

HILLARY CHIROODZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 7 June 2016 and 25 January 2017

Criminal Appeal

H Mukonoweshuro, for the appellant
T Mapfura, for the respondent

MUSHORE J: The appellant was charged with 14 counts of fraud and 16 counts of theft. He pleaded not guilty but after a lengthy trial was convicted of all 14 counts of fraud and 2 counts (out of the 16) of theft. In sentencing him, the Magistrate combined all counts as one for sentence. The sentence imposed was 3 and a half years of imprisonment of which 1 year imprisonment was suspended on condition that appellant did not within 5 years commit an offence involving dishonesty. The remaining 2 and one half years were suspended on condition that appellant restitutes the complainant company in the sum of US\$ 51,955-24 through the Clerk of Court Harare on or before 11 December 2012.

The appellant initially filed an appeal against conviction and sentence, but later abandoned his appeal against sentence. I will now proceed to deal with the appeal itself.

Basis of the appeal against the convictions for fraud.

The appellant contends that (i) because the State did not prove actual prejudice in the amounts of US\$ 43, 671-08, and (ii) because there was no audit done to establish that the appellant converted the said amounts to his own use, the fraud convictions cannot stand.

Basis of the appeal against the convictions for theft.

As to the convictions for theft, the appellant believes that the court incorrectly convicted him of theft claiming that someone other than himself made the relevant transactions and entries in his computer cash book.

The facts

The appellant was employed by Splash Paints (Pvt) Ltd (complainant company hereinafter referred to as ‘the complainant’) in the capacity of Human Resources Manager. He was also responsible for receiving cash for sales and making payment for services rendered to the company. The fraud charges related to payments to supplier companies or service charges. According to the state the appellant acted fraudulently by pocketing money which was intended to be paid out to suppliers and then making entries in his computer cash book which gave the impression that those suppliers had been paid by the complainant.

The theft charges related to amounts paid to the complainant by its customers for goods sold by complainant. The State alleged that appellant received actual cash; and then wrote out physical receipts which he furnished to suppliers and thereafter inputted the physical receipts into his computer cash book. Instead of depositing the cash into the complainant company’s bank account, it was alleged that he pocketed the cash.

Issues

The State alleged that since the appellant’s computer was password protected it was only he who could access it. On the other hand, it was the appellant’s defence that his computer had been tampered with and therefore some of the entries in his computer cash book could not be attributed to him. However the State alleged that each employee had individual password protected access to their own computer.

Actual prejudice?

It is trite that there is no requirement that actual prejudice be proven in convicting someone of fraud and that if potential prejudice is proven it suffices for a conviction. In section 136 of the Criminal (Reformation and Codification) Act [*Chapter: 9:23*] fraud is defined as follows:-

“136 Fraud

Any person who makes a misrepresentation

(a) intending to deceive another person or realising that there is a real risk or possibility of deceiving another person; and

- (b) intending to cause another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;
- shall be guilty of fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person, and be liable to
- (i) a fine not exceeding level fourteen or not exceeding twice the value of any property obtained by him or her as a result of the crime, whichever is the greater; or
 - (ii) Imprisonment for a period not exceeding thirty-five years; or both. (*My emphasis*)

The Criminal (Reformation and Codification) Act [*Chapter: 9:23*] provides an interpretive section on the essential elements for fraud.

Section 135 reads as follows:-

“135 Interpretation in Part IV of Chapter VI

In this Part-

“defraud” means to commit the crime of fraud upon a person;

“document or item” means an embodiment of any information, design or other written or depicted matter in any material form whatsoever that is capable of being read or understood by persons or machines and, without limiting this definition in any way, includes

- (a) coins, banknotes and negotiable instruments;
- (b) receipts, certificates, vouchers, tickets, invoices, stamps, marks, licences, permits, statements of account and any entry in any book of account;
- (c) paintings and other works of art;
- (d) documents of a literary or historical nature;
- (e) information stored by electronic means that is capable of being printed out or retrieved or displayed on a screen or terminal;
- (f) any three-dimensional item;

