MARTIN SIBINDI
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZHOU & CHIKOWERO JJ
HARARE, 22 November 2021 & 3 August 2022

Criminal Appeal

E. Mubaiwa for the appellant
A. Muziwi for the respondent

ZHOU J: This is an appeal against conviction and sentence. The appellant was convicted of the offence of theft by false pretences under the old law. He was sentenced to 24 months imprisonment of which 6 months imprisonment was suspended for five years on condition that during that period he does not commit an offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. The effective sentence was therefore 18 months imprisonment.

The appeal is opposed by the respondent.

The definition of the offence, as given by Jonathan Burchell in *Principles of Criminal Law* (*5th ed*), p. 704, is as follows:

> "The crime of theft by false pretences is committed by any person who unlawfully, with intent to steal and by means of a misrepresentation appropriates property capable of being stolen."

The learned author explains that this crime occupies a position between the offence of theft and that of fraud. Its object is to penalize situations where a person manages to appropriate property belonging to another person by means of making a false representation to the victim, thereby extracting the consent of the victim to the taking or preventing any opposition to the taking, of the property. The offence has features of both theft and fraud.

In casu, the facts which were found by the Court *a quo* to have been proved are as follows: that that in the case of the first complainant Tendai Mataure, in 1998 the appellant through E.R.S. Real Estates agents, advertised that he was selling a residential stand in extent 500 square metres. The stand was said to be a subdivision of the Remainder of Lot 12 of Tynwald/Salisbury Township lands (Harare). The complainant was directed to a piece of land that he viewed. After that he signed an agreement of sale and paid a deposit of $80 000.00 out of a purchase price of $160 000.00 which he had been advised of. He paid the balance in instalments. In respect of the second complainant Godfrey Ngoshi, the appellant in 1999 approached complainant and informed him that he was selling residential stands measuring 500 square metres for $320 000.00. The stand that was offered to this complainant was said to be a subdivision of the Remainder of Lot 12 Tynwald. The complainant and one Getrude signed an agreement of sale as purchasers and paid the full purchase price of $320 000.00 in instalments. The said stands which the appellant sold were non-existent as the property of which they were said to be subdivisions had been approved for construction of two storey flats and townhouses. In other words, there was no approval or a permit to subdivide that land into individual residential stands.

The appellant was convicted and sentenced in June 2006. He obtained condonation to file his appeal out of time on 16 December 2020.

The notice of appeal raises three grounds of appeal in relation to the conviction. The three grounds were not supported in argument by counsel. At the hearing counsel for the appellant sought to attack the judgment of the Court *a quo* on the only one ground that the judgment was irregular because, so it was contended, it did not consider the state evidence. This ground of appeal is not in the notice of appeal. However, those grounds of appeal in respect of which no oral submissions were made will also be considered because they were not explicitly abandoned and the main heads of argument were filed in support of them.

The first ground of appeal is that the Learned Magistrate erred in finding that the appellant had misrepresented to the complainants that he was selling individual stands when the agreement of sale clearly stated that what was being sold were land shares. The court found that indeed the sale was of land. The so-called shares pertain to land as they are inextricably linked to a definite piece of land with a defined area of 500 square metres, hence the reference in the agreement to an approved subdivision. These were not shares in a company, but merely a way of defining the form

of title to land. Read as a whole, the written agreement is clear that it pertained to sale of land. Clause 4 of the written agreement of sale in which Tendai Mataure is the purchaser refers to the seller's obligation to give vacant possession of the property to the purchaser. The appellant would be mischievous to suggest that the purchasers would take occupation of shares. Clause 7 refers to the appointment of conveyancers in the registration of transfer of title. Shares do not require the involvement of a conveyancer to pass transfer. Clause 9 of the written agreement states that the property is being sold as it stands "together with all fixtures and fittings". Shares have no fixtures and fittings and cannot have these. There is also reference in the same clause to the purchaser having acquainted himself with property and any servitudes, leases boundaries, beacons and locality, all of which apply to immovable property. The last clause which contains special conditions makes mention of sewer and water charges and the fact that subdivision "has not yet been registered' (whatever that is intended to mean). These are not matters that would be relevant to a sale of shares. Clearly the substance of the sale was an immovable property which the appellant was always aware that he could not sell. The letter from the City of Harare dated 2 March 2005 shows that the purported sale of individual stands, whether as shares or anything else, was not authorized by law.

As regards the written agreement with Getrude and Godfrey Ngoshi, para 3 of the preamble recites the following: "AND WHEREAS the seller wishes to sell and the purchaser to purchase one of the stands which has come into existence as a result of subdivision". Where there is a reference to a land share it is clear that the share relates to an immovable property which is described as measuring 488 square metres. It also refers to the giving of vacant possession. The substance of the agreement of sale is land held through the title of shares. Appellant knew that he could not sell the so called shares over the land in question because the legal requirements for such a sale were not in existence.

The learned Magistrate therefore correctly found that the appellant indeed sold two non-existent pieces of land. The complainants received no title to the land described in the agreements of sale.

The second ground of appeal is that intention to permanently deprive the complainants of their money was not established. This is false, because at the trial it was established that the appellant was paid money pursuant to the sales of non-existent properties. He was always aware

when he was receiving the money that the properties which he was selling were non-existent. The mixing up of shares and stands in the written agreements was meant to steal money from the complainants.

The third ground of appeal is that the Court *a quo* erred in holding that the appellant could only sell land shares if he had a certificate of compliance. Nothing really turns on this issue whichever way it is decided, because, as found, the charge related to sale of stands which were non-existent, as the shares, even if they were sold, did not relate to any identifiable stands. In other words, there was no stand which the complainants could be legally given occupation of. The Court *a quo* found that occupation of the land in the absence of compliance with the requirements of the law was unlawful. In any event, the finding that the City of Harare and not the Surveyor's department is responsible for creating land shares was based on the evidence of a witness E. Gavaza who was believed by the Court *a quo*. The acceptance of that witness' evidence has not been challenged. In this case the City of Harare never authorized the land shares and did not issue a certificate of compliance.

Appellant's counsel through the supplementary heads of argument and at the hearing advanced the contention that the judgment of the court *a quo* is irregular. In this regard, reliance was placed on the allegation that the judgment of the Court *a quo* did not consider the evidence that was led on behalf of the state or make a finding on that evidence that the state had proved its case against the appellant. It is further submitted that the Court *a quo* placed the onus on the appellant to prove his defence and that the evidence adduced on behalf of the state exonerated the appellant. The submissions are based upon a faulty reading of the evidence tendered and the judgment of the Court *a quo*. As shown above, all the evidence tendered on behalf of the state pointed to the guilt of the appellant. The agreements of sale produced by the state witnesses show that the appellant sold land or rights in land to the complainants. The evidence of receipts produced also shows that payment was made. The receipts make reference to Stand Number although in some instances make reference to a share number, which shows that the share was merely a form of title to land. The witnesses stated that they paid the full purchase price. The stands that the appellant pretended to be selling were non-existent. Yet he received payment for them. The learned Magistrate was very much alive to the evidence led on behalf of the state, hence her observation (Record 5, para 2 et seq**)** that "State led evidence from 2 witnesses . . ." The court

analysed the evidence and reached the conclusions stated in the judgment, including that the complainants did not receive any title over the land which they paid for.

For the first time in the heads of argument (para 1.9) it was submitted on behalf of the appellant that the shares that he was selling to the complainants were shares in a company. This is not in the defence outline. The share certificates were not produced, neither were the company documents produced to show that such a company existed. In short, the submissions in the supplementary heads of argument which contain the only case advanced at the hearing bear no relation to the defence that was pleaded by the appellant in the trial court. As noted, the arguments advanced at the hearing do not help the appellant at all.

As for the sentence, two grounds are set out in the notice of appeal. The first ground is that the learned Magistrate misdirected herself in imposing a custodial sentence in circumstances where a non-custodial sentence would have met the justice of the court. Sentencing is a matter that falls within the discretion of the trial court. The appellate court does not readily interfere with the exercise of that discretion unless it was not judicially exercised in the sense, for instance, that the trial court applied the wrong or irrelevant principles, or failed to take into account the applicable principles. It is not enough for the appellate court to think that it would have imposed a different or lighter sentence than that imposed by the trial court. That is not a basis for interfering with the exercise of the sentencing discretion of the trial court. In this case the court *a quo* did consider the mitigating factors, which include that he is a first offender, a family man with a wife and children, and a breadwinner. The court considered the aggravating factors as well, which included the loss to the complainants which is clearly irremediable owing to changes in the currency which took place after 1998 and 1999 when the sales took place. The offence itself is a very serious and a prevalent one as found by the trial court. It was carefully planned and executed. The failure to consider the non-custodial sentences is justified by the reasons given.

The second ground of appeal is that the sentence imposed induces a sense of shock. For it to induce a sense of shock the sentence imposed must be manifestly excessive, in the sense of being too severe when compared to sentences imposed in similar cases. Other than a reference to cases which deal with general principles on sentencing, there was no reference to any comparable case in which a lesser sentence was imposed. The offence is one involving dishonesty; the complainants have not recovered their loss, yet the appellant benefitted. The offence itself is

prevalent as noted earlier on, and the court *a quo* noted how innocent persons are losing their hard-earned cash to conmen who sell non-existent properties to them. In this case, it is surprising that no charges were preferred against the estate agent in the case of the first complainant. There is need for the criminal justice system in cases of sale of non-existent properties to hold accountable those who hold themselves out as the agents in such sales as co-perpetrators of the offence. An agent must know what property he or she is selling on behalf of a principal instead of just worrying about receiving the commission from the sale of a non-existent property.

In all the circumstances of this case, the appeal is without merit.

In the result, the appeal is dismissed in its entirety.

CHIKOWERO J agrees . . . . . .

Bherebhende Law Chambers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioner