WATMORE CHIPENDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 14 October 2014 and 3 December 2014

Criminal Appeal

GT Mharapara, for the appellant
T Mapfuwa, for the respondent

HUNGWE J: The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] after a trial. He was sentenced to 24 months imprisonment of which 6 months imprisonment were suspended for five years on conditions of good behaviour. Dissatisfied with both the conviction and sentence, he appeals to this court.

The facts upon which the appellant was convicted are as follows. The appellant in September 2008, represented to one Emmanuel Nyanyiwa that he was selling his stand on which was an uncompleted building structure being Stand Number 452 Chidzidzi, Mutoko. As a result of this, the complainant parted with a princely sum of US$8 000, 00 over a period of time under the belief that the appellant had sold the stand to him. The "sale" was oral. The complainant who is related to the appellant had no reason to doubt the good faith of the appellant and paid the amount of money asked for in tranches at different places. No acknowledgement of the sale was written nor was the receipt of the money paid over made by either party. It would appear from the evidence that the appellant avoided making public his receipt of payments made by or on behalf of the complainant. Complainant's agents said so in court.

The appellant, on 9 June 2010 sold the stand in issue to one Marybar Bvunzawabaya for US$6 000-00. There was no written agreement of sale as would ordinarily be required in a sale of land in terms of the Deeds Registry Act [*Cap 20:05*]. However, the appellant deposed

to an affidavit confirming the sale of the stand to Marybar Bvunzawabaya. That affidavit was used to effect transfer from the appellant to the said Bvunzawabaya. When the complainant got wind of this development, he made a report of fraud against the appellant to the police. The police charged the appellant for fraud.

In convicting the appellant, the learned trial magistrate found that in fact the prosecution cited the incorrect complainant. He held that because when he made the misrepresentation that he was selling the house to the complainant, when the house was available for sale, therefore he did not misrepresent. He however misrepresented to Bvunzawabaya therefore he was guilty.

The learned Trial Magistrate misconstrued the gist of the charge preferred against the appellant. So did Mr Mapfuwa, for the respondent on appeal. The gist of the charge of fraud as against the appellant at the time was that when he obtained payment of money from Emmanuel Nyanyiwa, those payments had been induced by fraud in that he never intended to sell the house to him as confirmed by his subsequent act of selling it to Bvunzawabaya. He executed the affidavit through which the purchaser was able to take transfer of the immovable property thereby making the sale *perfecta.* When he denies selling to Nyanyiwa, as he did throughout the trial, the appellant is merely confirming his state of mind at the time he misrepresented to him that the house or stand was for sale for the reason he gave. He did not commit the sale to writing, nor did he acknowledge receipt of the money paid towards the "sale". In effect therefore the police were correct to prefer that charge as it was. There was no basis to invoke s 138 (c) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] as the Magistrate did. I find the reasoning by the Magistrate devoid of any logic when he states, in his concluding paragraph, that the target of the fraud was Bvunzawabaya. If there had been any written agreement of sale for the initial sale may be it could have been arguable that the subsequent sale was indeed a fraud. That he did not commit himself to paper on the sale to Nyanyiwa shows that he never intended that Nyanyiwa takes transfer of the property. Therein lies the fraudulent misrepresentation for which he was properly convicted of. The appellant led Emmanuel Nyanyiwa to believe that he was selling Stand Number 451 Chidzidzi, Mutoko. Emmanuel Nyanyiwa acted on this misrepresentation to his financial prejudice. The learned Trial Magistrate, in my view, fell into error when he reasoned thus:

> "A misrepresentation based on the promise must be such that the accused from promises to do something he knows he will not be able to do. In this case, may be we would be saying accused promised to transfer ownership of the house to Nyanyiwa.

> But we cannot say accused, at the time, would not be able to transfer ownership. He had not sold the house yet, and there was nothing that would curtail his powers over that house. In short I do not see how it can be held that accused lied to Nyanyiwa."

As correctly stated by the learned trial magistrate, the gist of the offence is the deliberate making of false statements to induce the intended victim to part with money or property. *Mens rea* in the form of intention is a requirement. The perpetrator must be aware that the misrepresentation is in fact false (intention to deceive). The perpetrator must also have the intention to defraud in that he or she must have the intention to induce someone to follow a course of action that is prejudicial as a result of the misrepresentation. Intent in the form of *doluse ventualis* is sufficient to prove fraud. In short the necessary and essential elements of the offence of fraud may be stated as consisting in a) unlawful; (b) intentional; (c) misrepresentation of facts (distortion of the truth); (d) calculated to prejudice another.

I have already demonstrated the basis of a finding for fraudulent conduct by the appellant. He clearly "sold" the house to Nyanyiwa. Believing that he had bought the house, Nyanyiwa set upon a course of conduct which included payment of money to the appellant. The payments were not receipted or otherwise accounted for besides an acknowledgement through a short message service. Whilst he was getting "payments in dribs and drabs" from Nyanyiwa, he sold the same stand to another person and set in motion a process through which that buyer got transfer. What appellant's conduct demonstrates is that he never intended to sell the stand to Nyanyiwa. He therefore told a lie about his "sale" of the stand to Nyanyiwa. His intention was to deceive Nyanyiwa into parting with his money to his prejudice. It is not relevant to the inquiry into whether the appellant intended to defraud his victim that in fact the appellant could, if he wished, carry out the promise which he gives in order to induce the victim to act to his or her prejudice. When the trial court held this view, it fell into error. The charge was properly framed. No recourse to s 138 (c) of the Criminal Procedure and Evidence Act, [*Cap 9:07*] was necessary.

In the result I am satisfied that there is no merit in the appeal against conviction.

As for appeal against sentence, in light of the sentiments expressed above, the first ground advanced against sentence falls away. The other grounds of appeal against sentence are mere criticisms of the sentence imposed by the trial court. These grounds do not show that the sentencing authority erred in any way or failed to exercise its sentencing discretion

judiciously. The appellant has not shown any misdirection, the basis of which this court may interfere with the sentence imposed. In the result the appeal against sentence fails as well.

Consequently, the appeal be and is hereby dismissed in its entirety.

MANGOTA J agrees _____

Mthombeni Mukwesha Muzawazi & Associates, appellant's legal practitioners
Attorney-General's Office, respondent's legal practitioners