REPORTABLE (68)

TAPUWA CHIDEMO
v
THE STATE

SUPREME COURT OF ZIMBABWE
BHUNU JA, KUDYA JA & MUSAKWA JA
HARARE: 29 NOVEMBER 2023 & 19 JULY 2024

T. L Mapuranga for the appellant

E. Makoto for the respondent

MUSAKWA JA: This is an appeal against the judgment of the High Court (the court *a quo*) in which it dismissed the appellant's appeal against conviction for fraud as defined in s 136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] (the Code) by the Magistrates Court.

BACKGROUND FACTS

The appellant was employed as an accountant by the Zimbabwe Revenue Authority (ZIMRA). He was arraigned before the magistrates' court facing nine counts of fraud as defined in s 136 of the Code. It was alleged that the appellant was the sole user of a software system called Paynet used by Zimbabwe Revenue Authority ZIMRA to refund value-added tax to its clients. It was the State's case that the appellant transferred various amounts of money using the Paynet system from ZIMRA's account to various individuals and companies. The money would then be withdrawn and handed over to the appellant. It was alleged that the appellant used the credentials

"T Chide" to access the system and to make the payments. The appellant was found guilty of counts two and five and was acquitted of the rest of the counts.

In respect of the second count, it was alleged that the appellant diverted ZIMRA's money and deposited it into his wife's bank account. The total amount that was alleged to have been deposited into the wife's account amounted to USD45 882.60.

With regards the fifth count it was alleged that the appellant registered a company called Armeline Enterprises (Private) Limited and opened a bank account for the same. Thereafter he deposited USD414 656.01 from ZIMRA's account.

The appellant pleaded not guilty to all counts. In his defence, the appellant averred that he was not the only one who had access to the payment system and as such, someone else could have made the transfers. He argued that his credentials were T.E. Chidemo and not T. Chide. He denied ever authorizing the transfers in dispute and that someone else could have made a transfer into his wife's bank account and thereafter cloned the bank card to access the money.

The State led evidence from witnesses from Paynet, ZIMRA and auditors from a company called KPMG. The witnesses testified that the appellant was responsible for the value added tax refunds and that he was the one who processed the transfers in question. Representatives of companies whose bank accounts were deposited with money transferred from the ZIMRA account testified that after withdrawing the money they would hand it over to the appellant.

The trial court found that the State had failed to prove that the appellant's credentials were T. Chide. It found that the omission by the State to produce the audit report as evidence was fatal to its case as the report would have proved whether or not the appellant was the one who authorized the transactions in question. It found that the State failed to prove beyond a reasonable doubt that the appellant was the only person who had access to Paynet. As a result, the appellant was acquitted of all the counts save for counts two and five.

With regards counts two and five, the trial court found that the evidence before it established that the appellant was the one who registered a company called Ameline Investments and opened a bank account in its name. It found that the appellant's identity number and address were included in the application form used to register the company as well as opening the bank account.

On count two, the trial court found that the same address was used when the appellant's wife opened a bank account in 1997. It ruled that the defence that someone else transferred the money into the appellant's wife's account and cloned the bank card was not believable. As a result, the appellant was convicted of counts two and five and sentenced to six years' imprisonment of which one year was suspended on condition of good behaviour. A further two years were suspended on condition he paid restitution of USD450 538.61 to ZIMRA.

Aggrieved by the decision of the trial court, the appellant appealed to the court *a quo*. The appellant contended that the trial court fell into error by convicting him on the basis of circumstantial evidence. He argued that no sufficient evidence had been placed before the trial court to prove that he committed the offence beyond a reasonable doubt.

The respondent made an application for leave to file a counter-appeal. The application was made in terms of s 61 of the Magistrates Court Act [*Chapter 7:10*]. The basis of the application was that the trial court erred when it acquitted the appellant in circumstances where the same *modus operandi* was used in the commission of the offences.

