

MASIMBA MUNEMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 14 May & 18 July 2012

Criminal Appeal

C Daitai, for the appellant
F I Nyahunzvi, for the respondent

HUNGWE J: The appellant was charged with theft of trust property as defined in s 113(2) of the Criminal Law [Codification and Reform] Act, [*Cap 9:23*], (“the Code”). He was also charged with fraud as defined in s 136 (2) of the Code in the alternative. He pleaded not guilty to both the main and the alternative charge. After a trial, he was found not guilty on the main charge but was convicted on the alternative charge. He was sentenced to five years imprisonment of which one year was suspended on condition of good behaviour and a further two years were suspended on conditions of restitution.

He now appeals against both conviction and sentence.

In his appeal against conviction he raises four grounds. His first ground of appeal was that the court misdirected itself in convicting him in his personal capacity when he was acting on behalf of a company called Burberry Investments (Pvt) Ltd. In his second ground he states that the magistrate erred in ruling that the appellant made any representations to the complainant which induced him to release the funds to the appellant. The third ground was that the magistrate misdirected himself by finding that the appellant had no capacity to supply washed peas coal in the absence of any evidence to support such a finding. The fourth ground was that the magistrate misdirected himself in finding that a clear breach of contract amounted to a crime of fraud.

The ground of appeal against sentence advanced by the appellant was that it was grossly unreasonable and induced a sense of shock.

Regarding the first ground, no authority was cited for the contention on appellant's behalf that it was improper to charge the appellant in his own capacity when he acted on behalf of a company. The State, on the other hand, contended that even if the appellant acted on behalf of a company, the State was entitled to charge either the appellant personally or the company or both the appellant jointly with the company. I find a merit in the contention made by the State.

The situation urged by the appellant under this ground was previously governed by subs (5) of s 357 of the Criminal Procedure and Evidence Act, [Cap 9:07] prior to its amendment. The old section recited that:

" (5) When an offence has been committed (whether by the performance of any act or by the failure to perform any act) for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the [said] corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of that offence, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall, on conviction, be personally liable to punishment therefor."

This provision is not peculiar to the Criminal Procedure and Evidence Act of Zimbabwe. An identical section exists in the Criminal Procedure Act 1977, of the Republic of South Africa, viz s 332(5).

Interpreting this provision in *Attorney-General v Paweni Trading Corporation (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (SC) the court held that the intention of the lawgiver was to make directors vicariously liable for criminal acts committed by their companies unless they can establish that they did not participate in such acts. In the words of ROPER AJ in *R v Theron* 1960 (3) SA 331 (1) at 335 F-G:

"The plain meaning of subs (5) is that, when an offence has been committed for which the corporate body is liable to prosecution, a director or responsible servant is to be liable as having committed that offence unless he shows that he was not responsible for it. I see no reason for limiting the language of the subsection to offences which are capable of being committed not only by a corporate body but also by an individual person."

By the use of the phrase "unless it is proved that they did not take part in the commission of that offence", the Legislature clearly intended that the director or responsible servant, in such circumstances, shall be deemed guilty of the offence for which the corporate body is liable to

prosecution, and the onus is on the director or responsible servant of the corporate body to prove on a balance of probabilities that he did not take part in the commission of the offence and could not have prevented it. See *S v Avon Bottle Store (Pty) Ltd & Ors* 1963 (2) SA 389 (A) at 391H-392A.

Section 357 of the Criminal Procedure and Evidence Act, [Cap 9:07] was amended by Act 23 of 2004. The provisions of s 357 are now captured in s 385 of that Act. It recites:

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(1)

(2)

(3) In any criminal proceedings against a corporate body, a director or employee of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question:

Provided that—

- (i) if the said person pleads guilty, the plea shall not be valid unless the corporate body authorized him to plead guilty;
- (ii) if at any stage of the proceedings the said person ceases to be a director or employee of that corporate body or absconds or is unable to attend, the court or magistrate concerned may, at the request of the prosecutor, from time to time substitute for the said person, any other person who is a director or employee of the corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;
- (iii) if the said person, as representing the corporate body, is committed for trial, he shall not be committed to prison but shall be released on his own recognizance to stand trial;
- (iv) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant enactment makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and

sale of any property of the corporate body in terms of section three hundred and forty-eight;

- (v) the citation of a director or employee of a corporate body to represent that corporate body in any criminal proceedings instituted against it shall not exempt that director or employee from prosecution for that offence in his personal capacity.

