

PROSECUTOR GENERAL
versus
CONVERGING INVESTMENTS (PVT) LTD
and
ISMAIL MOOSA LUNAT
and
MAHOMED IQBAL LUNAT
and
TRIAL MAGISTRATE, NEMADIRE

HIGH COURT OF ZIMBABWE
ZHOU AND CHIKOWERO JJ
HARARE, 13 and 17 September 2021

Criminal Appeal

E Makoto, for the appellant
G Nyoni, for the first, second and third respondents

ZHOU J: This is an appeal by the Prosecutor General (“the appellant”) against a decision of the magistrates court in terms of which the first, second and third respondents were acquitted on a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The first, second and third respondents (hereinafter called the respondents) are contesting the appeal. The fourth respondent cited in the notice of appeal was the trial magistrate. He has no interest in the appeal and should not have been cited.

The facts upon which the charge is founded are as follows. The complainant, Toppers Uniform (Private) Limited, is a company incorporated in terms of the laws of Zimbabwe. It was represented in the trial proceedings by Mahomed Zakariya Patel, its director. He is also a director of other companies. The second and third respondents were said to be directors of the first respondent which is a company incorporated in accordance with the laws of Zimbabwe. The respondents were the accused persons in the court *a quo*. The allegations against the respondents are that in or around August 2018 they, acting in concert and in connivance with each other unlawfully and with the intention to deceive and cause prejudice to the complainant or realising that there was a real risk or possibility that the complainant might be deceived and act upon the misrepresentation to its prejudice, misrepresented that they owned and were

offering for sale an immovable property for USD\$1 400 000.00 in cash. The immovable property in question is Stand 1245 Bulawayo Township. It is alleged that the property was represented as being registered under Deed of Transfer 2515/97. It was alleged that as a result of the misrepresentation the complainant was induced to enter into an agreement of sale with the first respondent and suffered prejudice in the sum of US\$1 400 000.00 which he paid for the immovable property. The allegation is that the Deed of Transfer given to the complainant's representative was fake as it did not relate to the property in question. Stand 1245 did not belong to first respondent but had been sold to one Timothy Mafuka Nkomo in 2005. Complainant is alleged to have subsequently discovered that the property that had been pointed out to him was not Stand 1245 of Bulawayo Township but was Subdivision A of Stand 448 Bulawayo Township registered under a different Deed of Transfer, 1263/95.

All the respondents denied the existence of the agreement of sale. The second respondent, who was the one who dealt with the complainant's representative stated that the claims by the complainant arose from an illegal foreign currency transaction between the complainant and one Molai in respect of which he had only played the role of a middle man by brokering the illegal transaction since he knew the said Molai who received the foreign currency from the complainant. When the complainant's representative failed to recover the money paid to Molai he blamed the second respondent, and used duress to compel him to sign the documents which he now wants to rely on as proof of an agreement of sale.

In its judgment the court *a quo* found that there was no evidence linking the third respondent to the transactions for it to be concluded that he ever made any misrepresentation to the complainant. In respect of the alleged transaction in which the complainant's representative and the second respondent were the major actors, the court concluded that the evidence led did not prove the alleged representation and sale agreement. It concluded that the probabilities pointed to a failed illegal foreign exchange deal as alleged by the second respondent. It therefore came to the conclusion that the guilt of the respondents had not been proved beyond reasonable doubt.

In the notice of appeal the appellant attacks the judgement of the court *a quo* on the ground, essentially that by acquitting the respondents the court relied on facts that could not reasonably be entertained. It is argued that the evidence of the three state witnesses proved the essential elements of the offence of fraud.

The settled position of the law, which both counsel noted, is that the onus to prove the guilt of the respondents rests squarely on the shoulders of the appellant. That guilt must be proved beyond reasonable doubt. This position of the law is stated in many cases. In the case of *S v Van Der Meyden* 1999 (1) SACR 447(w) at 448 f-g, the principle is articulated as follows:

“The onus of proof in a criminal case is discharged by the state if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent... These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other... In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and, so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true...”

The court *a quo* also cited the following celebrated statement on the criminal standard of proof from the case of *Rex v Difford* 1937AD370 at 372:

“It is equally clear that no *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.....”

