

REGGIES NAZARE
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU AND DUBE JJ
HARARE, 8 November 2011

Criminal Appeal

O.Mushumha, for the appellant
S. Fero, for the respondent

DUBE J: The appellant appeared before a Bindura magistrate facing a charge of contravening s 136 of the Criminal Law (Codification & Reform) Act [*Cap*9:23], that is fraud. The allegations are briefly that sometime in September 2008, the appellant fraudulently sold the complainant a grinding mill. That the appellant failed at the time of the sale, to disclose the fact that the grinding mill was built under a power line and on unapproved plans and that it had been condemned by Chaminuka Rural District Council.

The appellant was convicted of the offence and sentenced to six years imprisonment of which two years was suspended on the usual conditions of good conduct. Aggrieved by this decision the appellant appealed to this court. The State conceded that the conviction was improper and on 8 November 2011, we allowed the appeal and set aside the conviction and sentence. We gave our brief reasons thereafter. For some strange reason, the appellant's counsel has written to the court requesting for reasons for judgment. These are they:

Below is a caption of the concession by the State:

“7. It is submitted that this is a proper case in which the court *a quo* must have invoked provisions of s 232 of the Criminal Procedure and Evidence Act [*Cap* 9:07]. The section empowers the trial court to *mero motu* subpoena a witness whose evidence is vital for a just decision of the case. Failure by the court to do so is a fatal misdirection. See *State v Todzvo* 1997 (2) ZLR 162 (S). In *casu* the evidence of the following witnesses would have assisted the court to clarify evidence and therefore reach a just decision of the case:

- i) The evidence of Chipaya was pertinent to clarify the circumstances surrounding the transaction entered into by the appellant and the complainant. It remained unclear at the conclusion of trial whether

Chipaya gave the complainant a loan at the appellant's behest; a fact which the appellant denied. The role played by Chipaya which would have conclusively assisted in determining the appellant's intention; was not fully canvassed by the trial court.

- ii) The evidence of "the individual" who approached council for inspection of the building was vital. It would directly link the appellant to the commission of the offence. It would no doubt prove that he "knew" that the building was indeed condemned. Relying on exhibit 2 which does not even bear the signature of the "individual" as proof of receipt, was unsafe in the circumstances.
 - iii) The evidence of officials from the Health Inspection Department, who supposedly continued renewing the appellant's trading licence in light of the serious defects and hazard posed by the building.
 - iv) There evidence of West Rangarirai Dandawa who was allegedly operating the milling plant when the inspection of the building was carried out was pertinent. He would have either confirmed or denied that the inspection took place in his presence and if it did, whether the findings were relayed to the appellant. His evidence would also have been tested under cross examination.
8. The respondent also concedes that the evidence of Itai Rudzati, Titus Mudereri and Sydney Chiwara who are all employed by Chaminuka District Council; was at variance on material aspects with regards condemnation of the building in question. Whilst Titus Mudereri could not confirm that the building was indeed condemned; Sydney Chiwara the Chief Executive Officer maintained that the council in question had not dealt with that specific case and in terms of the Rural District Councils Act [*Cap 29:13*]; he must indeed have knowledge of it. See, s51 (4) and 51 (5) of the relevant Act. There is no evidence on record that the condemnation of the building ever went through.
9. It is submitted that in the absence of clarity of facts and proof of the facts, it was indeed a misdirection on the part of the learned court *a quo* to attempt to draw inferences from such facts. The law on circumstantial evidence was clearly spelt out by WATERMEYER JA in *R v Blom* 1939 ad 188 AT 202 – 203. In *casu*, no direct evidence was led to show that the appellant made a misrepresentation and had the requisite intention. The court *a quo* attempted to draw inferences from inadequate and unsubstantiated facts, and this was a fatal misdirection."

We consider that the concession by the State was proper for the following reasons;

There is no evidence on record to show that the building was ever condemned by the responsible council. Evidence was led to the effect that there were recommendations made to condemn the grinding mill but it does not appear that the recommendations were acted upon

or followed up. It does not seem that council ever made any resolution to the effect that the grinding mill was built on unapproved plans and more so that it had condemned the premises and made a decision that the grinding mill should be demolished. If any such decision was ever made, no evidence was led to show that appellant was aware of that decision or development. There was evidence led to the effect that some unidentified individual had at some stage approached council with a request to council for inspection of the grinding mill premises but the record does not reveal who this individual is. The court assumed that the individual was the appellant and that it had in fact been communicated to him that the building was condemned. The appellant was not identified as the individual. The Health Inspection Department continued to renew the appellant's trading licence and therefore implying that there was no issue with the operation of the mill.

An official from council was called as a defence witness and he told the court that the building was never officially condemned and that if there were any recommendations to demolish the mill, such recommendations were not acted upon by council.

In the absence of any evidence on record to show firstly, that the process of condemnation went through and secondly that the appellant was aware of any decision or process regarding condemnation of the building in issue, it is improper to find that appellant made the misrepresentation as alleged. In a charge of fraud where it is alleged that an offender made misrepresentations based on information that he supposedly holds and which another person relied and acted upon, it is essential that the State lead evidence to show that the offender, possessed knowledge of the alleged facts. That despite possessing such knowledge of the position complained of, he deliberately with intention to defraud, failed to disclose the information complained of.

The inference that the trial magistrate drew, that the appellant had knowledge that the buildings were condemned is not the only reasonable inference to be drawn from the proved set of circumstances. For that reason we upheld the appeal and quashed the conviction and sentence.

BHUNU J: agrees

Mushuma Law Chambers, appellant's legal practitioners
Attorney General's Office, respondent's legal practitioners