REPORTABLE (09)

(1) CHRISTIAN COMMUNITY LIFE ASSURANCE PRIVATE LIMITED (2) WASHINGTON FRERA (3) VINCENT TOM BARIS (4) NORMAN NGOSHI
v
(1) PROSECUTOR GENERAL (2) MS GLORIA TAKUNDWA

SUPREME COURT OF ZIMBABWE
BHUNU JA, MAKONI JA & CHATUKUTA JA
HARARE: 27 FEBRUARY 2024 & 10 FEBRUARY 2025

T.L. Mapuranga, for the appellants

E. Makoto, for the first respondent

No appearance for the second respondent

BHUNU JA:

INTRODUCTION

1. This is a criminal appeal against the whole judgment of the High Court (the court *a quo*) which reversed the appellants' acquittal by the Regional Magistrate, Harare on one count of forgery as defined in s 137 of the Criminal law (Codification) and Reform Act [*Chapter 9:23*] (the Code) and two counts of fraud as defined in s 136 of the Code. The court *a quo,* in the process of appeal, overturned the verdicts of acquittal and substituted them with verdicts of guilty on all the 3 counts for all the 4 appellants. Thereafter it remitted the matter to the trial magistrate for sentencing. Aggrieved, the appellants have appealed to this Court for relief. The appeal is opposed.

THE PARTIES

2. The first appellant is a private limited liability company duly registered as such in terms of the laws of Zimbabwe. It was represented by the second respondent in court proceedings. The second to fourth respondents are its shareholders and directors.

3. The first respondent is the Prosecutor General responsible for the prosecution of all criminals, duly appointed as such in terms of the Constitution of Zimbabwe. The second respondent is the presiding Regional Magistrate who presided over the trial in the first instance.

THE CHARGES

Count one (Forgery)

4. The appellants appeared before the Regional Magistrates' Court, Harare jointly charged with one count of forgery coupled with two counts of fraud as defined in the Code. The second respondent presided over the trial. It being alleged in count one that on 9 May 2017 and 21 March 2018 the four appellants, one or more of them, with the intention to defraud one Yan Yu and the late Zhaosheng Wu forged the signatures of Yan Yu and the late Zhaosheng Wu onto a fraudulent agreement of sale purportedly made between the first respondent and the late Zhaosheng Wu. Yan Yu's signature was allegedly forged onto the fraudulent document as a witness and Zhaosheng Wu as the buyer.

5. The terms of the forged agreement were that the first appellant had swapped a gold mining claim in Bindura with 100% shares held by Zhaosheng Wu in Shomet Industrial Holdings (Pvt) Ltd (Shomet).

Count two (Fraud)

6. In the second count the four appellants are alleged to have unlawfully, with intent to deceive the Registrar of Companies misrepresented to him that Yan Yu and Zhaosheng had resigned as directors of Shomet. Thereafter they further misrepresented to him that they were now the new directors of Shomet, when in fact Yan Yu and Zhaosheng had not resigned at all and no new directors had been appointed. It was alleged that as a result of the misrepresentation, the said company lost control of its 25.1499 hectares piece of land called Lot 358 of Prospect situated in Waterfalls, Harare, valued at $4 200 000. 00.

Count 3 (Fraud)

7. In the third count, it is alleged that in March 2018, the four appellants acting in concert and common purpose, with intent to deceive misrepresented to Forthbury (Pvt) Ltd that they were directors of Shomet who were looking for a partner to develop the 25.1499 hectare piece of land. They intimated that the prospective partner was obliged to pay a commitment fee of US$101 000.00 to the potential prejudice of Forthbury (Pvt) Ltd.

BRIEF SUMMARY OF THE FACTS

Counts one and two

8. The complainant in counts one and two is Shomet Holdings (Pvt) Ltd duly represented by Yan Yu hereinafter referred to as the complainant. It is the owner of 25.1449 hectares of land situated at stand number 358 Prospect Waterfalls, Harare. The company is in the business of property development. The complainant and her so called husband, the late Zhaosheng Wu (Zhaosheng) were proprietors and directors of Shomet.

9. The appellants allegedly got wind of the couple's bid to obtain a loan to finance their company's business operations. They then allegedly hatched a plan to fraudulently deprive the couple of their company and assets.

10. Appellant number two, Washington Frera, is alleged to have approached the complainant and fraudulently misrepresented to her that their company, Christian Life Assurance (Pvt) Ltd (the firstappellant) was in a position to advance her company, Shomet, a loan of US$2 2000 000 at an interest rate of 15% per annum.

11. The complainant and Zhaosheng took the bait and accepted the loan offer. As surety for the due performance of the loan, they offered their 100% shares in Shomet to the appellants. In consequence thereof, the complainant and Christian Community Life Assurance (Pvt) Ltd, represented by appellant number two, concluded a loan contract. It was a term of the agreement that appellant number one would advance the loan funds to the complainant on or before 9 May 2019. Upon signing the contract, the complainant released copies of Shomet's particulars to the second appellant.