.....

(11).....

First, a company being a juristic entity, cannot commit an act of representation on its own. It acts through the medium of a natural person in whatever it does. It cannot therefore form a criminal intent of its own. But the company can commit a crime. If those individuals carry out acts, in the furtherance of its legitimate objects, do so in an unlawful manner, both the company as well as the personnel so acting can be charged and convicted of a criminal offence. Second, in the present case at no time during trial was it contended that, in acting in the manner he did, the appellant acted on behalf of the company. Third, although the money was deposited in the company's account, it does not follow that the appellant was acting on behalf of the company. No such company resolution to this effect was produced during the trial.

As pointed out in the respondent's heads of argument, in all the undertakings which the appellant personally signed in acknowledgment of his obligation to repay the money lost by the complainant, the appellant personally committed himself to repay the money which he received from the complainant. No reference is made to anyone else.

Therefore the fact that the State chose to charge the accused alone, does not, in any way vitiate the conviction. The evidence led at trial shows that it is the appellant who was approached in order to supply coal. He confirmed that he had the capacity to supply the required quantities within the stipulated period. Subsequent to receiving money meant for the purchase of coal, the evidence shows that the appellant personally confirmed that he had the capacity to supply 1 500 tons of coal when he knew he could not, or in circumstances where he should have reasonably foreseen that he could not possibly deliver that quantity in the required time. It is this

misrepresentation which led complainant to release money to the appellant. The first ground of appeal therefore fails.

As for the second and third grounds, these grounds cannot be upheld for the following reasons. The record of proceedings shows that the appellant was approached by one Mukuna and the complainant. He therefore misrepresented, to these two, that he was capable of delivering 1500 tonnes of coal before the contract deadline. It was this misrepresentation which induced the complainant to part with \$40,000, 00. Yet, to his knowledge, the appellant had no such capacity. The evidence shows that he owed his friend Donald Takawira money for three truckloads of coal. He had difficulty in paying this debt and had channelled part of complainant's payment towards this debt instead of paying for the coal. According to Takawira, the appellant was not a coal merchant but would buy coal, on behalf of others, through registered coal merchants.

I find no merit in the fourth ground. Now, "fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another". See Vol II of Hunt's *South African Criminal Law and Procedure 2 ed p 755*.

It seems to me, therefore, that if a person, with intent to defraud, unlawfully makes a false representation which is potentially prejudicial to another, he commits the offence of fraud. It is not necessary that the representation be acted upon by the party to whom it is made, to his prejudice, in order to constitute the offence. It is sufficient that the false statement was made with intent to defraud.

As WESSELS JA observed in *R v Seabe* 1927 AD 28, regarding the prejudice necessary to support a charge of fraud, at p 32:

"It seems to me therefore that where there is some risk, though perhaps slight, the element of prejudice necessary to support *crimen falsi* exists."

The fact that a contract to supply was used by fraudster who knew he could not supply what he promised is no bar to a conviction for fraud.

In the premises the appeal against conviction fails in its entirety.

Appellant contends that the sentence imposed is so harsh as to induce a sense of shock but does not demonstrate, by way of case authority why one should be shocked by the sentence imposed in the court *a quo*. A sentence is not liable for interference unless it can be shown that the sentencing authority misdirected himself in considering those factors which he is entitled to consider resulting in a sentence that is outrageously out of line with previously decided cases. There is no such averment in the present case and indeed it cannot be said the other considerations influenced the court *a quo* when assessing sentence or that it is out of line with previously decided cases. In the premises I dismiss the appeal against sentence.

In the result I make the following order

1. The appeal against both conviction and sentence be and is hereby dismissed.

MAVANGIRA J: agrees

Magwaliba & Kwirira, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners