

PROSPER CHITANGA

vs

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & WAMAMBO J
MASVINGO, 16th & 23RD October 2019

CRIMINAL APPEAL

T. Chivasa, for the appellant
Ms M. Mutumhe, for the respondent

MAWADZE J: This is an appeal in respect of both the conviction and sentence.

The appellant was convicted after a protracted trial by the Magistrate sitting at Chivi on 1 July, 2019 and he was represented by *Mr Chivasa*.

The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] and sentenced to 4 years imprisonment of which 1 years imprisonment was conditionally suspended for 5 years on the usual conditions of good behaviour. A further 1 year was suspended on condition the appellant paid restitution in the sum of US\$471 and RTGs133.21 through the Clerk of Court at Chivi on or before 31 August 2019. The appellant has to serve an effect sentence of 2 years imprisonment.

At the time of the hearing of the appeal *Mr Chivasa* submitted that the appellant who has been in prison for about 4 months has already paid the restitution in the sum of US\$471 and RTGs133.21.

The facts of this matter which give rise to this appeal are largely common cause save for the appellant's role in the commission of the offence.

The appellant was jointly charged with three other accomplices Cordination Magavhe aged 28 years residing at Chivi Growth Point, Babra Masvosvere aged 20 years residing in Beitbridge and Shelter Ezra aged 28 years residing at Chivi Growth Point. The other three accomplices Cordination Magavhe, Babra Masvosvere and Shelter Ezra pleaded guilty to the charge and each was sentenced in the same manner as the appellant. The appellant is the only one who denied the charge hence the matter proceeded to trial.

The offence of fraud in this matter was committed with surgical precision. The three accomplices Cordination Magavhe (Cordination), Barbra Masvosvere (Babra) and Shelter Ezra (Shelter) together with the appellant are said to have hatched a plan to defraud Mukuru.Com Money Transfer Company branch situate inside N. Richards Wholesale at Chivi Growth Point. As already said the only disputed fact is the appellant's role or involvement in this criminal enterprise as appellant denied any role or knowledge of the commission of the offence.

Cordination as his name denotes was the co-ordinator of this whole criminal enterprise as he was an ex-employee of Mukuru.Com Money Transfer Company at Chivi Growth Point. He provided a clip board, counterfeit audit papers titled Mukuru.Com, 2 T-shirts inscribed "Mukuru Send Money Home" and some cash box keys which he had stolen while employed at Mukuru.Com Transfer Company branch situate at Chivi Growth Point. It is Cordination who briefed the other accomplice of the tactics to be employed in committing the fraud.

Babra was assigned the prominent role of executing the fraud and stealing of the money at Mukuru.Com Transfer Company branch at Chivi Growth Point. This is probably because she was the only one who was not a resident at Chivi Growth Point as she resides in Beitbridge and was therefore not known at Chivi Growth Point.

The appellant's role, which he disputes, is that he provided a lap top from which the counterfeit Mukuru.Com fraudulent documents were generated and acted as a sentinel during the execution of the offence by Babra.

Shelter, again as her name denotes provided shelter for the culprits as the plan to commit this fraud was polished up at her residence at Chivi Growth Point, she offered accommodation to Babra and provided a handbag Babra used.

The fraudulent plan was executed in the following manner. On 11 January 2019 Babra proceeded to the Mukuru.Com Company branch at Chivi Growth Point inside N. Richards Wholesale where she posed as auditor from Mukuru.Com Company who had come to carry out official duties at the branch. She was wearing the t-shirt inscribed “Mukuru Send Money Home”, was carrying a handbag and a clipboard attached with the fake or counterfeit Mukuru.Com Company documents. Babra carried herself as an Auditor from Mukuru.Com Company Head Office in Harare who had come to perform her duties at the Mukuru.Com Company branch at Chivi. She approached the complainant Raviro Chirape a cashier employed at the Mukuru.Com Company branch at Chivi Growth Point. Babra then proceeded to carry out “an audit” inside the booth at Mukuru.Com branch at Chivi Growth Point and Raviro Chirape believed Babra was an auditor. Babra proceeded to check the financial books and cash on hand in order to carry out the reconciliation. At the material time there was US\$5 475 and \$533 bond notes which Barbra counted with Raviro Chirape. After about an hour Barbra asked the cashier Raviro Chirape to go and buy for her some water to drink. When the cashier went to buy the water Babra simply took the money at the Mukuru.Com Company branch. After the cashier returned Babra later left with the cash and caused the cashier to complete fake audit forms which showed that Babra had carried out audit duties unaware that Babra had stolen the money in her absence. The culprits then regrouped at Shelter’s house and proceeded to Zvishavane to share the loot.