“misrepresentation” means any act or omission of any kind whatsoever which wrongly or incorrectly represents any fact, law, character, circumstance, opinion or other thing whatsoever and, without limiting this definition in any way, includes-

- (a) a false statement of fact or law or a false expression of opinion;
- (b) silence on the part of a person who has a duty to speak, knowing that another person has been or will be misled by the silence;
- (c) a promise to do something in the future, when made by a person who knows that he or she will not be able to do that thing or who realises that there is a real risk or possibility that he or she may not be able to do it;
- (d) a false statement by a person who wishes to borrow money or any other thing as to the purpose for which he or she requires the money or other thing;
- (e) an exaggerated claim as to any quality of a thing that is being sold, where the person who makes the claim knows or realises that the person to whom he or she makes the claim is being or is likely to be deceived thereby;
- (f) the use, publication or uttering of a document which contains a false statement, knowing that the document contains a false statement or realising that there is a real risk or possibility that it does so;

“potentially prejudicial” means involving a risk, which is not too fanciful or remote, of causing prejudice;

“prejudice” means injury, harm, detriment or damage of any kind whatsoever, including material or financial prejudice, prejudice to reputation and prejudice to good administration;

“public document or item” means a document or item, including a judicial document or item, issued by or on behalf of the State.

The appellant’s actions caused both potential prejudice and actual prejudice. Actual prejudice is not limited to a pecuniary loss but also includes prejudice to reputation and prejudice to good administration which prejudice was very clearly occasioned to the complainant company by the actions of the appellant.

In *Rex v Jolosa* (1903 (TS) SOLOMON JA explained:-

“It would indeed be monstrous that if a man forged a cheque and presented it at the bank and the bank did not cash it, he should be guilty of the crime of falsity, because no one had been injured. All the elements of the crime of forgery would be present in such a case. The act would have been one which is calculated and intended to prejudice a third person, and that in my opinion, by Roman-Dutch law, would be sufficient”

And later in the same judgment;

“The necessity of proving prejudice has invariably been insisted upon, but the differences of opinion have arisen as to what is meant by prejudice. It is common cause that the prejudice would not necessarily be one affecting a man’s pocket or his property rights, but would include an invasion of any civil rights. It has even been held, though there is a difference of opinion on this point, that the risk of being prosecuted for an offence constitutes prejudice. And the great preponderance of judicial opinion is in favour of the view that it is of necessary to prove actual prejudice, but that it is sufficient if the false representations were calculated to prejudice the person to whom they were addressed.”

A good illustration of an invasion of civil rights was demonstrated in *S v Reggis* 1972 (1) RLR where an accused was convicted of fraud in circumstances where he had obtained a loan by falsely misrepresenting the purpose for which the loan was required. The misrepresentation was held to have prejudiced the complainant by inducing him to exchange his existing rights of ownership in his money for the contractual rights of a lender thereof.

The state witnesses gave precise evidence and made reference to specific entries in appellant’s computer cash book and the receipts which the appellant issued. When looking at the exhibits it is striking that each document is labelled in the appellant’s name. The physical

evidence produced by way of exhibits corroborated their testimony that indeed those amounts were due to them and ought to have been paid by the appellant. The false entries pertaining to the 14 counts of fraud appear in appellant's computer cash book, exh 6, and in particular on pages, 86, 87, 89, 90, 92, 94, 98, 99, 100, 101, and 102. The complainant's representatives gave convincing testimony that it was only appellant who could have made the entries because each individual employee had their own computer and their own special password. This is what Annis Patel for the State said:-

A Patel (cross-examination) page 42 record

- Q. Where is the proof then that he received the money? He denies entering anything about these in the system?
- A. This could happen if his password was compromised.
- Q. What is your capacity on the system?
- A. I could only monitor what he would be doing but not do anything on it.
- Q. The accused will say that his account was tampered with?
- A. Only if he had given his password to someone.
- Q. Where was the accused when you gave him time to explain himself?
- A. He was there but later disappeared.
- Q. You later followed him up at his house?
- A. He is the one who came to surrender his keys to his office.
- Q. When he had disappeared that I when you discovered the offence
- A. No we discovered them when he was there and asked him to explain himself that is when he disappeared."

In the words of the court *a quo*, "*I did not see how the owner would be able to access his cashbook which was secured by a password and do the functions with that cashbook. This would definitely defeat the whole purpose of having passwords in the first place*". We find that it would have been impossible for any other employee to breach the appellant's electronic cash-book.

Abdul Sabba, a manager at complainant company narrated how the enquiry into the case began when various customers began enquiring when they could expect payments for

services rendered or goods supplied. The enquiry led to the appellant being investigated because he was the employee who the customers communicated with on a daily basis. The appellant's accounting systems were thereafter scrutinized and it emerged that entries in his computer cash book did not reconcile with physical receipts pertaining to money which the appellant company had supposedly paid these suppliers. Thus the money which was reflected in the appellant's as having been received by complainant's suppliers had never been received by them.

At p 41, Annis Patel, testifying for the State explained how the password system worked and convincingly testified that it could not be tampered with. He also gave uncontroverted evidence that the appellant abruptly left work and only returned to voluntarily surrender his keys when he failed to explain away the various frauds occurring with his cash book and systems. The appellant also failed to furnish the company with bank deposit slips to demonstrate that he had banked the money in the company count instead of pocketing it. The excerpt from Annis Patel's testimony below best demonstrates these uncontroverted facts.

A Patel (cross-examination)

- “Q. How did you discover these offences?
- A. The first was when Mr Johnson of Rock Chemicals was arguing with the accused. The others we got from suppliers and customers
- Q. How did you prove that they had not received the payment?
- A. The accused did not produce the receipts.
- Q. Was the cash book not the proof of payment?
- A. No, if he paid by deposit at bank the deposit slip would be the proof.
- Q. Why do you say that the sales representative handed the money to the accused?
- A. These people cannot post the receipts and it is the accused only who could do so, He could not have done so (posting) if he had not received the money.”

Potential prejudice.

When it comes to potential prejudice, the *caveat* as suggested by the authorities is that the prejudice must not be too fanciful or too remote. The standard test to be applied is the reasonable man test. The enquiry is objective and the trial court needs to apply its mind to an accused's conduct and then assess the harm occasioned by such an accused's conduct. In *R v Seabe* 1927 AD 28, KOTZE JA said:

“The decided cases are not all in agreement on this point. But it seems to me on careful consideration, that, whenever in the opinion of a person of ordinary sense and judgment, that is of the reasonable man, it appears that a risk of prejudice has been caused by the prisoner’s conduct, there the requirement of the law that some prejudice must be shown, in order to support the charge of fraud or falsity, has been satisfied. Under such circumstances it cannot be satisfactorily maintained that the prejudice is either fanciful or too remote”.

The court *a quo* confined its enquiry to actual prejudice having been caused by appellant’s actions and rightly convicted appellant of fraud on that basis. However the facts show that the complainant suffered potential prejudice in addition to actual prejudice.

Theft

The trial court acquitted appellant of the theft counts pertaining Open Hardware and Paradise Hardware (13 counts) for lack of evidence. On the remaining two counts the court *a quo* correctly concluded that appellant had pocketed the cash and rightly rejected his defence that his computer was tampered with.

I am unable to find any misdirection on the part of the magistrate. The evidence was detailed but very clear. The magistrate put it very well in remarking that this case was not complex and only required basic appreciation of arithmetic to follow. Appellant failed to account for the money which went missing. He chose to leave his employment abruptly without any excuse and without giving notice to his employer. His conduct in that regard suggests that he was not willing to cooperate with an investigation into the truth of the matter.

So we conclude as we must that the appeal lacks merit in its entirety to the extent that it’s obvious that this was an appeal for appeal sake.

Accordingly the convictions are safe and we order as follows:-

“Appeal dismissed”.

HUNGWE J agrees.....

*H Mukonoweshuro & Partners, applicant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners*