

REPORTABLE (65)

ARTHUR CHIKUKWA
v
THE STATE

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSHWAYO JA & MAKONI JA
HARARE: 24 OCTOBER 2019

Appellant In Person

Mr *Mapfuwa*, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court dated 3 October 2016. After hearing argument in the matter, we allowed the appeal and made the following order:

1. The appeal be and is hereby allowed.
2. The judgment of the court *a quo* is set aside and is substituted with the following, “The accused is found not guilty and is discharged.”

We indicated that the reasons would follow. These are they.

On 3 October 2016 the appellant was convicted of the offence of fraud as defined in s 136 (a) and (b) of the Criminal Law (Codification to Reform) Act [*Chapter 9:23*] and Money Laundering as defined in s 8(3) of the Money Laundering And Proceeds of Crime Act

[Chapter 9:24]. For purposes of sentence, both counts were treated as one and he was sentenced as follows:

1. “10 years imprisonment of which 2 years are suspended for 5 years on condition the accused is not convicted of any offence of which dishonesty is an element for which he is sentenced to imprisonment without the option of a fine.
2. 4 years imprisonment is suspended on condition the accused pays restitution of US\$225 000.00 to the complainant through the Registrar of this court by no later than 31 December, 2017.
3. Effective prison term to be served is 4 years imprisonment.
4. An order of compensation is hereby granted to the complainant, Light Glass Enterprises (Pvt) Ltd in terms of s 362 of the Criminal Procedure & Evidence Act, [Chapter 9:07] in the sum of US\$54 118.57.”

The court *a quo* found that the appellant on a date unknown but during the month of July 2014, whilst purporting to represent Rock Rabbit Investments (Private) Limited (Rock Rabbit Investment), approached the complainant, Robert Mhlanga, representing Light Glass Enterprise (Private) Limited (Light Glass) and sold a mining concession under Special Grant 5341 in the name of Rock Rabbit Investments. The complainant and the appellant entered into a verbal agreement of sale of the mining concession. The complainant offered to pay in cash and in kind in the form of an immovable property and two motor vehicles (the property). The total purchase price was the sum of USD2 775 000.00 (two million seven hundred and seventy five dollars).

In November 2015 when the complainant attempted to commence operations, he discovered that the appellant had no authority to dispose of the concession under Special Grant 5341. A report was made to the police and the appellant was arrested. The total prejudice was USD2 775 000.00 and nothing was recovered.

PROCEEDINGS BEFORE THE COURT A QUO

Before the court *a quo*, the respondent led evidence from three witnesses. These were, Robert Mhlanga, the complainant, Mr Salim Suleman Desai, a legal practitioner and Mr Hai Zhang, a director of Rock Rabbit Investment (Private) Limited.

Robert Mhlanga's evidence was that the appellant had misrepresented that he was a director of Rock Rabbit Investments (Private) Limited and had a mandate to sell or deal in the Special Grant 5341 issued to Rock Rabbit Investments. This induced him, in his capacity as the director of Light Glass (Private) Limited, to enter into a verbal agreement with the appellant on behalf of the company. He left the details of the agreement, particularly the legalities and the consummation of the agreement, to his lawyer, Mr Desai.

It was his further evidence that the property was to be released to the appellant upon the production of title to the concession and a geological report detailing the quantities of the available coal.

Next to testify was Mr Desai. He is a legal practitioner with Desai & Associates. He engaged the accused in connection with the sale of the mining concession and was given some documents which included *inter alia*, the Special Grant 5341 issued to Rock Rabbit Investments by the Minister of Mines, a letter from the Chairman of the Mining Affairs Board addressed to the Directors of Rock Rabbit Investments to which was attached the Special Grant and the appellant's passport. He in turn handed over the property forming part of the purchase price of the mining concession to the appellant. He then requested for the company registration documents and the geological report. The appellant promised to produce the documents, but however failed to produce these despite numerous requests, phone calls and meetings. He then

demanded return of the property from the appellant who failed to do so. He thereafter made a report to the police.

Mr Zhang Hai is a director of Rock Rabbit (Private) Limited together with his father. He testified that he engaged the appellant as a consultant to apply for a Special Grant to mine coal in the name of Rock Rabbit Investments. The application was successful and they were granted Special Grant 5341. That was the only assignment that he asked the appellant to do on behalf of Rock Rabbit Investments. He produced company documents in the form of CR14 and CR6 which reflected the directorship of Rock Rabbit Investments. It was his further evidence that he never asked appellant to act on behalf of Rock Rabbit Investments in a transaction with Light Glass. On being asked whether the appellant owned 60 per cent shareholding in Rock Rabbit his response was, "That would be funny. It's not possible at all." He did not elaborate further.

Under cross examination, the witness however agreed that in his statement to the police he had stated that appellant initially came as a consultant but he had verbally agreed that he be appointed a director of Rock Rabbit Investments. He also agreed that in the same statement he stated that the appellant was one of the directors of Rock Rabbit Investments. He denied that he had used the appellant in other transactions. Upon being shown proof that he had mandated the appellant to identify investors to exploit another Special Grant, he admitted penning the document. He however explained that he only engaged him as a consultant.

At the close of the State case, the appellant unsuccessfully applied for discharge in terms of s 198(3) of the Criminal Procedure and Evidence Act Chapter. As a result, he was put to his defence.

The appellant's case was that he did not approach Robert Mhlanga intending to sell the Special Grant but was looking for an investor who could invest USD15 000 000.00 into the project. The money would be used for exploration and to set up the mine. Robert Mhlanga counter proposed that he buys a controlling stake of 60 per cent in the shareholding of Rock Rabbit Investments in the sum of USD8 000 000.00. Robert Mhlanga did not have adequate funds and as a result offered to pay using the immovable property and the motor vehicles. This left a balance of USD 910 000.00. The companies' lawyer, Mr Desai, paid the other USD100 000.00. With regard to obtaining the geological report as a condition of the sale, the appellant contended he needed money in order to process and obtain the report. He had used part of the money he received to pay one Nyandoro who had introduced him to Robert Mhlanga.

It was his case that because of its change of fortunes, the complainant resorted to using the police to resile from the agreement. It wanted to walk away from the agreement since it did not raise the capital required to move the project forward.

He conceded that he did not appear in the company records of Rock Rabbit Investments as a director as he was appointed as a director verbally by Mr Zhang.

On the basis of the evidence that was led before it, the court *a quo* found that the appellant had misrepresented that he had a mandate to sell or deal in Special Grant 5341 issued to Rock Rabbit Investments and that he was a director of Rock Rabbit Investments. In this regard, it found that Mr Zhang had no motive to lie that the accused was not a director of Rock Rabbit. It was satisfied that Mr Zhang had engaged the appellant only as a consultant to assist him to obtain the Special Grant.

The court also found that once the appellant received the property and the money in issue through engaging in an activity of a criminal nature, the property became proceeds of a crime.

It consequently found the appellant guilty and sentenced him as outlined above. Aggrieved by the conviction and sentence the appellant filed the present appeal.

THE APPEAL

Notwithstanding that the appellant raised five grounds of appeal, this Court took the view that he was basically attacking the propriety of the conviction and the severity of the sentence.

SUBMISSION BEFORE THIS COURT

The matter was initially set down on 11 October 2019. When the appellant, a litigant in person, was called upon to address the court in connection with an application for condonation for late filing of Heads of Argument made by the respondent, he launched into an attack on the criminal justice delivery system in Zimbabwe and on the judicial officer who presided over his matter in the court *a quo*. He raised serious allegations of impropriety on the part of the presiding officer.

Since his utterances appeared out of turn and did not relate to the matter before the court, the matter was stood down to chambers wherein he was advised that the matter was to be postponed to enable him to raise his concerns with the administration of the judiciary.

At the resumed hearing of the matter, the appellant contended that the conviction was not sustainable as the State had failed to establish the essential elements of fraud beyond a reasonable doubt.

Mr *Mapfuwa*, for the respondent, submitted that the court *a quo* was correct in convicting the appellant. It was his further submission that the appellant had misrepresented that he owned Rock Rabbit Investments to Mr Mhlanga and had made the same misrepresentation to Mr Desai. The misrepresentation was revealed by the testimony of Mr Zhang who testified that the appellant was not a director of Rock Rabbit Investments.

Mr *Mapfuwa* was engaged by the court as to the exact nature of the misrepresentation which the State alleged was made by the appellant. This was because the allegations were not clear. The charge sheet alleged that the appellant misrepresented that he had a coal mining concession in Tuli under Special Grant 5341 in the name of Rock Rabbit Investments and that he had a mandate to sell the special grant. Thus, the allegations against the appellant from the manner in which the charge was framed was that he misrepresented that he had mining concession in the name of Rock Rabbit (Private) limited which he was authorised to sell.

The court *a quo* correctly identified the issue that fell for its determination in the trial *a quo*. It was whether the appellant was authorised to deal with the mining concession. Whether the appellant was a director of Rock Rabbit or had shares in the company, was not the dispositive issue in the matter.

As the *ratio* for its decision to convict the appellant, the court *a quo* found as indicated above, that the respondent had proved beyond reasonable doubt that the appellant had misrepresented that he had the authority to deal with the mining concession.

In coming to its conclusion, the court *a quo* relied on the evidence of Mr Zhang to the effect that the appellant was not a director of Rock Rabbit Investment (Private) Limited and had only been engaged by that company as a consultant.

Mr *Mapfuwa* conceded that there were inconsistencies, which he termed ‘minor’, in the evidence of Mr Zhang. On being asked by the court whether the court *a quo* was alive to these minor inconsistencies, his response was that seeing that the conviction was based on the evidence of an unreliable witness, Mr Zhang, the conviction might not have been safe.

The concession made by Mr *Mapfuwa* is proper. It is clear from the record that there were some material inconsistencies in the evidence of Mr Zhang. In his evidence in chief he was categorical that he only engaged the appellant as a consultant to help him obtain the Special Grant 5341. He had no further dealings with him. He even ridiculed the appellant’s suggestion that he was a director of Rock Rabbit Investments. Under cross examination, it became apparent that he had not told the truth regarding his dealings with the appellant. A document he authored was produced indicating that he had also engaged the appellant and two others to be his agents for “the sole and exclusive purpose of seeking and, identifying any prospective partners and investors to jointly exploit and finance the exploration and other mineral resources to which Special Grant 5324, Gweru Mining District.” The document is dated 17 May 2016 some two years after the Light Glass debacle. It was the appellant’s case

that the mandate given in respect of Special Grant 5324, is the same mandate that he got in respect of the Special Grant 5341. It further confirmed the appellant's version that he (Mr Zhang) had verbally appointed him as a director of Rock Rabbit Investments. This fact also appears in Mr Zhang's statement which he made to the police. He told the police that the appellant was a director of Rock Rabbit Investments.

What is also apparent from the record is that the court did not assess the credibility of the witnesses appearing before it especially that of Mr Zhang on whose evidence the sole issue in the matter turned. All that it said about this witnesses' evidence is that he had no motive to lie as against the appellant. It did not give any cogent reasons for its belief. From summarising the evidence of the witnesses the court *a quo* proceeded to make findings of fact and then the conclusion that the appellant was guilty. It did not assess the credibility of any of the witnesses.

The effect of a courts' failure to make findings on the credibility of witnesses has been laid out in several cases. In *Mazorodze v The State*¹, the court remarked thus:

“The respondent did not comment on the credibility of witness for the prosecution. It left that matter totally unaddressed. The appellant's criticism of the court *a quo*'s proceedings on the mentioned aspect has merit.

Credibility of witnesses lies in the domain of the trial court. The appeal court does not, as a matter of principle, interfere with the court *a quo*'s findings in respect of credibility of witnesses. (See *Beckford v Beckford*, 2009 (1) ZLR 271 (S))

...there are occasions when an appeal court may interfere with the court *a quo*'s reasoning on the issue of credibility of witnesses who will have testified before it. One such occasion is where, as *in casu*, the court *a quo* does not make any specific findings of fact as to the credibility of witnesses who testified before it. That is a misdirection which allows us to be at large and to re-assess the evidence of the witnesses. Our object would be to establish the witnesses' credibility or otherwise” of those two witnesses and that none of them did have a reason to lie against the appellant. He did not profer any cogent reasons for the belief which he entertained as regards the credibility or otherwise of those witnesses - and

¹ HH 154/16

- (a) the respondent remained mute regarding the alleged misdirection.” (Emphasis added)

In *Hwande v The State*² MAKARAU J as she then was made the following pertinent remarks regarding the need for a trial court to assess the credibility of witnesses:

“In assessing the cogency of the evidence that was before it at the end of the trial, the court *a quo* did not give its assessment of the credibility of this witness. It is important for trial courts to always assess the credibility of the witnesses appearing before it for the guidance of appeal courts. Where a finding of credibility has been done by the trial court, an appeal court is always slow to disregard such a finding³. Where such a finding is however not made, the appeal court is placed in the less advantaged position of having to assess the credibility of the witness on the basis of the record without the “evidence of the demeanour of the witnesses, their candour or partisanship and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial”.⁴

Thus whilst an appellate court in such instances can make findings on the credibility of witnesses, it is at a disadvantage as such assessment is made based on the record without seeing and hearing the witnesses, observing the demeanour, candour or partisanship which is the preserve of the trial court.

In *Charangwa v The State*⁵ the court emphasized the point that the judgment of a trial court must reflect the court’s appraisal of the credibility of each witness stating what evidence was accepted or rejected and giving reasons for its decision. It stated thus:

“The reasons why the trial court rejected the appellant’s evidence are not apparent from the judgment. The court simply dealt with the state witnesses’ evidence and ended there. The trial court failed to analyse and give reasons for rejecting the appellant’s defence. The judgement does not deal at all with the testimony of the appellant. In *S v Ncube* HB 61/03 the court stated the following regarding the need to appraise each witness’s evidence;

² HH 39/05

³ See *S v Isano* 1985 (1) 62 (S)

⁴ Per LORD MAcMILLAN in *Thomas v Thomas* [1947] 1 All ER 582.

⁵ HH 664/15

“...a court’s judgment in a criminal trial should contain a brief summary of the facts found proved and trial court’s appraisal of the credibility of each witness stating what evidence was accepted or rejected and giving reasons for its decision. What is required is a complete and meaningful judgement touching on all material evidence led at the trial.”

See also the case of *Clever Howard v The State* HH 39/05. The court in this case also impressed on the need for a trial court to always assess the credibility of witnesses appearing before it.

An offender who goes through a trial is entitled to know the outcome of his trial and the court’s findings on his credibility. Each witness’s evidence is required to be weighed and reasons given why the evidence has been accepted or rejected. Such an offender is also not just entitled to the outcome of the trial but to be furnished with the reasons why the defences he raised were rejected. A judgment should be well balanced and is required to include reasons showing that both the offender and the complainant’s versions have been considered. It must be shown that all the facts and issues raised have been considered and weighed. This judgment falls far short of requirements of a good judgment.”

Failure to do so renders the judgment passed ‘bad’ so to say as highlighted in the *Charangwa* case *supra*.

Thus, the conclusion reached by a trial court without assessing the credibility of witnesses or weighing such evidence constitutes a gross misdirection upon which an appellate court may allow the appeal and order a re-trial or in turn assess the evidence itself.

Assessment of witnesses’ evidence and making findings on credibility is the yardstick with which it can be determined that a court of law has applied its mind to the

case before it in a proper manner. This can be drawn from the findings of the court in *S v Singh*⁶ where it noted:

“Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.” (My emphasis)

What comes out from the above authorities is that, the assessment of the credibility of witnesses is one of the key tasks of the trial judge. A trial judge must consider all the evidence, record any credibility findings and explain a logical and rational basis for those findings. As such, it has been reiterated by this Court time and again that an appellate court is generally reluctant to interfere with a trial court’s decision on the credibility of witnesses unless it concludes that such findings cannot be supported. See *Mthimkhulu v Nkiwane & Anor* S-136/01. Above all, the findings of credibility must be considered in the light of proven facts and probabilities. See *Gumbura v The State* SC 78/14.

⁶ 1975 (1) SA 227 (N) at 228

In *casu*, the court *a quo*, after outlining the evidence of the witnesses made a blanket statement that “The court has considered all the evidence led in this case as well as submissions made by both counsel.” It did not, in analysing the cogency of the evidence, assess the credibility of the witnesses. It did not set out why it accepted the evidence of the state witnesses and rejected that of the appellant and its reasons thereof.

If the court *a quo* had properly applied its mind to the evidence of Mr Zhang and that of the accused, it would have arrived at a different conclusion as to whether the State had established, beyond a reasonable doubt, the guilt of the appellant. It would have found that Mr Zhang was inconsistent in his testimony. His evidence in court differed in material respects from the statement he had given to the police confirming that the appellant was indeed a director of Rock Rabbit (Private) Limited, verbally appointed so by him although the official documents had not yet been amended to reflect the fact. It would have realised that it was unsafe to convict the appellant in the circumstances. It would have found that the evidence tendered before the court suggested the appellant was more than a mere consultant in respect of the mining concession. He had been instrumental in the issuance of the mining concession to Rock Rabbit Investments (Private) Limited and had in his custody the actual grant and the accompanying letter from the Ministry of Mines advising the Directors of Rock Rabbit Investments (Private) Limited of the issuance of the grant.

The appeal had merit hence the order made by this Court.

MAKARAU JA I agree

HLATSHWAYO JA I agree

National Prosecuting Authority, respondent's legal practitioners