The matter came to light the same day when Raviro Chirape the cashier at Mukuru.Com Company branch at Chivi Growth Point later realised that all the money in her possession had been stolen. The CID details from Mashava later on investigated the matter and on the same day arrested Cordination and the appellant with the help of CCTV at N. Richards Wholesale at Chivi Growth Point. Upon their arrest CID details recovered United States dollars from Cordination and the appellant. Further an HP Laptop bearing serial numbers of counterfeit documents used by Babra when she misrepresented herself to Raviro Chirape, the cashier at Mukuru.Com Company Branch at Chivi Growth Point as

an auditor were recovered. Thereafter Cordination led to the arrest of Babra who had returned to Beitbridge and also accused Shelter. The amount of US\$760, \$67 bond notes was recovered from Babra and US\$1 800 from Shelter. Both the appellant and Cordination were found with some cash. Further the t-shirt inscribed “Mukuru Send Money Home”, the clipboard, a purse, the attire Babra was wearing posing as an auditor were recovered at Shelter’s residence thrown inside a blair toilet.

The total cash stolen is US\$5 475 cash and \$533 bond cash. The amount recovered in US\$3 589 cash and \$75 bond cash.

The appellant gave a very lengthy defence outline covering 23 paragraphs. In brief the appellant denied conniving to commit the fraud with Cordination, Babra and Shelter. The appellant said the only person he knew was Cordination and he was not known to Babra and Shelter. The appellant denied taking any part in the commission of the offence. He denied playing any role in the commission of the offence or getting any share of the loot. The appellant however admitted to the following facts which are;

- (a) that he is a very close friend of Cordination an ex-employee of Mukuru.Com Company branch at Chivi
- (b) that he is well known to the cashier, Raviro Chirape, at Mukuru.Com Company branch at Chivi Growth Point as he frequents N. Richards Wholesale or transacting at the said Mukuru.Com Company branch
- (c) that on the day in question on 11 January 2019 he indeed was at N. Richards Wholesale Chivi Growth Point where the Mukuru.Com Company Branch is situated hence his images were captured on CCTV. However, the appellant said his mission at those premises was not to carry out any surveillance in furtherance of any criminal conduct but to meet a female friend Eustina Mbaradze and for shopping purposes inside N. Richards Wholesale
- (d) that on the way into N. Richards Wholesale he passed by the Mukuru.Com booth which is by the entrance and greeted the cashier who is the complainant Raviro Chirape
- (e) that the fraudulent documents used by Babra to commit the fraud were generated from his HP Laptop. The appellant however said this was done by his friend Cordination who had unfettered access to his laptop which had no password and that this was done without the appellant’s knowledge or approval

- (f) that he was found in possession of money stolen from Mukuru.Com Company branch at Chivi Growth Point being United States Dollars. The appellant however said he had been given this money by his friend Cordination who owed the appellant some money and that it was not the appellant's share of the loot.

After hearing evidence from the complainant Raviro Chirape the cashier at Mukuru.Com Company branch at Chivi, Babra a convicted accomplice who had been properly warned and the investigating officer Nxumalo Mxolisi all for the state and from the appellant and his defence witness Cordination also a convicted accomplice, the court *a quo* found in favour of the state and dismissed appellant's version of events or evidence as false. Irked by this decision the appellant approached this court on appeal and the grounds of appeal in respect of both conviction and sentence are as follows: -

“GROUNDS OF APPEAL

1. RE: CONVICTION

1.1. The learned Magistrate erred in law when he convicted the appellant of fraud as defined in Section 136 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] in the absence of proof beyond reasonable doubt particularly in that;

- (a) He wrongfully made inferences from circumstantial evidence which inferences were not the only reasonable inferences which could be made in the circumstances.*
- (b) He wrongfully relied on evidence of an accomplice in circumstances where the risk of false incrimination was very high and had not been eliminated.*
- (c) He wrongfully rejected the appellant's explanation in his defence which was probable in the circumstances.*

1.2. WHEREFORE appellant prays for the success of the appeal and for the setting aside of the decision of the court a quo convicting the appellant of the offence and substitution of the same with a verdict of Not Guilty.”

In relation to sentence the appellant is of the view the community service should have been imposed in light of the mitigating factors which include inter alia the delay of 5 months in finalising the matter, that the appellant is a first offender, that half of the stolen money was recovered, that the amount stolen was not substantial, that the sentence imposed was within the threshold of 24 months effective sentence and that the appellant is a suitable candidate for community service.

I should commend *Mr Chivasa* for his detailed and well researched heads of argument. Equally so I need to commend the learned trial Magistrate for a very lucid judgment and a clear appreciation of not only the facts in issue but the law involved.

The simple task for this court is to assess as regards conviction if the court *a quo* properly applied the principles of circumstantial evidence and or the liability of co-perpetrators.

The liability of co-perpetrators is provided for in section 196A of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. This provision simply reinforces the common law principle or doctrine of common purpose which entails that for the doctrine of common purpose to apply in any case it has to be proved that the accused did something to associate himself with the actions of the person who actually committed the offence knowing that the other person intended to commit the said offence or foreseeing that possibility see *State v Mubaiwa & Anor* 1992 (2) ZLR 362 (S); *State v Chauke & Anor* 2000 (2) ZLR 494 (S) at 497 A.

This position is well articulated by the esteemed author Burchell in South African Criminal Law and Procedure Volume 1, 3rd Edition at page 307 wherein the learned author said;

“where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within the common design”

In casu, if it is proved that the appellant indeed connived with Cordination or Babra or Shelter or all of them in perpetrating this fraud, the appellant’s criminal liability irrespective of his actual role may be inferred on the basis of the doctrine of common purpose. In specific terms it is said the appellant agreed to commit this offence, that he provided the laptop used to generate the fraudulent documents, that he acted as a sentinel during the commission of the offence and that he got the spoils of the loot. This is however denied by the appellant but the court *a quo* disbelieved him.

Babra’s evidence is that Cordination who was the brains behind this fraud briefed her that the appellant would be engaging in surveillance during the execution of the actual fraud by Babra as a sentinel to ensure Babra’s safety. Indeed, Babra was given by Cordination and actually used the fraudulent documents generated from the appellant’s laptop. In her evidence Babra said that although she personally had not met the appellant some person Cordination told her was the appellant would call her while she was executing the fraud giving her real time information of

what was happening around the crime scene at Mukuru.Com Company premises at Chivi Growth Point. Babra said after successfully executing the fraud she met Cordination and Shelter after which they proceeded to Zvishavane to share the loot. She said the other person she was told was the appellant was constantly calling them updating them on what was happening at Mukuru.Com Company branch at Chivi Growth Point in the aftermath of the commission of this offence. She said this person was identified by Cordination as the appellant and that the appellant had therefore not joined them specifically for that reason. Lastly, Babra said as they shared the money Cordination reserved another share for the appellant and returned to Chivi to ostensibly give the appellant his share. Indeed, when police detectives first sighted Cordination later that day he was in the company of the appellant at Chivi Growth Point and appellant was later found with part of the money stolen from Mukuru.Com Company that very day.

The assessment of the credibility of witnesses is within the domain or province of the court *a quo*. Babra's evidence was that although she had not physically met appellant at any stage she was briefed that appellant's role was to provide surveillance or act as a sentinel and that some other person indeed apprised her on the telephone on what was happening. Indeed, it would have been desirable for the police to have checked the telephone records for all persons involved to verify Babra's evidence. Nonetheless such an omission in my view is not fatal to Babra's evidence. Babra was not known to the appellant. She is a convicted accomplice. She had nothing to gain by falsely incriminating the appellant.

The question which arises therefore is why would she go out of her way to fabricate the existence and role of a fourth player in the execution of this offence. The court *a quo* found none and there is no such reason in my view. On that basis she was found to be a credible witness and the danger of false incrimination was found to be none existent.

On the other hand, the same cannot be said for Cordination. Despite later pleading guilty to this offence Cordination upon his arrest in the early hours of 12 January, 2019 denied any role in the commission of the offence even after some US\$307 had been found under his bed. This can be gleaned from a copy of the police running diary log produced through the investigating officer. Cordination denied ever being involved in this matter and said the money found in his possession was money given to him by his parents (*see the version of page 52 recorded in Shona*). Apparently

he only admitted to the offence when police's evidence became overwhelming as investigations progressed.

When Cordination testified he sought to exonerate the appellant alleging that the appellant played no role. He denied ever telling Babra that the appellant was involved and that the money he gave the appellant stolen from Mukuru.Com was to pay a debt owed to appellant. He further said that he used appellant's laptop to generate fraudulent documents without the appellant's knowledge.

In my respectful view Cordination's evidence was properly rejected. He is the appellant's friend and the two were very close. He admitted under cross examination that he would naturally protect the appellant (*see page 46 of the record*). Most importantly he initially lied to the police. The court *a quo* was correct to reject his evidence and assess him as an incredible witness.

It is for the said reasons that appellant criminal liability was based on doctrine of common purpose or a co-perpetrator. The court *a quo* thus found that the appellant was at the scene of crime at N. Richards Wholesale, that he had knowledge of the offence or criminal act, that he worked in cahoots with other accomplices including Babra by manifesting a sharing of common purpose in providing his laptop, acting as a sentinel, providing surveillance and getting a share of the criminal proceeds. The appellant on that basis has the necessary *mens rea* to commit the fraud see *S v Mgedezi & Ors.* 1989 (1) SA 687 (A).