The application was opposed by the appellant who raised a preliminary point to the effect that the application was not made within a reasonable time as contemplated by the law. The court *a quo* upheld the preliminary objection. It found that the application was not made within a reasonable time as 13 months had elapsed following the appellant's acquittal of the seven counts.

PROCEEDINGS BEFORE THE COURT *A QUO*

In determining the appeal before it, the court *a quo* held that the findings by the trial court were consistent with the proven facts. It found that there was evidence that the appellant was involved in opening the bank account and reasoned that the identity number and address of the appellant were used when his wife opened the bank account. The court *a quo* further found that the defence proffered by the appellant that his wife's bank account was cloned was not probable. Consequently, the appeal was dismissed.

Dissatisfied by the decision of the court *a quo* the appellant noted the present appeal on the following grounds of appeal:

"The court *a quo* erred in upholding the conviction of the appellant by the trial court -

1. For fraud in circumstances in which the trial court had made a specific finding that the State had failed to prove the circumstances which amounted to the act of misrepresentation.

2. Based on evidence that he benefited from the fraud only while ignoring findings by the trial court that it was not proven that the appellant was involved in the alleged fraudulent misrepresentation to the complainant.

3. On the basis that it was incredible that anyone else could have accessed the funds defrauded from the complainant even though the trial court had found nothing incredible in the fact that in the acts perpetrating the fraud, someone had created a profile in a name meant to mimic the appellant's initials.

4. On the basis that it was incredible that someone sought to falsely incriminate the appellant by creating a profile meant to look like the Appellant's actual profile, forged a CR 14 for Armeline Enterprises (Private) Limited and opened a bank account using the forged CR14 to falsely portray the appellant as the actual perpetrator yet the trial court acquitted the appellant of eight (8) counts on the basis that there was no direct evidence linking him to the offences thus accepting that the offences might have been committed by someone else different from Appellant.

5. On the basis that it was beyond a reasonable doubt false that someone else had accessed the defrauded funds in the account of the company called Amerline Investments (Private) Limited when the trial court found that the CR 14 used to open the account had been forged such that the appellant's explanation became credible since he would not have needed to forge a CR 14 for a company that he controlled in order to open its bank account.

6. And effectively agreeing with the trial court that there was now a new requirement for the crime of fraud which was that the person accused of fraud benefited from the fraud.

7. For alleged fraud relating to Tsitsi Kanyasa, his wife, on the basis that he allegedly accessed the funds transferred to her bank account in circumstances where Tsitsi Kanyasa did not implicate appellant and she was discharged of the same offence at the close of the State case by the trial court."

APPELLANT'S SUBMISSIONS

At the hearing of the appeal Mr *Mapuranga,* counsel for the appellant, submitted that the court *a quo* erred when it upheld the conviction of the appellant by the trial court. He argued that the court *a quo* made a finding that the appellant was not the sole user of the Paynet system which was used to transfer money, hence it ought to have set aside the conviction by the trial court.

Counsel argued that an imposter stole the identity particulars of the appellant and committed the offence. He further argued that the CR 14 form which was used in the registration of the company in which the appellant's name appears as a director was not authentic. He reiterated that there was insufficient evidence to prove that the appellant committed the offence.

RESPONDENT'S SUBMISSIONS

Mr *Makoto,* counsel for the respondent submitted that the requirements for circumstantial evidence were met before the appellant was convicted. He argued that there is no doubt that the appellant was involved in the commission of the offence. Further, he submitted that the defence that an imposter was involved was highly improbable. He argued that it was impossible that the imposter could have known the appellant's intricate details like his wife's bank account, his identity number and his address which appeared on the CR 14 forms used in the

registration of the company and on the application forms used when the wife's bank account was opened. Counsel thus prayed for the dismissal of the appeal.

ISSUE FOR DETERMINATION

In light of the above, the sole issue arising for determination is:

Whether or not the court a quo erred when it upheld the conviction of the appellant.