12. Appellant number one defaulted in advancing the loan funds by the due date resulting in the complainant cancelling the loan agreement through an email addressed to the appellants.

13. Notwithstanding cancelation of the loan agreement, the appellants allegedly connived and manufactured a fake agreement dated 10 May 2017 in which they misrepresented that Christian Life Community assurance Company (Pvt) Ltd had swapped its gold mining claim registration number 40638 known as Foot 62 on Mountain View Farm Bindura with the complainant's 100% shares in Shomet. In their fraudulent scheme, the

appellants forged the signature of Zhaosheng Wu and Yan Yu onto the fraudulent agreement.

14. The State alleges that the appellants drafted the fraudulent document with the full knowledge that the gold claim registration number 40638 known as Foot 62 of Mountain View did not belong to them.

15. Using the fake agreement, the appellants approached the Companies Registry and fraudulently effected change of directorship of Shomet under the false pretext that both Zhaosheng and Yan Yu had resigned as directors of Shoment. Thus, they got a fraudulent CR14 falsely depicting themselves as directors of Shomet.

16. On 2 November 2017 appellant number two approached the Deeds Registry Office purporting to represent Shomet and misrepresented that Shomet had lost its Deed of transfer 621/2009 for its Waterfalls 25.1449 hectares of land. He then fraudulently got a replacement certified copy thereby rendering the authentic deed of transfer held by the complainant redundant and invalid in terms of s 20 of the Deeds Regulations.

17. The offence came to light during the process of due diligence conducted by one Cornillius Muzvongi a director of Fortbury (Pvt) Ltd (Fortbury), the complainant in count three. A report was then made to the police resulting in the arrest of the appellants.

18. As a result of the appellants' forgery and fraudulent conduct, the complainant is alleged to have suffered a potential prejudice of US$4 200 000.00 and Fortbury US$101 000.00.

Count Three (Fraud)

19. The complainant in count three is Fortbury (Pvt) Ltd (Fortbury) represented by its director, Cornillis Muzvongi (Cornillius). Fortbury is in the business of property

development. In count three the appellants are alleged to have approached Cornillius Muzvengi in his capacity as the director of Fortbury with the fake CR 14 specified in para 15 of count two sometime in March 2018 with the intent to defraud his company Fortbury.

20. Armed with the fake CR 14, they misrepresented to him that they were the owners and directors of Shomet, the owner of 25.1449 hectares of land in Waterfalls, Harare. They intimated to him that they were looking for a developer to partner them in the development of the property. They showed him the property and he developed an interest in the proposed partnership.

21. The appellants then laid a condition that Cornillius had to pay them US$101 000.00 to facilitate Fortbury joining the partnership. Upon agreement in this respect, the parties concluded a memorandum of agreement. Cornillius had however the vigilance and presence of mind to do a diligence search before paying the required US$101 000.00.

22. He requested for the relevant CR 14 and was given the fake CR14. During the verification process at the Companies Registry Cornillius discovered that the genuine director of Shomet was Yan Yu. He thus visited her at her given address number 9 Knowels Close, Mount Pleasant, Harare. During discussion, they both realized that they had been cheated.

23. Upon realization of the mischief, they made a report to the police, leading to the arrest of the appellants. A police trap was set and the appellants were arrested while in the process of receiving the US$101 000.00 from Cornillius.

APELLANTS' PLEAS

24. All the four appellants pleaded not guilty to all the three charges prompting the trial magistrate to delve into a full-fledged contested trial.

SUMMARIES OF DEFENCE

First and second appellants. Defence outline

Count one

25. The first and second appellants proffered a joint defence outline. It was their defence that sometime in May 2017 they entered into a written loan agreement with the complainant and her partner whom she called her husband. Upon cancelation of the loan agreement by the complainant, the parties proceeded to negotiate a swap deal.

26. As a result of further negotiations the parties concluded a sale agreement which superseded the original loan agreement. In the agreement of sale, the appellants stipulated that they had swapped a mine in Bindura with one thousand shares in Shomet. Thus, the complainant and her partner got a mine in Bindura in exchange for their one thousand shares in Shomet.

27. Both appellants denied that they forged the complainant and her partner's signatures. They were adamant that all the transactions they did pertaining to the 25.1449 hectares belonging to Shomet were lawful.

Counts two and three

28. In respect of counts 2 and 3, both appellants one and two protested that they were never charged with those counts as appears from their warned and cautioned statements.

29. Notwithstanding their protests, both appellants adopted the facts relating to their defence in count one as their defence outline in counts 2 and 3.

Third and fourth appellants' defence outline

30. Both third and fourth appellants gave a brief joint defence outline. Their defence is that sometime in September 2017 they were invited by the first and second appellants to join as directors of Shomet. In return they were to be rewarded with 5000 shares in equity.