The next issue to consider is the question of circumstantial evidence.

The celebrated case of *R v Blom* 1939 AD 188 at 202 – 203 outlines how circumstantial evidence should be treated by the trial court in criminal matters. The cardinal principles are that;

- (i) that the inference sought to be drawn must be consistent with all proved facts. If not, the inference cannot be drawn
- (ii) that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is the correct one. See also *S v Tambo* 2007 (2) ZLR 33 H; *S v Marange & Others* 1991 (1) ZLR 244(S)

It is competent for a court to return a verdict of guilty solely on circumstantial evidence see *S v Shonhiwa* 1987 (1) ZLR 215 (S); *S v Vhera* 2003 (1) ZLR 668 (H) at 650 C.

The court *a quo* applied these principles to the circumstances of this case. The proved facts were juxtaposed with the appellant's explanation and the trial court concluded that the appellant's explanation cannot possibly be true. The relevant facts which were considered are not in issue and are as follows: -

- (a) Cordination who was the brains behind this fraud is appellant's close friend. This is admitted by the appellant. In fact, appellant and Cordination were later seen together that very same day by the police.
- (b) the appellant was present at the crime scene at the material time. This is confirmed not only by the CCTV but by the appellant himself. The appellant's explanation is that N. Richards Wholesale is a public place and that he wanted to see a friend there and to do some shopping. Indeed, that may be so. The appellant actually passed by the complainant's booth and greeted her.
- (c) the appellant was found in possession of some of the stolen cash in United States dollars identified by the serial numbers the very day the money had been stolen. Upon his arrest the appellant as per the investigating officer said he had been given the money by his relatives. However later after the money had been matched with the serial numbers he changed the story and said he was given the money by Cordination as payment for money he was owed by Cordination. It is therefore clear appellant was not consistent in explaining how he became in possession of the stolen money and had therefore told a lie on a material issue.
- (d) the fraudulent documents used to commit the fraud were generated from the appellant's laptop. The appellant's explanation is that Cordination is the one who generated the fraudulent documents using the appellant's laptop as he had unlimited access to it and it had no password. No further explanation is given as to why Cordination chose to use the appellant's lap top.

Indeed, each of those facts proven or not in issue, taken in isolation may on their own not lead to any adverse inference. However, when they are considered conjunctively together with the accused's own explanation a proper adverse inference in my view was made. The close friendship appellant had with Cordination is admitted. Is it plausible that appellant would be paid his debt with the stolen money the very day it was stolen? Why would appellant lie to the police about the

source of this money initially? One would raise eyebrows as to why Cordination would choose to use a dear friend's laptop to generate fraudulent documents and why the appellant did not know about it. The appellant's presence at the crime scene dovetails with Babra's evidence as regards appellant's role.

In my view the court *a quo* assessed the credibility of all the witnesses and made findings of fact. The appellant's evidence or version of events was rightly rejected. The principles of law applicable to the facts of co-perpetrators or acting in common purpose together with circumstantial evidence are not only well articulated but properly applied to the facts of this case. I find no misdirection at all on the part of the court *a quo*. The threshold or degree of proof required in criminal matters was achieved. The appellant's conviction is unassailable in the circumstances. Consequently, the appeal against conviction cannot succeed.

In relation to sentence the court *a quo* gave very cogent reasons as why an effective custodial sentence was appropriate.

I share the same view that the option of community service is wholly inappropriate in this case. All the four culprits were given similar sentences in line with the principle of uniformity in treating accomplices in the absence of any objective factors to distinguish their sentences or to treat them differently. The moral blameworthiness of the appellant is very high in this case and deserve severe censure. This was a well-planned and executed criminal act of fraud. There was an element of planning and premeditation. A number of people were involved who played different roles to ensure success of the criminal enterprise. It was a gang offence involving team work. The appellant derived benefit from his criminal conduct and was properly degorged of such benefit by being ordered to pay restitution. As a first offender part of his sentence was suspended on condition of good behaviour. Even after deciding to exercise his rights by pleading not guilty to the charge unlike his accomplices, he was not treated differently. The company from which the appellant and his colleagues stole from provide an invaluable service to the general public and well-being of our economy.

At the end of the day a proper balance of the mitigatory and aggravating factors shows that the sentence of community service was wholly inappropriate. It would send wrongful and harmful signals to persons of like mind and put the whole criminal justice system into disrepute. Clearly the appeal against sentence lacks merit.

Accordingly, it is ordered that the appeal in respect of both conviction and sentence be and is hereby dismissed.

Wamambo J. agrees

Chivasa & Associates, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners