FERDINAND PIKIRAYI
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 21 March 2018 & 13 June 2018

Criminal appeal

Mrs *G. Bwanya*, for the appellant
Mr *T. Chikwati*, for the respondent

MAFUSIRE J

[1] At all relevant times Turnall Holdings ["***Turnall***"] was a distributor of asbestos sheets. At all relevant times the appellant, then 55 years old, now 57, was employed as a dispatch controller and stationed at its Bulawayo depot. At all relevant times the complainant, Major Family Savings Group, was one of Turnall's trading customers.

[2] In late September 2016 the complainant bought two loads of asbestos sheets from Turnall. The order was supposed to be delivered at the complainant's hardware shop at Nyika Growth Point in Masvingo. One load of asbestos sheets weighing 30 tonnes, and valued at $25 624-75 was never received by the complainant. Instead it was received in Harare by one Tapfumaneyi Ngarande ["***Ngarande***"] who was unrelated or unknown to the complainant. He sold the whole lot for himself. This was common cause.

[3] A fraud was perpetrated on the complainant. There was evident sophistry and precision in the planning and execution of the fraud. In brief, the trading arrangements between Turnall and the complainant were these. The complainant would place an order with Turnall's sales department. The complainant would source transporters and supply their details to Turnall. These details would include the name of the transport company; the details of the driver; the particulars of the haulage truck, and the actual date of collection.

[4] On collection, the appellant would verify such details with the driver. If all was in order he would authorise the loading and dispatch of the goods, after the necessary checks by other departments like security.

[5] In this case the complainant contracted a transport company called Zimside Logistics to bring its order. Through electronic mail the complainant furnished the appellant with the necessary details. One of the drivers from that transport company would be a Mr R. Madzingo [“***Madzingo***”]. His mobile telephone number; national identity registration, and the particulars of the horse and trailer that he would be driving were all relayed to the appellant Collection would be on 28 September 2016.

[6] The fraud happened this way. At around 10:30 hours of that date the complainant’s assistant buyer, David Gangata [“***Gangata***”] received a telephone call from someone pretending to be from Zimside Logistics. The caller advised that Madzingo’s truck had had a breakdown and would not be collecting the one load. However, the caller assured Gangata that there would be a replacement truck and driver the details of which he would furnish shortly.

[7] Shortly afterwards Gangata received from the same caller through the telephone short message service [sms] the details of the replacement driver together with those of his horse and trailer. His name was Julius Mafuta [“***Mafuta***”]. His mobile telephone number and national registration particulars, and the registration particulars of the horse and the trailer were supplied. Gangata dutifully relayed them to the appellant.

[8] It was common cause that Gangata’s caller was one Arnold Mutandwa [“***Mutandwa***”]. He was the fraud mastermind or kingpin. By the time of the accused’s trial he had already been convicted on his own plea of guilty and sentenced to 24 months imprisonment all of which was suspended on the usual conditions of good behaviour, restitution and community service. Mutandwa’s role in the fraud completed some of the missing pieces of the jigsaw.

[9] Mutandwa was not employed by Zimside Logistics. He was not employed by Turnall. He had nothing to do with the complainant’s order, except to steal it. He got to know of

the complainant's order prior to delivery. He got to know of the fact that Madzingo was one of the drivers from Zimside Logistics to collect one of the loads.

[10] In making those telephone calls to Gangata, Mutandwa used telephone handsets and sim cards registered in other people's names. It was a disguise. Mafuta had nothing to do with the fraud. He was a driver employed by Quest Logistics, a completely different company, and totally unrelated to Zimside Logistics. He had been in Bulawayo on a separate and unrelated delivery for his employer. Mutandwa approached him as he was parked at a fuel station awaiting a chance return load back to Harare.

[11] Using an alias, Mutandwa interested Mafuta in the complainant's load. He introduced two other players to Mafuta: Ngarande as Mutandwa's boss and owner of the load, and Fidelis Mamunde Sibanda ["***Sibanda***"] as an assistant. Again he used false names for these two.

[12] Oblivious of the fact that he was being used as a tool in a theftuous transaction, Mafuta's horse and trailer were loaded with the complainant's load. Ngarande had paid him some money for fuel. He had also made a part payment for the hire charge.

[13] At Turnall there were no glitches. Mafuta's details had already been fed into the system. Sibanda collected Mafuta's identity documents, ostensibly for advance security clearance. But at the security section he simply impersonated Mafuta. The appellant, part of whose duties included driver and truck verification, said the driver's picture on the identity document handed over to him by Sibanda was unclear. Therefore, he failed to pick out the fact that Sibanda was not the person on the identity document.