31. They both denied having been party to the alleged forgery and fraudulent conduct which they laid at the door of first and second appellants. It was their defence that all their actions and conduct was under the misapprehension that Shomet had been lawfully acquired by the first and second appellants.

STATE EVIDENCE

32. The complainant Yan Yu also colloquially known as Mrs Wealer or Mrs Shomet gave evidence on behalf of the State. She identified herself as the founder member and managing director of Shomet. She explained that for convenience's sake she uses the said English names but her Chinese name Yan Yu remains her official name.

33. It was her testimony that she knew all the appellants as they were introduced to her through an estate agent as potential buyers of their property. She however saw the fourth appellant for the first time as they were signing the loan agreement. She narrated how she had sat in her office with the appellants to negotiate the aborted loan agreement.

34. It was her testimony that on 16 March 2008 a certain Mr Collin Mudzongwe whom we now know to be Cornillius Muzvongi called at her home and left a CR 14 Form depicting the name of her company Shomet and a copy of the title deeds of her land in Waterfalls. He also left copies of the relevant permits which the appellants had obtained from her in 2017. The CR 14 form depicted the names of the second to fourth appellants as directors of Shomet. It indicated that she had resigned as a director of the company. She denied

having resigned as indicated on the CR 14 form or at all, hence the report to the police for forgery and fraud. The alleged fake CR 14 form was produced in evidence.

35. Under cross-examination she denied that she entered into a swap deal where she and her partner swapped their 100% shares in Shomet for a mine in Bindura as alleged by the appellants. She denied ever having negotiated any sale agreement with the appellants. She only got to know about the sale deal upon the appellants' arrest.

36. She met Muzvongi the following day whereupon they discussed the matter and decided to report to the police the charges of forgery and fraud.

37. The rest of Yan Yu's evidence was consistent with the summary of the State case. There is no point in regurgitating it. She however further elaborated that Zhaosheng, her former husband, co-director of Shomet and signatory to the loan agreement had since passed on. She was duly appointed as the executrix of his estate and issued with letters of administration by the Master of the High Court. She produced the said letters of administration in court.

38. The appellants however contested the authenticity of the letters of administration arguing that Zhaosheng was still alive. He was alive and well in China.

39. Cornillius Muzvongi gave evidence on behalf of the State. His evidence was consistent with the Summary of the State Case and corroborated Yan Yu's evidence in every material respect. It is not necessary to repeat his evidence, but suffice to give a brief summary.

40. He confirmed having entered into a partnership agreement on behalf of his company Fortbury with the appellants who claimed to be directors of Shomet. During the

negotiation process he became suspicious of the appellants' weird behavior. This prompted him to do a diligent search which unearthed their alleged criminal conduct. He then contacted the complainant who confirmed the alleged criminal conduct. A police report was made and a police trap was set. The appellants were caught in the trap and arrested as they were about to receive the fraudulent deal money from the witness.

41. Leonard Tendai Nhari a consultant forensic scientist gave evidence on behalf of the State. He is the holder of a Bachelor of Science Honours Degree, a Master of Science Degree in Bio-Chemistry with special emphasis on forensic analysis. He is the former Chief Government Forensic Scientist having joined government service in 1980.

42. It was his testimony that he examined a photocopy of an agreement between Christian Life Community Assurance (Pvt)) Ltd represented by Frera Washington who was the buyer and Zhaosheng Wu who was the seller. He compared the signatures on this questioned document with those on standard documents. He found the design and construction of the signatures on the questioned document not similar and therefore not consistent with the respective signatures of Zhaosheng Wu or Yan Yu. The apparent differences between the questioned and standard documents could not be attributed to natural variation. He demonstrated his evidence with the aid of enlarged photographic images. On the basis of such observation he concluded that the questioned signatures on the questioned agreement of sale were consistent with forgery.

43. Mr Nhari also examined the loan agreement between Christian community and Shomet. He concluded that the signatures on that document were consistent with those of Zhaosheng Wu. The design and construction on the questioned documents matched those on standard documents.

44. The forensic scientist was not shaken under cross-examination. He stuck to the correctness of his report.

45. Clara Beatros Tendai Gombakomba is a government forensic scientist. She is the holder of a Bachelor of Science degree in Bio-Chemistry and Biological Sciences. She has also undergone extensive in-house training on forensic science. She examined the questioned signatures pertaining to the agreement of sale and compared them with standard signatures of the authors. She came to the same conclusion with Mr Nhari that the questioned document is the product of forgery. Just as Mr Nhari, she came to that conclusion because of the differences in pen movement and constructions.

46. Martha Chakanyuka was the next State witness. She is employed by the Department of Deeds, Companies and Intellectual Property. She testified that Shomet Industrial Holdings was incorporated on 17 March 2006 with Zhaosheng Wu and Yan Yu as its directors. On 10 October 2013 two additional directors Jethro Mazenge and Tarisai Hapanyengwe were appointed. Chipo Mupambari was later appointed as an additional director on 18 March 2014.