APPLICATION OF THE LAW TO THE FACTS

The appellant's bone of contention is that the court *a quo* erred when it convicted him in circumstances where there was no sufficient evidence to prove that he was guilty of the charges levelled against him. He avers that the trial court based its conviction on circumstantial evidence without considering other inferences that could be drawn from the evidence placed before it.

It is trite law that circumstantial evidence is narrowly construed. With circumstantial evidence the inference sought to be drawn must not permit other reasonable inferences.

Before the court can draw an inference of guilt, however, the inference must be the only one that can be drawn from the facts. The inference must be consistent with the proven facts and it must flow naturally, reasonably, and logically from the facts. The evidence must also exclude, beyond a reasonable doubt, every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the accused's innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused

is guilty of the crime charged and that inference is established beyond reasonable doubt, then the court must find the accused guilty of that crime. In drawing inferences, the court must take into account the totality of the evidence, and must not consider the evidence on a piecemeal basis.

In *casu*, the first inquiry is simply this; what are the proven facts? The court finds that the following facts were proved:

1. It was the appellant that diverted ZIMRA's money and deposited it into his wife's bank account using the same address that was used when the appellant's wife opened a bank account in 1997 and deposited USD 45 882.60

2. The appellant was the one who registered a company called Armeline Enterprises (Private) Limited and opened a bank account in its name in which he deposited USD414 656.01. The appellant's identification number and address were included in the application form used to register the company as well as opening the bank account

3. The appellant was responsible for VAT refunds. It was through such refunds that funds were diverted into his wife's bank account and the company styled as Armeline Enterprises (Private) Limited.

4. The appellant was linked to the address known as 352 Chishawasha, PO Box Mabvuku appearing on the forged form CR 14 for Armeline Private Limited and the forms used in the opening of a bank account for his wife.

With regards to the first finding of the court *a quo*, the trial court properly found the appellant's defense of possible cloning of his wife's bank card to be implausible. The appellant stated that his wife had not been using the card for a very long time which made it highly unlikely

that the card could have been cloned. Cloning can only be possible when the card is in constant use.

In the evaluation of the evidence placed before the trial court, this Court observes the following principles: Evidence must be weighed in its totality. Probabilities and inferences must be distinguished from conjecture and speculation. The court must sift truth from falsehood. There is no onus on the accused to prove the truthfulness of any explanation which he gives or to convince the court that he is innocent. Any reasonable doubt regarding his guilt must be afforded to the accused. See *S* v *Jochems* 1991 (1) SACR 208 (A), *S* v *Jaffer* 1988 (2) SA 84 (C), *S* v *Kubeka* 1982 (1) SA 534 (W) at 537 F-H.

A court is empowered to factor in falsehoods by an accused in deciding whether he is guilty or innocent. See *S* v *Mtsweni* 1985 (1) SA 590 (A), where the court stated that a false statement by an accused can be used in drawing an inference of guilt from other reliable evidence. See also PJ Schwikkard's Principles of Evidence 2nd ed p 503-504. The appellant lied that his wife no longer used the bank card which was used in the second count. In this regard, the court *a quo* made a finding that the bank card was still being used by the wife. Consequently, the claim that the appellant's wife in whose account some of the funds were transferred did not access those funds is devoid of merit.

In addition, the appellant's defense was further discredited when he averred that the purported cloner of the card approached ZIMRA VAT Refunds Section where he worked and further caused ZIMRA funds to be transferred into his wife's bank account. In this regard the evidence adduced during trial attested to the fact that the appellant was responsible for the disbursement of VAT refunds to legitimate clients of ZIMRA as he supervised and authenticated

various refunds before payments in the section. Therefore, the inference drawn by the trial court was consistent with all the evidence that was led. It cannot be a coincidence that money found itself into the bank account belonging to the appellant's wife and a bank account bearing the name of a company registered by the appellant. This is particularly so given that the appellant was employed at ZIMRA when the transfers were made. The argument that someone else effected transfers into these bank accounts and proceeded to withdraw it is improbable.

