, he was satisfied that the witnesses told the truth regarding whether the deceased had bought the stand or was just a care-taker. In my view, his assessment of the evidence is difficult to discredit. In any event, the thrust of the three witnesses' evidence was that the first appellant sold the stand to the Dingolo family for ZW$700, 00. The second appellant was aware of the full facts as he stayed with Violet Dingolo on this property. There was subsequent, subsequent to the sale, bad blood between Violet Dingolo and second appellant who, by that time kept or knew where the documents for the transaction over the land were kept. He then, to fix his sister over their dispute, nicodemously decided to influence the first appellant to sell the stand since no change of name had been effected. He

knew all the facts. This must the reason why first appellant recruited him as his witness when he approached the Epworth Local Board over the sale to Joseph Marume. In my view, the finding that Violet Dingolo had bought the stand from first appellant cannot be faulted. It accords with the probabilities of the matter in light of the evidence given by the local authorities' former employees. It is less likely that Violet Dingolo was a care-taker of the property. It is more likely that she had bought the property hence she lived there without any interference from the first appellant until her death some 28 or so years later.

There was no requirement for Violet Dingolo to testify to this fact as believed by Mrs *Fero,* for the respondent, before a finding on the issue of whether she was a free sitting care-taker tenant or a purchaser. The oral evidence, as well as the circumstantial evidence abounded to make a clear and specific finding without doubt. Issues of credibility are the province of the trial court unless the finding is so grossly unreasonable and contrary to the evidence led that an appeal court interfere. In my view, there is nothing unreasonable in the finding that there was concluded, sometime in 1984 or 1984, a cession of rights, title and interest by the first respondent acting together and in collusion with the second appellant, in favour of the late Violet Dingolo. This was noted by the Local Board who could not register this new position because the first appellant, on the day he and Dingolo and second appellant appeared before it, had no proper means of identity as required by the bye-laws. However, an endorsement to that effect was made. When the second sale was concluded, the Board authorities expressed surprise as to how this could have been allowed. The first sale had been recorded and registered as an endorsement on the two parallel registers.

Sometimes circumstantial evidence may be stronger than real or secondary evidence. In the present case, it would appear to be case that all the circumstances leave one in no doubt as to what took place. The evidence given by the state witness explain why second appellant stands where he does today. He turned against family. He colluded with first appellant. He cast his dye with him in spinning a yarn about the status of the land in issue. The fact is that first appellant sold all his rights, title and interest in stand 1055, Makomo Extension, Epworth, by way of cession in favour of Violet Dingolo way back in 1984 or 1985. It is irrelevant that the sale was not at law recognised, but it was not illegal. There is a world of difference there. It is the form rather than the substance which was not permitted as no authority had been obtained from the State in order for the Board to deal with that land in that way. But nothing stopped people from renouncing their rights in the land in favour of others

and registering the new position. This is the reason why the Board, in full appreciation of this circumstance, opened another register to take care of that new situation which had developed. It was a way of recognising the new sub-lessees. (See *Jangara* (*supra*)).

As for the contention that the appellants ought to have been given the benefit of the doubt for the reasons stated in para(s) 2.1 to 2.6, I am satisfied, as was the learned trial magistrate, that no prejudice was suffered by the estate of the late Violet Dingolo. A fraudulent sale cannot pass title in the res sold thus. Title remained with the seller. This appeal was not called upon to determine the issue as to whether title passed but it seems to me that I must express my prima facie view in light of the evidence led during trial. As I said, there was nothing illegal in the cession concluded between the first appellant and the Dingolo' family. Although Mr *Mureriwa* contends that the sale was illegal, he does not provide the authority for his proposition. I have referred to a chain of case law pointing the other direction. In my view, that case law is good law and has not been over-ruled. Joseph Marume paid US$2 000, 00 on the understanding that the stand was available for sale. It was not. The appellants knew this but went through the motions and managed to get his name on the Board's register. That entry does not pass the rights it purports to because it is founded on a fraud. This in essence is the basis of the fraud as the appellants managed to defraud Joseph Marume.

Even assuming that there was another way of looking at the transaction, I would still come to the same conclusion that the appellants dealt with the property dishonestly leading to a potentially prejudicial situation for either Joseph Marume or the estate of the late Violet Dingolo. But one cannot possibly argue that the Dingolo estate was prejudiced when up till her death the late Dingolo enjoyed the full rights of ownership and possession. The contention being made now that because the appellants "sold" the property to a third party therefore the earlier sale was void *ab initio* lacks merit and flies in the face of the lived reality. Both the Dingolos and Board employees were surprised that the appellant managed to register the subsequent sale. One witness ventured to allege that an insider at the Local Board facilitated the perpetration of the fraud by registering Joseph Marume as the new buyer when, procedurally, the registration ought not to have been accepted. That, as pointed out above, did not pass ownership as the foundational basis of the "sale" was vitiated by fraud. No authority is needed for this trite position of the law.

Finally the appellants content that the court subjected the defence evidence to microscopic scrutiny. Conversely, the court failed to subject the State case to the same scrutiny. I disagree. There is no doubt that both the State and defence witnesses suffered fading memories in respect of the events which occurred some 28 years earlier which they were expected to testify on. Whilst there is an admission that there were discrepancies in the evidence of the State witnesses, the court did not overlook these but considered its overall impact on the credibility of the State case and concluded that this did not render the State case irreconcilable. On the other hand the defence case was that no sale occurred. The defence witnesses denied an event which occurred. The State witnesses explained why this event occurred. That then is the true and foundational underpinning of the assessment of the evidence by the court *a quo.* I am unable to find any misdirection in that approach. Assessment of evidence requires a common sense approach. This is a quality which a trier of fact is generally endowed with. A trial court assesses reliability and credibility of witnesses from the spoken word and seeks confirmation from other independent confirmatory sources like records, or corroboration etc. and where the probabilities in the matter, from ordinary human experience, would lie. Where, as here, the only evidence propping up the defence case is their word, without more, a court must weigh that word against the other evidence and determine where the probabilities of the matter lay. In the present case, the court made adverse findings of credibility against the appellants in a methodical manner. I am unable to find fault with that approach. My own reading of the record confirms that the findings regarding the lack of probity on the part of the appellants is justified. There is no merit in the contention by the appellants that the magistrate downplayed the discrepancies in the State case and exaggerated those in the defence case. I have given only one example of the several instances which demonstrate the point I make here.

The appellants decry the finding that the case of the State was proved beyond doubt. The trial court took into account all the relevant evidence that it was entitled to take in the assessment of the evidence and concluded that the case for the state had been proved beyond reasonable doubt.

The failure by the State to call or subpoena Joseph Marume was thought to be fatal to the State case. He is the complainant and no doubt he stands to lose the prospect of gaining from his investment. In my view, the failure to call a complainant is not always fatal to the case for the State. I can image the untenable position of a conviction for rape where the

complainant did not testify despite being available. Clearly, that position calls into question the propriety of conviction were the court to convict in the absence of a complainant's evidence. The charge of fraud stands rather on a different and separate pedestal. Requirements for proof of the essential elements in crimes against proprietary interests do not necessarily coincide with those crimes against the person. Therefore, in my view, if evidence necessary to prove all the elements of the offence can be led from other sources than the complainant, I do not suppose that it can be argued that because the complainant, who stood to suffer actual or potential prejudice did not, for whatever reason, testify therefore the conviction ought not to stand.

What is required is proof beyond a reasonable doubt. As I pointed out above, circumstantial evidence, although it may exist as secondary evidence, may be more cogent than direct evidence. This will be so as long as each piece of the strand of evidence has been proved beyond reasonable doubt and which, when combined together, build a formidable body of evidence that breaches the threshold of proof beyond a reasonable doubt, then it can be safely said there has been proof beyond reasonable doubt. In the specific instance of the present matter, there is no doubt that the State chose not to call Joseph for the reasons given. He had resiled from in own statement to the police. He was likely to turn hostile to the case for the State. The State decided against calling him. This view appear to be confirmed by his sponsoring the defence's legal costs. While no adverse inferences can be drawn from that, it is reasonable to assume that he chose not to imperil his investment in the purchase of this stand by leaving the protagonists to fight it out. In the final analysis we were unable to find good basis for the notice in terms of section 35 of the High Court Act, [*Chapter 7:06*].

In the result we were satisfied that the appeal against conviction lacked merit. It is therefore dismissed.

There was no appeal against sentence whether on the basis of its perceived severity or some other ground of inappropriateness. The comment in the Notice and Grounds of Appeal that because the complainant did not lodge a complaint therefore the sentence induces a sense of shock boggles the mind. In the final paragraph of the Notice and Grounds of Appeal it is said:

> "This sentence under the circumstances of the matter is such as to induce a sense of shock in the mind of the alleged complainant and any reasonable person. The court clearly acted out of for a in (*sic*) providing a remedy which none of the parties prayed for."

The reasons given for the sentence imposed in the court *a quo* indicate that the court considered that the appellants had benefitted from the payment made by Joseph Marume. It also considered that an appropriate sentence is one which did not result in the immediate imprisonment of both appellants but held that the sentence ought to ensure that what was ill-gotten was restored to the complainant. The court was aware that this type of crime attracts lengthy custodial sentences in appropriate circumstances as set out in the penalty provision of s 136 of the Criminal Code. The court settled for a non-custodial sentence and preferred an order for community service rather than a fine. At the hearing of this appeal I did not hear Mr *Mureriwa* contest the appropriateness of the sentence. I assume that since no relief was asked for in respect of sentence, the appellants are content with the sentence imposed in the court *a quo*.

For these reasons, the appeal against sentence is therefore dismissed.

Disposition

The appeal is therefore dismissed in its entirety.

BERE J authorises me to state that he agrees with this judgment.

Scanlen & Holderness, appellants' legal practitioners
Prosecutor-General's Office, respondent's legal practitioners