47. It was her testimony that her records show that on 17 March 2017 Zhaosheng and Yan Yu resigned. On 25 September 2017, Washington Frera, Vincent Tom-Barris and Norman Ngoshi were appointed as new directors.

48. The new CR 14 left out the additional directors Jethro Mazenge, Tarisai Hapanyengwe and Chipo Mupambari who had not resigned. This was a fundamental irregularity such that the CR 14 ought to have been rejected. The CR 14 is supposed to be amended to include the excluded directors who have not resigned.

49. Detective Assistant Inspector Brian Pfungwa Museruka gave evidence on behalf of the State. It was his evidence that during investigations he discovered that the gold mining claim registration number 40638 known as Foot 62 on Mountain View Farm Bindura which is at the heart of this case belonged to one Lynette Mukute. She intended to sell the mine to the second appellant. The second appellant at the time of the alleged offence had paid only a commitment fee of US$500.00 sometime in 2016. Thus the registered owner of the mine at the time of the offence was Lynette Mukute. He however testified that when he arrested the accused persons, he found the second appellant in possession of the mine's registration certificate. He denied that possession of the certificate conferred any ownership rights on the second appellant as he was not the owner of the mine.

50. He also testified that, during investigations he was shown the original deed of transfer for the Waterfalls property which was lodged with CABS building Society for safe keeping by the complainant.

51. The State then closed its case.

THE DEFENCE CASE

52. The appellants' defence is basically that the entire State case is founded on fraud perpetrated by the complainant and her partner who fraudulently misrepresented himself as Zhaosheng. This is because she was never married to Zhaosheng. Zhaosheng whom she claims to be dead is alive and well in China. It was their argument that the complainant and one Zhaoxi who is the twin brother of Zhaosheng were committing fraud by misrepresenting themselves as Mr and Mrs Zhaosheng Wu.

53. The first and second appellants maintained that they had entered into a genuine contractual agreement with the complainant and her partner Zhaosheng for the swap of 100% shares in Shomet with a mine in Bindura. They denied having made any misrepresentations to the Registrar of Companies as alleged by the State. They also denied having forged any signatures as alleged by the State. They maintained that the signatures on the agreement of sale were the genuine signatures of the complainant and her partner.

54. Appellants 1 and 2 further complained that counts 1 and 2 amount to a splitting of charges. The two counts should have been formulated as one charge.

55. As regards counts 2 and 3 they denied that they had been charged with those counts. They however adopted the facts in count one as their defence outline on those counts.

56. Accused 3 and 4 denied having signed any fraudulent documents. It was their defence that sometime in September 2017 they were invited by appellants one and two to join as directors of Shomet. They were to be rewarded with 5000 shares each. They agreed to become directors under the misapprehension that the first and second appellants had acquired Shomet lawfully. They thus denied any criminal intent when they became directors in Shomet. Both appellants denied being involved in any transaction that forms the basis of the charges apart from being innocently invited to become directors in Shomet.

THE TRIAL MAGISTRATE'S DETERMINATION

57. On the above pleadings and evidence, the trial Magistrate found that there was not enough evidence to prove that the first and second appellants had made any misrepresentation to the complainant and the Registrar of Companies. She also found

that there was no sufficient evidence showing that the agreement of sale relied upon by the appellants was forged. She further found that third and fourth appellants had innocently accepted to become directors in Shomet. She thus absolved all the appellants of any criminal conduct and acquitted them.

APPEAL TO THE COURT *A QUO*

58. Aggrieved, the State appealed to the court *a quo* on the grounds of irrationality. Counsel for the State contended that the trial court had failed to assess the facts rationally and had failed to consider and determine vital evidence.

59. The court *a quo* upheld the State's contention that the trial court had acquitted the appellants on a view of the facts that could not reasonably be entertained as it had failed to properly consider vital evidence implicating the appellants. It determined that the trial court had not properly dealt with evidence placed before it. It found the following faults in the trial court's assessment of evidence:

    (i) It omitted to deal with some of the vital evidence
    (ii) It did not deal with all the evidence placed before it.
    (iii) It omitted to deal with all the exhibits placed before it.
    (iv) It failed to properly consider that all the members of the first appellant at their annual general meeting unanimously resolved that fraudulent activities had occurred.

60. Having considered the evidence on record, the court *a quo* concluded that there was overwhelming evidence against the appellants upon which the trial court ought to have convicted the appellants. It thus upset the verdict of acquittal and substituted it with one of guilty in respect of all the appellants on all the three counts.

APPEAL TO THE SUPREME COURT

61. Disgruntled, the appellants appealed to this Court on 11 grounds of appeal. It is cumbersome to repeat them. Suffice it to say, that all the counts with the exception of

counts 4 and 5 raise the same issue that the court *a quo* erred in reversing the verdict of acquittal in the absence of incriminating evidence beyond reasonable doubt.

RELIEF SOUGHT

62. The appellants seek the following relief:

(1) The appeal be allowed.

(2) The judgment of the court *a quo* be set aside and substituted with the following –

"1. The appeal is dismissed
2. That the convictions of the appellants by the High Court on the 6th of June 2022 are set aside.
3. The sentence imposed upon the Third and Fourth Appellants by the Magistrates Court on the 10th of August 2022 are set aside.
4. The sentences imposed upon the First and Second Appellants by the Magistrates Court on 12 of August 2022 are set aside."

THE LAW

63. Counsel for the appellants Mr Mapuranga submitted that on the authority in *State* v *Muserere* SC 147/21, an appellate court can only reverse the verdict of the trial court where the trial court's view of the facts cannot reasonably be entertained. In that regard the appellant has to prove a gross misdirection on the part of the trial court's view of the facts. In other words the appellant must demonstrate that the factual findings of the trial court were so grossly unreasonable such that no court faced with the same set of facts would entertain such a view.

64 In elaborating on the appropriate test for an appellate court to reverse the verdict of a trial court based on factual findings counsel for the appellants placed reliance on the earlier case of *AG* v *Paweni Trade (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (SC) at p 32 F , where KHORSAH JA had this to say:

> "To my mind, then, if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together point inexorably to the guilty

> of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court could not have reasonably inferred the innocence of the accused, then, the verdict of acquittal is perverse, and the Attorney General is entitled to attack it."

65. There is no dispute as to the applicable requirements for upsetting the verdict of a trial court by an appellate court. Indeed, counsel for the respondent was alive to those requirements. In his appeal he endeavoured to prove that the court *a quo* had met the test for an appellate court to reverse the judgment of a lower court.

ISSUE FOR DETERMINATION

66. The issue for determination is whether or not the court *a quo* had passed the test for intervention and if so, whether it was correct in its finding that the trial court erred in acquitting the appellants in the face of overwhelming evidence. The other two issues are whether the trial magistrate was bound by the High Court's findings in related civil proceedings and the effect of the alleged splitting of charges on conviction and sentence of the appellants.

ANALYSIS AND DETERMINATION.

67 The trial court mounted its decision on its view of the complainant as not being a credible and believable witness. It appears that it zeroed in on the fact that she sometimes uses the names Mrs Wealer and Mrs Shomet as evidence of her being of a dishonest disposition. It also fastened onto the factual position, now accepted by the state, that her partner whom she claimed to be her husband had fraudulently passed himself off as Zhaosheng, his twin brother when his true name is in fact Zhaoxi Wu. Investigations have however since established that Zhaosheng Wu is indeed alive and well in China contrary to the complainant's assertion that he had passed on.

68. The complainant gave an innocent explanation as to why she uses the name Mrs Wealer or Mrs Shomet which are not her official names. It was her explanation that she finds it convenient to use those English names in an English-speaking environment rather than her Chinese name. There is no evidence on record that she had used her assumed nick names to mislead or defraud anyone. In fact in her dealings with the appellants she used her official name. There is also no evidence on record to show that her partner Zhaoxi Wu who claimed to be Zhaosheng used his assumed name improperly to adversely influence his dealings with the appellants. He gave no evidence and for that reason we are in the dark as to why he assumed his twin brother's name Zhaosheng Wu. The complainant is not accountable as to why her partner used his twin brother's name.

69. Counsel for the appellants sought to rely on the legal principle that if a litigant gives false evidence his evidence will be discarded and treated as if he had not given any evidence at all. In *Leader Tread Zimbabwe Pvt) Ltd* HH 131 of 2003, NDOU J had this to say at p 7 of his cyclostyled judgment:

> "It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see *Tamahole Bereng* v *R* [1949] AC 253 and *South African Law of Evidence* by L Hoffmann and D T Zeffertt (3 ed) at p 472."

70. The same sentiments were expressed in *Lerm* v *Hamandishe NO & Anor* 1983 (1) ZLR 196 (HC) where the High Court said:

> "A false affidavit at any time is bad enough, when it is presented in a judicial matter in order to mislead the Court then it is quite inexcusable."

71. What is clear from the cited case law is that the courts were dealing with and criticizing evidence proffered before them in court by a litigant or witness. In this case neither Zhaosheng nor Zhaoxi gave any evidence. It will therefore, be folly for any court to treat Zhaoxi Wu and critique him as if he had given evidence before the court. In the normal

run of things, the courts are minded to restrict themselves to evidence proffered before them and not to wander and determine cases on the basis of non-existent evidence not adduced before them.

72 On a proper reading of the record, it is clear that Zhaoxi's alleged fraudulent behaviuor is not material to the determination of this case. The appellants have no basis for saying that he perpetrated a fraud on them. In fact they seek to cling on to the alleged contract on the basis that his signature on the alleged contract of sale is valid and binding. That being the case, there is absolutely no basis for pontificating as alleged by the appellants that the whole State case is premised on a monumental fraud arising from Zhaoxi's conduct in assuming his twin brother's name.

73 It is contradictory for counsel for the appellants to submit that a conviction premised on fraud cannot stand when on the other hand they seek to cling onto the alleged contract of sale arguing that it was validly transacted by the alleged fraudster. They have gone all out of their way to defend his signature but in the same breath allege that the contract is a product of a monumental fraud. It boggles the mind for them to say that a contract of sale which they claim to be lawful and valid is a product of a monumental fraud. The appellants cannot blow both hot and cold. That type of conduct betrays their lack of honesty and probity.

74. To a large extent, all the three counts fell to be determined on the alleged contract of sale. This is because it was central to the root cause of the forgery and frauds allegedly perpetrated by the appellants.

75. The first and second appellants' defence is that they legitimately swapped the complainant and her partner's 100% shares in Shomet with a gold mine in Bindura known

as Foot 62 on Mountain View Farm Bindura. They however do not dispute that they do not own the mine. The registered owner of the mine is Lynette Mukute. The mine is registered in her name and she has not given her consent that the mine be transferred to the complainant and her partner. All that the second respondent had was a purported agreement of sale with the owner of the mine and copies of the particulars of the mine. Such an agreement does not however confer legal ownership rights of the mine on anyone except the registered owner of the mine.

76. The inescapable factual position is that the first and second appellants purported to swap 100% shares in Shomet with a gold mine which did not legally belong to them. That being the case, the appellants had no legal right to deal in or trade any rights, interest and title in the mine which did not belong to them.

77. The second appellant's contention that they believed they were now the lawful owners of the mine sounds hollow and empty in the absence of any supporting evidence from Lynnette the real owner of the mine.

78. It is a fact that Zhaoxi also known as Zhaosheng, did not hold 100% percent shares in Shomet as there were other shareholders and directors of the company to the knowledge of the appellants as reflected on the original CR 14 certificate which was at their disposal. It was therefore not legally possible for Zhaoxi to single handedly sell 100% shares in Shomet. It was also not legally tenable to simply drop out other directors from the company register without following laid down procedures.

79. As correctly pointed out by the learned judge *a quo*, on 26 September 2017, the second appellant wrote to the registrar of Companies advising that by resolution dated 25 September 2017, Shomet's shareholding had changed and allotted as follows:

- Second appellant : 50%
- Third appellant : 25%
- Fourth appellant : 25%

80. The letter requesting regularization was couched as follows:

"4. Regularize the company's shares to reflect the following:

NAME	**POSITION**	**SHAREHOLDING**
Washington Frera	Managing Director	10 000 shares
Vincent Tom-Baris	Executive Director	5 000 shares
Norman Ngoshi	Executive Director	5 000 shares

Your urgent regularization of the above matters is awaited, and we give you the instructions as the *bona fide* owners of the company Shomet Industrial Holdings (Pvt) Ltd premised **on a loan converted into 100% equity in the company which we now exercise**. (My emphasis)

Regards
(Signed)
Mr Washington Frera
(Director)."

81. In their pleadings, the appellants made a fundamental contradiction on a crucial point of fact capable of disposing of the appeal. By way of a company resolution they submitted to the Registrar of Companies that the reason they sought regularization of the register was on the premise of a loan converted into a 100% equity in the company. Yet when the game is up and they are charged with forgery and fraud the story changes to a swap deal with a mine which does not belong to them.

82. In her judgment the second respondent did not address this glaring contradiction on a crucial point of fact dispositive of the case before her. Had she addressed her mind to this vital aspect of the case, she would have undoubtedly realized that it is the appellants

who were of deviant characters and not the complainant whom she subjected to unwarranted criticism based to a large extent on irrelevant issues.

83. On the facts of this case it does not seem to matter whether Zhaoxi used his brother's name Zhaosheng or Yan Yu used her colloquial nick names. Even if the court was to find that there was an element of impropriety in this respect that would still not have assisted the appellants. This is because everyone is entitled to the benefit and protection of the law. Criminals and miscreants in society included. The bottom line is whether the appellants committed the offences charged.

84. It is plain from the record of proceedings that in seeking a replacement deed the appellants lied to the Registrar of Deeds that the original deed of transfer was lost when in truth and in fact it was readily available, safely stored in a bank. It is clear that they did not ask the complainant for the original deed of transfer because they knew that this would alert her of the forgery and frauds they had committed. The appellants obtained a fraudulent certified deed of transfer which had the effect of nullifying the legitimate original deed of transfer stored at CABS Head office. That type of conduct can only be consistent with fraud.

85. Cornillius Muzvongi was an impeccable witness who had no reason to fabricate evidence against the appellants. He by chance stumbled on evidence implicating the appellants while carrying out a genuine due diligence process. His evidence complements and corroborates that of the complainant in every material respect. All the available evidence unmistakably points to the appellants using the information and documentation fraudulently obtained from the complainant about Shomet to defraud the complainant and Conillius Muzvongi's companies.

86. The complainant's evidence distancing herself and her partner from the signatures on the questioned agreement of sale is amply corroborated by concrete expert evidence on record. Both experienced qualified handwriting experts independently confirmed that the purported signatures on the questioned sale agreement relied upon by the appellants were fraudulent. As correctly pointed out by the learned judge *a quo*, the expert evidence almost pales into insignificance because the alleged sale agreement was not used to perpetrate the fraud at the Registrar of Companies' office. The cancelled loan agreement was instead used to effect the fraudulent change of directorship in Shomet.

87. There is a seamless joint uniting all the 3 counts charged. They were committed with the collective common intention to benefit the appellants from the criminal stripping of the complaint and her compatriots of their rights, interest and title in Showmet and to swindle Cornillius of US$101 000.00.

88. The third and fourth appellants cannot wriggle out of criminal liability when the evidence clearly shows that they were part and parcel of the whole criminal enterprise. Although the evidence shows that the second appellant was the more active party in the execution of the crimes, his co-appellants had a stake in the whole criminal scheme and stood to benefit from the crimes charged. The evidence of the Complainant provides a link between them and the commission of the crime. It was her evidence that she saw them and they participated in the negotiations and signing of the loan agreement which gave birth to the commission of the 3 counts charged. They eventually profited from the crimes. They fraudulently became Shomet directors and were due to fraudulently receive US$101 000.00 from Cornillius. Likewise, the first appellant company cannot escape vicarious liability because it allowed itself to be used as a vehicle for committing the

offences by its directors. It further stood to benefit from the proceeds of the crimes committed on its behalf.

89. In analyzing the evidence of the complainant, the learned judge *a quo* concluded that the second respondent erred in discrediting and disbelieving the complainant. He found that the complainant was discredited on irrelevant issues. We share the same sentiments as the judge *a quo*. The complainant testified that she had dealings with the third and fourth appellants in respect of events leading to and culminating in the conclusion of the loan agreement. That evidence is corroborated by their incorporation into the directorship of the fraudulent CR 14 certificate depicting them as directors of Shomet. We accordingly uphold the court *a quo's* finding that the second respondent erred in discrediting and disbelieving the complainant's evidence. Her finding in this regard was palpably wrong such that the learned judge *a quo* was correct in intervening to put things right in the interest of the due administration of justice.

90. By the same token we hold that the further evidence which the appellants intended to lead to the effect that Zhaosheng is alive and well and that he misrepresented his true name is irrelevant. That evidence is not disputed by the State but it does not take the defence case any further.

91. A reading of the case and evidence adduced before the trial court evinces on the part of the appellants calculated predetermined set minds to defraud and strip the complainant, her partner and other shareholders and directors of their rights, interest and title in Shomet. The appellants' participation in the affairs of the fraudulently acquired Shomet, directorship and company resolutions to further the criminal enterprise betrays them.

92. Ordinarily, a court of appeal does not lightly upset the assessment of the trial court on matters of credibility of witnesses and factual findings. This is because the trial judicial officer is best suited to determine matters of credibility and demeanor as they will have seen and heard the witness live in court. Where however, the trial court's assessment is grossly irrational in its defiance of logic, a higher court must not hesitate to intervene and put matters right in the interest of justice. In the case of *State* v *Muserere* SC 147 of 2021 this Court held that:

> "In other words, in order to trigger interference by the appellate court, the appellant must demonstrate that the factual findings of the court *a quo* were so grossly unreasonable that no court faced with the same set of facts and applying its mind to them, would entertain such a view."

93. In this case the sufficiency of evidence fell to be determined on the validity or otherwise of the contract of sale. In *R* v *Sibanda & Ors* 1965 RLR 363 (A) at 370 A-C the appellate court had this to say:

> "Generaly speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt, It is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt: See *R* v *de Villiers* (1944 Ad 493). Where, however, there is a particularly vital fact which in itself determines the guilt of an accused it must be proved beyond reasonable doubt"

94. As we have already seen, the contract of sale could only have been fraudulent because when seeking to register themselves as the new directors of Shomet, the appellants abandoned the bogus sale agreement and relied on the non-existent cancelled loan agreement and not the swap sale agreement. It is unthinkable and not in the least probable that the appellants could have relied on a cancelled loan agreement if they had negotiated a valid swap sale agreement as they now allege. Failure to appreciate this naked contradiction which completely destroyed the appellants defence constituted gross irrationality which could not have been committed by any court considering the facts

correctly. That finding of fact is dispositive of all the three counts charged as they are intertwined and conjoined in their purpose and sequence of commission.

Whether the Court *a quo* was correct in holding that The Magistrates' Court was not bound by the decision of the High Court in related civil proceedings. (Count 4)

95. This issue arises in ground of appeal number 4, where counsel for the appellants argues that the trial magistrate was bound by the High Court order now under appeal which ordered the reinstatement of the CR 14 which was held by the court *a quo* to be fraudulent and to that extent a nullity. The court *a quo* dismissed that argument on the basis that civil proceedings are no bar to criminal proceedings.

96. Our courts in a long line of cases have consistently held that civil proceedings are not a bar to criminal proceedings. In *Chawasarira Transport (Pvt) Ltd* v *The Reserve Bank of Zimbabwe* H - H - 86 – 2009, the High Court held at p 4 of the judgment that:

> "It is instructive to always bear in mind that in our law criminal proceedings are separate and distinct from civil proceedings such that criminal proceedings are not a bar to civil proceedings. Section 4 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that:
>
> '**4 Neither acquittal nor conviction are a bar to civil action for damages**
> Neither a conviction nor an acquittal following on any prosecution shall be a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of any alleged offence.'"

97. The rationale for that conclusion of law is given at p 4 - 6 of the judgment. Where the court said:

> "It must be borne in mind that the object of criminal proceedings is to punish the offender whereas the object of civil proceedings is to compensate or provide redress to the injured party. The standard of proof in criminal proceedings is ordinarily proof beyond reasonable doubt whereas that for civil wrongs is proof on a balance of probabilities. It is therefore, not surprising that based on the same facts or evidence a criminal court may arrive at a different decision from that of the civil court."

98. We might as well add that though a civil court may reach a different verdict from that of the criminal court, both courts will be correct on account that they will be using different standards of proof to arrive at their respective verdicts.

99. In *Ex-Constable Matseketsa A 073911M* v *The Commissioner General of Police* HH – 79 -18: The Court *a quo* held that a conviction or acquittal in respect of any crime shall not be a bar to civil or disciplinary proceedings in relation to any conduct constituting the crime.

100. Thus in holding that the trial magistrate was not bound by the decision of the High Court in related civil proceedings the learned judge *a quo* was merely following long established precedent. He also relied on s 278 of the Criminal procedure and Evidence Act [*Chapter 9:07*] as did the learned judge in the case of *Ex-Constable Matseketsa, supra,* which provides as follows:

> "(1)……
>
> (2) A conviction or acquittal in respect of any crime shall *not be a bar* to civil or *disciplinary proceedings* in relation to any conduct constituting the crime at the instance of or ….. the *relevant disciplinary authority*.
>
> (3) Civil or disciplinary proceedings, in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings."

101. What readily comes to mind is the famous American case of *OJ Simpson* where the criminal court acquitted *OJ Simpson* of the murder of his wife and her friend but the civil court found him liable for the wrongful killings in a civil action for damages. See *Simpson* v *United States* | 199 U.S 397 (1905) and *Rufo* v *Simpson* 86 Cal. App. 4th (Cal. Ct, App. 2001). Both verdicts though different on the same set of facts were correct and have stood the test of time. Coincidentally, the same legal position obtains in Zimbabwe.

102. We accordingly hold that the learned judge *a quo* was correct in holding that this being a criminal case, the trial magistrate was not bound by the High Court's findings in a related civil matter.

THE EFFECT OF THE ALLEGED SPLITTING OF CHARGES (Count 5)

103. The purpose of a complaint about splitting of charges is to reduce the severity of punishment or sentence. It is not a defence or plea that affects conviction. In this case the two charges of forgery and fraud are separate and distinct offences capable of being charged separately. They were however committed with the single motive of committing fraud. The two offences are closely related in time space and aim such that they were both necessary for the completion of the ultimate criminal objective of stealing by misrepresentation of facts. The forgery was merely used as a vehicle to commit the fraud which was the ultimate object of the criminal enterprise.

104. The solution in such a case is not to acquit the accused but either to charge accused with one global charge incorporating both charges where possible or to consider both charges as one for the purposes of sentence. The ultimate object being to mitigate the severity of sentence through a reduction of a multiplicity of counts which is beneficial to the accused.

105. In this case there has been no complaint about the severity of punishment. What that means is that the alleged splitting of charges did not cause any prejudice to the appellants.

106. In the final analysis, we hold that the learned judge *a quo* met he threshold of intervening in the judgment of a lower court on criminal appeal laid down through precedent stated elsewhere in this judgment. That being the case, there can be no basis for any appellate court to interfere with the sentences imposed on the appellants.

DISPOSITION

107. Having regard to established precedent and the applicable law, we find no fault in the conclusion of fact and law reached by the learned judge *a quo*. For that reason the appeal can only fail.

108. It is accordingly ordered that the appeals be and are hereby dismissed.

MAKONI JA : I agree

CHATUKUTA JA : I agree

Nyamutanda & Mutimudye, the appellants' legal practitioners.

The National Prosecuting Authority, the 1st respondent's legal practitioners.