Although there was no direct evidence linking the appellant to the commission of the offences, the circumstances of the case were such that an inference of guilt could be safely drawn. It is pertinent to note that there is a caution on the use of circumstantial evidence. The requirements were clearly articulated in *Tepper* v *R* [1952] AC 480 at 489:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another, Joseph commanded the steward of his house, "*put my cup, the silver cup, in the sacks` mouth of the youngest."* And when the cup was found there Benjamin`s brethren too hastily assumed that he must have stolen it. It is also necessary before drawing such an inference of the accused`s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Circumstances under which circumstantial evidence can be relied on were laid down by WATERMEYER (JA) in the case of *R* v *Blom* 1939 AD 188 where at 202-203 the learned judge highlighted that:

> "(a) the inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
>
> (b) the proved facts should be such that the exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."

These "two cardinal rules of logic" have become embedded in our jurisprudence. In endeavouring to apply the "rules" to the evidence before it, a court should be careful not to fractionalise the process by applying the rules of logic in compartments. As in all cases of inferential reasoning any inference to be drawn, can only be done by considering all the relevant evidence as a whole.

In *R* v *de Villiers*, 1944 AD 493 at 508, the court held that the test is not whether each proved fact excludes all other inferences, but whether the facts considered as a whole, did so. Circumstantial evidence in itself may at times furnish direct proof of issues in question. In *S* v *Reddy* 1996 (2) SCR 1 (A) the court held that circumstantial evidence is not necessarily weaker than direct evidence. It further held that in certain circumstances it may even be stronger or of more value than direct evidence.

Inferences to be drawn when circumstantial evidence is involved must be carefully distinguished from conjecture or speculation. If there are no positive proven facts from which the inference can be made, the method of inference falls away and what is left is mere speculation or conjecture. See: *Caswell* v *Powell Duffryn Association Collieries Ltd* 1940 AC 152 at 169 per Lord Wright.

> "In order to decide whether the State has proved its case beyond reasonable doubt based on circumstantial evidence, the court needs to take into account the cumulative effect of the evidence before it as a whole. It is impermissible and an incorrect approach to consider the evidence piecemeal. See *S* v *Snyman1968* (2) SA 582 (A) at 589F, *S* v *Hassim* 1973 (3) SA 443 (A) at 457H, *S* v *Zuma* 2006 (2) SACR 191 (W) at 209B-I. The court must also not only apply its mind to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. Such probabilities should also be tested against the proven facts that are common cause. See: *S* v *Abrahams* 1979 (1) SA 203 (A); *S* v *Mhlongo1991* (4) SACR 207 (A); *S* v *Guess* 1976 (4) SA 715 (A); *S* v *Trainor* 2003 (1) SACR 35 (SCA."

With regard to the last proved fact, the appellant was responsible for VAT refunds. VAT refunds were diverted into the appellant's wife's CABS Bank account and into the account of Armeline Investments Private Limited.

The appellant is strongly linked to these illegitimate recipients of the ZIMRA VAT refunds. He is one of the directors of Armeline Investments as borne out by the CR 14 form. His identification number also appeared on the Armeline Investments account opening forms alongside his address which appears on an application for deposit and share accounts filed by his wife way back in 1997 before the commission of the offences.

In light of the above circumstances, the inescapable conclusion is that the appellant indeed electronically manipulated the ZIMRA Payment System and siphoned funds meant for ZIMRA clients into his wife's and company's bank accounts. The trial court's reliance on circumstantial evidence cannot be faulted in this regard as the above-proven facts exclude every reasonable inference from them save the one sought to be drawn.

DISPOSITION

In the present appeal, it is our view that the court *a quo* did not err in dismissing the appeal on the basis of the cumulative effect of the evidence placed before the trial court. The appeal is devoid of merit as there was no evidence of identity theft as claimed by the appellant.

In the result, this Court, makes the following order:

"The appeal be and is hereby dismissed."

BHUNU JA **:** I agree

KUDYA JA **:** I agree

Rubaya & Chatambudza, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners