

COLLIN MBOTO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIWESHE JP & HUNGWE J
HARARE, 22 September 2015 & 7 June 2017

Criminal Appeal

H Chitima, for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. He was sentenced to 24 months imprisonment of which 8 months imprisonment were suspended for 5 years on condition of good behaviour. Of the remaining 16 months imprisonment, 6 months were suspended on condition the appellant made restitution of the sum of US\$3 922-00 to the complainant before a specified date and the balance of 10 months imprisonment were suspended on condition that he performs 350 hours of community service at Marlborough Police Station. He appeals against his conviction only.

Of the six grounds of appeal, the first two grounds are a nullity for lack of compliance with the rules. The third ground of appeal suggests that the court *a quo* erred in that it “in effect required the appellant to prove his innocence beyond reasonable doubt yet the State failed to prove its allegations against the appellant.” In the fourth ground it is said that the court *a quo* erred in that it disregarded the appellant’s explanation and version of events yet that version was corroborated by documentary exhibits.

The fifth and sixth grounds of appeal attacked the court *a quo*’s findings on credibility as grossly unreasonable.

The facts upon which the appellant was convicted may be summarised as follows.

The appellant was an insurance broker who had brokered a bond of insurance between Sanctuary Insurance Company (“Sanctuary”), Clovegate Elevator Company (Private) Ltd (“Clovegate”) and the Mining Industry Pension Fund (“MIPF”). MIPF had contracted Clovegate Elevators to install a mechanical elevator in one of its high-rise buildings. In order to cover itself against unforeseen risks in the execution of the contract, MIPF required Clovegate to provide a bond of insurance for the due performance of the contract. The appellant organized this bond through Sanctuary Insurance and became Sanctuary’s agent to Clovegate. Sanctuary underwrote the bond. Sanctuary would raise a debit note against Clovegate, Clovegate would pay against this debit note. The appellant would receive his commission once Clovegate paid Sanctuary Insurance. Sanctuary Insurance covered the risk for the due performance of the contract between Clovegate and MIPF.

The evidence shows that the appellant’s erstwhile co-accused Shingirai Ishe Tanyanyiwa (“Tanyanyiwa”) during trial, advised his supervisors at Clovegate that in order to extend the cover at Sanctuary Insurance, a payment of US\$7 762-50 was required. Once the authorities at Clovegate gave a greenlight for the payment of this amount, MIPF released this sum of money to Sanctuary Insurance on behalf of Clovegate Elevators. When Sanctuary received the payment of this sum of US\$7 762-50, the appellant received US\$3 928-00 out of the \$7 762-50 in cash. The records at Sanctuary reflected that there had been an overpayment of the premiums by Clovegate. The US\$3 922-00 was therefore a refund to Clovegate. The agent, who is the appellant, signed for this refund purportedly for onward transmission to Clovegate. Matters came to a head when Clovegate was advised that its bond could not be renewed as Clovegate was in arrears on its premiums for the bond. It was only then discovered by both Clovegate Elevators and Sanctuary that although Clovegate dutifully made payments to Sanctuary through the appellant, who was an agent for Sanctuary, those payments were not always remitted in full resulting in a shortfall in the premiums.

These facts were found proved at trial. The trial court made the above findings based, among other evidence, on the followings excerpts:

At p 109 of the record the following appears;

“Q: In respect of count 2 it is stated that an amount of \$3 928-00 was released to Clovegate from Sanctuary. Who requested the money from Sanctuary?”

A: We were told that our General Manager, the 2nd accused requested for it indicating that he wanted it in cash because we were having liquidity problems but the money was signed for by the 1st accused.

Q: Is there written proof of that alleged request by the 2nd accused?

A: There is a letter which went to MIPF by 2nd accused. I don't know if the confirmation was made in writing but Sanctuary wrote in their books that it was a refund for Clovegate when they realised that the premium had been exceeded."

At p 110 the Managing Director of Clovegate Collin Mapepa Jeché gives the following responses during cross-examination:

"Q: Were you aware of the premiums that Clovegate was supposed to pay through MIPF?

A: The 2nd accused (the appellant) said \$7 762-00 and said he would write to MIPF so I was aware of that amount.

Q: So that amount is the amount which had been requested by Sanctuary?

A: No because if that was the case then Sanctuary would not have refunded it. The misrepresentation is on that the actual amount was supposed to be \$3 200-00 and that 2nd accused requested \$7 762-00 and it was paid to Sanctuary by MIPF only to realise the actual amount (owing) was \$3 200-00 and the 2nd accused requested the refund from Sanctuary.

Q: Why did Sanctuary receipt that money and not query?