This court is seized with this matter pursuant to an appeal noted by the appellant. Beyond the principles articulated earlier on *vis-a-vis* the standard of proof, the appellant is enjoined when he seeks leave to appeal, to show that the learned magistrate misdirected himself on a point of law or that he acquitted on a view of the facts which could not reasonably be entertained. That test reflects the onus which is upon the appellant where he seeks to overturn a judgment in terms of which an accused was acquitted.

This court is mindful of the fact that as an appellate court it does not have the benefit of assessing the evidence of the witnesses while they are giving evidence. The appellate court does not, therefore, interfere with findings of credibility made by the trial court in the absence of a clear misdirection on the part of that court. In this case the verdict depended primarily on the nature of the transaction between the complainant as represented by Mahomed Zakaria Patel and the first respondent as represented by the second respondent. While Patel alleged an agreement of sale, the second respondent alleged a failed illegal foreign currency deal. The fact that there was a signed agreement and acknowledgements of receipt of money had to be

considered in light of the totality of the other evidence, including that of the second respondent. The court *a quo* examined all the evidence, and came to the conclusion that in all probabilities there was a disguised illegal foreign currency deal. We find no fault in that conclusion when the following are considered. In the first instance the agreement of sale is meant to pertain to an immovable property, a double storey building, which the representative of the complainant never inspected. His evidence, which does not make sense and is inherently unconvincing, is that he passed by along the road and had a view of the building from a distance. He did not care to check on its condition or who occupied it and on what terms. He also made no effort to check on the title of the property with the Registrar of Deeds yet he was prepared to part with close to one and half million United States dollars. His explanation that he was working on the basis of trust was correctly rejected by the court *a quo*. The court *a quo* noted that Patel did not come across as an ‘unsophisticated, simple and rustic’ person. He is a business man. He would know about the basics to look for when purchasing an immovable property. This, it is clear, would probably not be his first immovable property acquisition. The fact that there was some relationship arising out of marriage, which is clearly not as close as appellant might want to portray it, or that the parties belonged to the same Islamic society, are insufficient explanations of how and why a business man would pay such a large sum of money in the circumstances described by the complainant’s witness.

But there are other more fundamental aspects of the case, which the court *a quo* applied its mind to. The very fact of making a transaction involving such a large sum of money a cash transaction was itself questionable. The court *a quo* noted the complainant’s inconsistent versions about the source of the large sum of money. Apart from manifesting hallmarks of money-laundering, the evidence did not reveal the existence of that money at the time of the transaction. Equally, the payment of sum of USD\$1 000 000.00 in cash clandestinely to an alleged seller of property is improbable unless the transaction was illegal as alleged by the second respondent and accepted by the court *a quo*. Even after making such a huge payment, the complainant’s witness wanted the court *a quo* to believe that before he was even asked to make pay transfer fees he could have the property registered in the name of the complainant.

The evidence of the other two state witnesses, the handwriting expert and the person who was assigned to value the property, was correctly found to be colourless by the court *a quo*. The writing and signature of the second respondent was never an issue before the court *a quo*. The issue was of the circumstances in which the documents concerned were signed. The

valuations were equally irrelevant because the values which the witness attached to the property are unconnected to the US\$1 400 000.00 which the complainant claimed to have paid for the property. The market value of the property was put at USD\$2 200 000.00, which was way above that which the complainant alleged that it had paid.

When all these deficiencies in the evidence led by the prosecution are considered in light of the allegation by the second accused as to the true nature of the transaction, the conclusions of the court *a quo* cannot be impeached.

The fact that the appellant even persisted with an appeal in respect of the first and third respondents is worrying. The first respondent is a company. There was no evidence tendered of a board resolution authorising it to be involved in the transactions from which the charges arose. As for the third respondent, the basis for persisting with the case against him is that he asked for the copy of the deed of transfer which was in the custody of the complainant. It is difficult to see how this conduct would fit into the requirements or elements of the offence of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act. The request for the deed of transfer, if it was made, was clearly after the alleged transactions were concluded.

In all the circumstances, the appeal against the acquittal of the respondents is without merit. The court *a quo* correctly found that the guilt of the respondents had not been proved beyond reasonable doubt. In the result, the appeal is dismissed.

National Prosecuting Authority, appellant's legal practitioners
Venturas & Samukange, 2nd respondent's legal practitioners
Ncube Attorneys, 1st and 3rd respondent's legal practitioners

CHIKOWERO J: AGREES