[14] The appellant facilitated the loading and the dispatch of the complainant's load. Mutandwa accompanied Mafuta back to Harare. Ngarande escorted them in a separate small truck. In Harare, Ngarande hired a crane to offload the asbestos sheets into other smaller vehicles for delivery to his various customers. After waiting a number of days, the complainant reported the loss to the police when it had become evident its order was never going to be delivered. Nothing was recovered.

[15] In the court *a quo*, the appellant and Ngarande were jointly charged with fraud. The appellant was convicted. Ngarande was acquitted. Ngarande's story, which the trial court believed, was that he had heard that a staff member at Turnall, who enjoyed staff discounts, had purchased a load of asbestos sheets using the electronic wire system, RTGS, and was now re-selling it for cash. Seeing that the price offered was a real bargain, Ngarande had sourced buyers who paid him cash in advance. He then bought the load which he was told belonged to the appellant, though he never dealt directly with him. Ngarande denied he had anything to do with the fraud. He denied he acted in collusion or in concert with Mutandwa or any of the other players. He said he was a genuine buyer, who paid the price asked, which he admitted was quite cheap.

[16] The State's case against the appellant was that he connived with Mutandwa and the rest of the gang to divert the complainant's load and steal it. The State said he supplied Mutandwa with vital information such as the name of the transporter the complainant had contracted to ferry its load; details of the drivers and their haulage trucks; the date of delivery, and so forth. The State said the appellant informed Mutandwa about Madzingo's truck developing a fault. When Mutandwa sourced a replacement truck and driver in the form of Mafuta, and supplied the details to the complainant by telephone, the complainant relayed them to the appellant in writing. The appellant then fed them into the system. So when Mafuta and his truck entered Turnall, no one raised eyebrows, especially given that it was the appellant's function to facilitate the loading and dispatch of customers' orders.

[17] The appellant vehemently denied any involvement in the fraud. He vehemently denied he knew any of the gang members, Mutandwa; Sibanda; Ngarande or Mafuta except that he might have met one or other of them, especially Mafuta, at the time of the collection of the load.

[18] The State Outline, spanning two pages, was quite detailed with the allegations as more or less set out above. On the other hand, the material portions of the defence outline, just four short paragraphs spread over half a page, read as follows:

"The Accused person denies the allegations levelled against him and he puts the State to the strict proof thereof.

1.
He will deny misrepresenting the complainant [*sic*] in any way alleged.

2.
He avers that he released the load to the transporter whose details were supplied to him by the complainant.

3.
He denies conniving with the other two accused person [*sic*] as alleged and put [*sic*] the State to the strict proof thereof."

[19] The accused was sentenced to 40 months imprisonment of which 12 months imprisonment was suspended for 5 years on the usual condition of good behaviour. A further 12 months imprisonment was suspended on condition he paid the complainant restitution in the sum of $25 624-75. The remaining 16 months imprisonment was suspended for community service.

[20] The appellant appealed against both conviction and sentence. On conviction the argument, in a nutshell, was that the State failed to prove the appellant's knowledge of, or involvement with, the fraudsters; or that it was him who had provided the necessary information to them, and that the appellant's release of the complainant's load to the wrong transporter was above aboard as the complainant had itself supplied the necessary particulars of that transporter.

[21] The mainstay of the defence was that the appellant neither knew any of the fraudsters nor had any prior dealings with them. Ironically, that proved to be the appellant's Achilles tendon. In a remarkable feat of detective work, the police, who had very few leads to begin with, except the telephone numbers supplied by Gangata and others, among others, traced those numbers to handsets and sim cards registered in Mutandwa's associates.

[22] Initially the police were treating the appellant as a potential State witness. That changed when they arrested Mutandwa and he implicated the appellant. Further investigations revealed that, contrary to his assertions, the appellant had received numerous telephone calls from one or other of the fraudsters, particularly Mutandwa. All the relevant call

histories were sourced from the mobile telephone service providers and transcribed. Among other things, they showed which sim cards; which telephone numbers and which handsets had been used at what time and place; and which corresponding numbers had received such calls. The appellant was in the thick of some of those calls.

[23] In this appeal Mrs *Bwanya*, for the appellant, argued that the telephone call histories did not show what was discussed; that they did not show that any of the calls had been initiated by the appellant, but that he had been a mere recipient; that each single call to him lasted no more than a few seconds, and that therefore the State could not be said to have proved its case beyond a reasonable doubt. Mrs *Bwanya* further argued that in his position as dispatch clerk, the appellant received numerous telephone calls from disparate members of the public and that there was nothing unusual in the fact that Mutandwa and others might have called him prior to the collection of the complainant's order by Mafuta.

[24] It is common cause that this case falls to be decided on circumstantial evidence, as opposed to direct evidence. Circumstantial evidence is drawn, not from direct observation of facts in issue, but relies on inferences to reach a conclusion by providing other facts or circumstances to connect them to the conclusion. Direct evidence is when a fact in issue is proved by direct evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact.

[25] To reach a conclusion via circumstantial evidence, there are two cardinal rules of logic, namely:

- That the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- That the proved facts should be such as to exclude from them every other reasonable inference, save the one sought to be drawn. If the proved facts do not exclude other possible inferences, then again the inference sought to be drawn cannot be drawn because a doubt exists whether such inference as is sought to be drawn is in fact correct;

see generally *Principles of Evidence*, by **P J Schwikkard & Ors**, 3rd ed., at p 21, and the case of *R v Blom*[1].

[26] Mrs *Bwanya* accused the court *a quo* for placing too much weight on the call histories. She said these were no more than a mere record of calls made to the appellant by Mutandwa. We disagree with such an approach. In assessing circumstantial evidence, the facts are not approached on a piece-meal basis. Individual facts are not to be subjected to the consideration of whether, individually, they exclude other inferences, or whether, individually, they exclude the reasonable possibility that the explanation given by an accused is true. The evidence is considered in its totality: see *S v Reddy*[2] and *R v de Villiers*[3]. In *R v Sibanda & Ors*[4] BEADLE CJ, at p 370A – C, said[5]:

> "Generally 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 those facts into consideration, and all the facts, taken together, prove the guilt of the accused beyond a reasonable doubt."

[27] Mrs *Bwanya* further argued that the call histories did not exclude the possibility that someone else from Turnall's sales department that knew of the complainant's order almost a week before the date of delivery could have been Mutandwa's informant. As such, the argument concluded, the State could not be said to have proved the appellant's involvement in the fraudulent deal beyond a reasonable doubt.

[28] But proof beyond a reasonable doubt does not mean absolute proof to an absolute degree of certainty. It does not mean proof beyond any shadow of doubt. The State does not have to close every avenue of escape or discount every fanciful or remote possibility. The doubt, in order to be reasonable, must not rest on pure speculation. It must be based upon a reasonable and solid foundation from all the evidence taken together: see **G Feltoe** *A Guide to Zimbabwean Criminal Law*, p 2. "***… [F]anciful***

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[1] 1939 AD 188, at p 202 – 3
[2] 1992 [2] SACR 1, at p 8c – d
[3] 1944 AD 494, at p 508
[4] 1965 RLR 363
[5] Quoted with approval by KORSAH JA in *S v Masawi & Anor* 1996 [2] ZLR 472 [S], at p 524G – 525B

possibilities should not be allowed to deflect the course of justice" [*Principles of Evidence*, *supra*, at p 569].

[29] At any rate, in this matter the State supplied a *coup de grace*. It showed that it was the responsibility of the customer, not Turnall, to headhunt transporters to ferry their orders. In this case it was the complainant, not Turnall, which had sourced and contracted Zimside Logistics. But on the call history was a phone call at the most crucial of moments by the appellant to Zimside Logistics. The appellant had no business dealing directly with a customer's transporter. Mrs *Bwanya* could not explain coherently why the appellant was phoning Zimside Logistics at such a time. It is a reasonable inference to be drawn from the totality of the evidence that from that telephone call the appellant picked vital information about Madzingo's truck developing a fault and therefore not being available to ferry one of the loads. It is another reasonable inference that the appellant passed on that information to Mutandwa.

[30] Furthermore, it was uncontested that Sibanda impersonated Mafuta on the day the complainant's load was scheduled to be collected. Conveniently the appellant did not scrupulously check the picture and the other particulars of Mafuta's driver's licence that Sibanda handed him. Furthermore, when Mafuta drove his truck into the collection yard, the appellant conveniently did not notice that it was not the same person behind the steering wheel that had earlier on handed him the driver's licence.

[31] Still further, it was common cause that emblazoned on the horse of the haulage truck that Mafuta drove into the collection yard was the name "***Quest Logistics***". Yet the appellant knew the complainant had contracted Zimside Logistics, not Quest Logistics. No meaningful argument was advanced why the appellant failed to query this discrepancy.

[32] According to s 136 of the Criminal Law [Codification and Reform] Act, *Cap 9:23* ["***the Code***"], fraud is committed when any person makes a misrepresentation [*a*] intending to deceive another person, or realising that there is a real risk or possibility of deceiving another person; and [*b*] intending to cause that other person to act upon the

misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that the person may act upon the misrepresentation to his or her prejudice.

[33] In this case, the appellant, acting in concert with, among others, Mutandwa and Sibanda, misrepresented to the complainant that its one load of asbestos sheets had been collected by a transporter contracted by the complainant itself, when in fact the load had been collected by a different transporter whose driver, Mafuta, through further misrepresentation by the appellant and his associates, had been made to believe that the load he was collecting from Turnall had genuinely been procured by Ngarande, when in truth and in fact, it had been procured by the complainant. The complainant suffered actual prejudice as nothing was recovered.

[34] We are satisfied that the appellant was properly convicted. The appeal against conviction is hereby dismissed.

[35] The appellant argued that the sentence of 40 months imprisonment, all of which was suspended on conditions of good behaviour, restitution and community service, was so excessive as to induce a sense of shock, given that:

- the appellant was a first offender;
- the appellant was old;
- the appellant was married;
- being out of employment, it was grossly unreasonable to expect the appellant to raise such a huge amount of money for restitution within just one and half months given him to pay;
- it was Mutandwa who had played a pivotal role in the commission of the crime yet the appellant's sentence was more severe.

[36] By all accounts, the sentences meted out by the court *a quo* on both Mutandwa and the appellant were shocking for their lenience. In terms of s 136 of the Code, fraud attracts a fine not exceeding level fourteen [i.e. $5 000], or not exceeding twice the value of any property obtained by the offender as a result of the crime, whichever is the greater; or imprisonment for a period not exceeding 35 years.

[37] The prejudice suffered by the appellant was real. Unquestionably, $25 000 is a huge amount to lose in one go. The fraud involved meticulous planning and execution. The appellant's moral blameworthiness was very high. He was a very bad apple in a reputable company. He used his vantage position as an insider to release confidential information of a customer in order to facilitate the fraud. Despite his age and marital status the appellant deserved to go to jail.

[38] The argument that being out of employment it was unreasonable to expect the appellant to raise restitution within a mere 1 ½ months was dishonest. That period was informed by what the appellant himself had told the court *a quo* in mitigation. Through his counsel he said he was prepared to sell his motor vehicle and an immovable property to pay the restitution. At any rate, if it was felt the period was too short all the appellant had to do was to apply for an extension, rather than to waste time by launching an unmeritorious appeal.

[39] Considering the manner the fraud was planned and executed, community service only served to trivialise this serious offence. Whilst the globular 40 months imprisonment; the suspension therefrom of 12 months for 5 years for good behaviour; and the further suspension of 12 months for restitution, were all appropriate, the appellant should have been made to serve the remaining 16 months in custody.

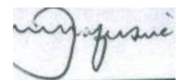
[40] Section 38[4][*a*] of the High Court Act, *Cap 7:06*, provides that in determining an appeal against sentence, if it thinks that a different sentence should be passed, the High Court ***shall*** quash the sentence passed at the trial, and substitute it with any other sentence warranted in law, ***whether more or less severe*** [emphasis added].

[41 This would have been an appropriate case to invoke the above provision. However, the appellant was not put on notice or ordered to show cause why the sentence of the lower court should be made more severe. Therefore, the sentence meted out to him shall not be altered. However, in terms of s 38[4][*b*] of the Code, it is hereby declared that the sentence that the court *a quo* should have passed on the appellant is as follows:

"40 months imprisonment of which 12 months imprisonment is suspended for 5 years on condition that during this period the accused is not convicted of an offence involving dishonesty for which he is sentenced to a period of imprisonment without the option of a fine.

A further 12 months imprisonment is suspended on condition that the accused pays the complainant, Major Family Savings Group, through the clerk of court, Masvingo Magistrates' Court, restitution in the sum of $25 624-75 on or before 31 October 2017."

13 June 2018



Hon Mawadze J: I agree ________________________

Chihambakwe Law Chambers, legal practitioners for the appellant
National Prosecuting Authority, legal practitioners for the respondent