A: The payment was made in RTGS form so Sanctuary received \$7 762-00 and since Sanctuary wanted \$3 200-00 the 2nd accused requested them to make a cash refund to Clovegate of the other amount and Sanctuary agreed to the refund because they knew they had been over paid.

Q:

A: It is clear that the misrepresentation started when I was told that a request was to be made from MIPF for \$7 762-00 and that MIPF was told that a premium was due to be paid to Sanctuary for that same amount. The crime is that the actual premium was \$3 200-00 and the refund was then released to Clovegate and was received by 1st accused and yet that refund was not received by Clovegate."

The court *a quo* believed the evidence given by Jeché on behalf of Clovegate. His evidence was that his subordinate, the 2nd accused at trial had advised him that they will ask MIPF to pay \$7 762-00 as a premium to Sanctuary on Clovegate's behalf. After payment was

effected Sanctuary was alerted (in all probability by the appellant, the agent, and the 2nd accused) about the overpayment which the 2nd accused asked to be made by cash as they were experiencing a liquidity crisis.

When the request was made of MIPF for \$7 762-00 by Shingirai Tanyanyiwa, the 2nd accused at trial, he knew that it was not true that such an amount was owed to Sanctuary as a premium. When this payment was made to Sanctuary again a refund was requested by Tanyanyiwa, in cash on behalf of Clovegate. The appellant signed for it and received it as such. It never found its way into the Clovegate coffers. It is on this basis that the court *a quo* found that the element of misrepresentation had been met.

At common law fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial:

CR Synman, *Criminal Law 4th ed* (2002) @ 520: See also J Burchell and J M Milton, *Principles of Criminal Law 2nd ed* (1992) @ 579.

A misrepresentation is “an incorrect statement of fact or law made by one person to another” Burchell (*supra*) @ 581; alternatively this has been expressed as “a perversion of the truth” (Synman at p 521).

The following statement by BUCKLEY J in *Re London Globe Finance Corporation Limited* [1903] 1 [Ch 728] makes the point:

“To deceive is to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind, and to defraud is to deceive or induce a course of action.”

Much later the following statement was made by LORD LANE CJ in *R v Grantham* [1984] 3 ALL ER 166 (CA) at 171:

“.....a person is guilty of fraud if he intends by deceit to induce a course of conduct on another which puts that other’s economic interests in jeopardy, even though he does not intend that actual loss should ultimately be suffered by that other.”

In India, the Supreme Court of that country expressed itself in similar terms regarding the intention to deceive as an essential element of fraud. In *Vimla (Dr) v Delhi Administration* AIR 1963 SC 1572; and in *Indian Bank v Satyam Fibres (India) (Pvt) Ltd* (1996) 5 SCC 550 the court said;

““Fraud” means an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the others is immaterial. The expression “fraud” involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss that is deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person on body, mind, reputation or such others. In short it is non-economic or non-pecuniary loss. A benefit to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the loss to the deceived, the second condition is satisfied.”

It will be clear from the above that the law in respect of fraud generally requires proof of deceitful conduct which is potentially prejudicial to another person. In deciding whether conduct is deceitful the court looks at the totality of the evidence and ask itself whether in all the circumstances sufficient conduct as would constitute a misrepresentation was established by the evidence led.

Our common law in this respect has been codified in s 136 of the Criminal Law (Codification and Reform) Act; [*Chapter 9:23*] which provides:

“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.”

The appellant’s co-accused ought to have been convicted. I make this observation in light of the fact that he, together with the appellant, played a crucial role in setting in motion a course of conduct through which Clovegate Elevators suffered loss in the sum of \$3 928-00 in count two. Tanyanyiwa triggered the request for the payment of \$7 762-00 from MIPF to Sanctuary on behalf of Clovegate. In truth and in fact at that point in time only \$3 200-00 was due to be paid as a premium on the bond of insurance. Both Tanyanyiwa at Clovegate and the appellant, as agent of Sanctuary, knew this fact. The evidence led clearly prove this fact.

After payment they pretended that the amount “overpaid” to Sanctuary was to be paid back to Clovegate as a “refund” when they pretty well knew that this was only a ploy to syphon

that money out of the payment system. This “overpayment” was throughout treated as a “refund” of the overstated and paid premium, yet in court the appellant claimed that these were his fees. The court, correctly in my view, rejected this claim as false. The mosaic of the evidence points to a scheme designed by the appellant and Tanyanyiwa to defraud both Clovegate and Sanctuary of various amounts of money.

The grounds of appeal consequently lack merit. They are dismissed. The appeal against conviction similarly lacks merit.

It is dismissed.

CHIWESHE JP agrees _____

Mbidzo Muchadehama & Makoni, appellants’ legal practitioners
National Prosecuting Authority, state’s legal practitioners