

BRIAN HAROLD COCKER
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 22 May and 17 July 2017

Criminal Appeal

T. Hungwe, for the appellant
R. Chikosha, for the respondent

MUSAKWA J: The appellant was convicted of fraud and was sentenced to 3 years' imprisonment of which 2 years were suspended for 5 years on condition of future good behaviour. The remaining 1 year was suspended on condition of paying restitution in the amount of \$45 000 by 30 November 2016. Appeal was noted against conviction only.

Despite the multiplicity of the grounds of appeal, they can be pared down to only three viable ones. They are as follows-

1. The trial court erred in convicting the appellant when no case of fraud had been proven.
2. The trial court erred in inferring that there was misrepresentation without establishing to whom it was made.
3. That the trial court erred in ordering that restitution be paid to the complainant as opposed to Tribac (Pvt) Ltd.

The background to the case is that the appellant was employed by Farmtrack Farming (Pvt) Ltd. Farmtrack Farming (Pvt) Ltd had a running contract farming agreement with Tribac (Pvt) Ltd. The agreement entailed that Farmtrack Farming (Pvt) Ltd be supplied with inputs for tobacco growing. It is not in dispute that the appellant negotiated with Tribac (Pvt) Ltd for the financing of a Toyota truck which was supplied by Chisipite Auto (Pvt) Ltd

(colloquially termed Chisi Auto). The motor vehicle was then registered in the appellant's name.

The charge, which was not elegantly drawn, reads as follows-

“In that on date (sic) to the Prosecutor unknown but during the month of May 2013 and at Tribac (Pvt) Ltd, 99 Josiah Chinamano Road, Harare, Brian Harold Cocker unlawfully and with intent to deceive Farmtrack (Pvt) Ltd represented by Farai Oliver Mashonganyika or realising that there was a real risk or possibility that Farmtrack (Pvt) Ltd represented by Farai Oliver Mashonganyika may be deceived misrepresented to Tribac (Pvt) Ltd that he had been mandated by Farmtrack (Pvt) Ltd represented by Farai Oliver Mashonganyika to obtain a motor vehicle under the tobacco contract farming scheme. In fact to Brian Harold Cocker, when he made such representation knew very well that Farmtrack (Pvt) Ltd represented by Farai Oliver Mashonganyika had not consented to such arrangement and only made the misrepresentation to induce Tribac (Pvt) Ltd to pay US\$45 000, 00 to Chi-Auto Car Sale towards the purchase of the said motor vehicle, Toyota 4x4 Smartcab on registration numbers ADA 2201 which he registered under his names to the prejudice of Farmtrack (Pvt) Ltd represented by Farai Oliver Mashonganyika to the sum of US\$45 000, 00 .”

The appellant's defence was that he was the managing director of Farmtrack Farming (Pvt) Ltd. He negotiated the motor vehicle loan and it was availed to him personally. He intended to repay from profits realised from the sale of tobacco by Farmtrack Farming (Pvt) Ltd. Before the tobacco was sold he was then dismissed from employment.

From the contested evidence, a director of Farmtrack Farming (Pvt) Ltd, Farai Oliver Mashonganyika testified that the appellant was employed as a manager. On the other hand, the appellant contended that he was the managing director. A Form CR 14 from the Companies Registry shows the appellant as a director whilst another Form CR 14 does not reflect him as such.

Farai Oliver Mashonganyika further testified that the financing of other goods other than farming inputs was subject to a company resolution. However, a loan statement from Tribac (Pvt) Ltd that was shown to this witness during trial reflected the appellant as the grower, which was not the case. When she came across the appellant driving the truck in question he claimed that it had been purchased for him by his parents. Later she saw a loan statement showing that \$45 000 was due from Farmtrack (Pvt) Ltd for a truck. It turned out the truck is the one registered in the appellant's name.

A representative of Tribac (Pvt) Ltd, Kenneth Andrew Butchered confirmed that the appellant negotiated the vehicle deal on behalf of Farm Track (Pvt) Ltd. He was not aware to whom the representations were made by the appellant.

On the other hand, although the appellant testified that the vehicle loan was advanced to him personally, in another breadth he stated that he acted as guarantor for the loan. This would have entailed that the loan was advanced to Farmtrack (Pvt) Ltd. Having further stated

that probably the motor vehicle was registered in his name, the appellant could not explain why the loan statement was in Farmtrack Farming (Pvt) Ltd's name. The appellant also conceded that an amount of \$45 000 was due to Tribac (Pvt) Ltd. Although he claimed to have made some payments to Tribac (Pvt) Ltd he did not tender any proof of such payment.

The nub of the issue is whether misrepresentation that is made to an unidentified person constitutes fraud. Although the respondent filed a concession in terms of s 35 of the High Court Act [*Chapter 7:06*], we were of the view that this was not well conceived. During the hearing Mr *Chikosha* withdrew the concession as he conceded that he had overlooked the provisions of s 138 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and s 157 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which the court brought to his attention.

Whilst acknowledging the provisions in the above statutes, Mr *Hungwe* persisted with the appeal. He submitted that the complainant received statements from Tribac (Pvt) Ltd but did not query them. He further submitted that the appellant was a managing director as evidenced by one of the Forms CR 14 from the Companies Registry. He also submitted that the loan was to be offset from the proceeds of the sale of tobacco that the appellant was to benefit from. As such, there was no fraudulent act that prejudiced Farmtrack (Pvt) Ltd.

I now proceed to analyse the issues. As can be noted from s 135 of the Code which defines misrepresentation, misrepresentation includes a false statement of fact or a false statement by a person who borrows money or any other thing as to the purpose for which he requires the money or thing. When the appellant made representations to Tribac (Pvt) Ltd, it was to the effect that the motor vehicle was for Farmtrack Farming (Pvt) Ltd's farming operations. This aspect of evidence by Kenneth Andrew Butchered of Tribac (Pvt) Ltd was not challenged. That is why the loan reflected on Farmtrack Farming (Pvt) Ltd's account. As stated earlier, the motor vehicle was registered in the appellant's name. Therefore, if the purpose of the loan was personal as it turned out to be, then a false statement was made by the appellant as to the purpose for the loan.

As regards to whom a fraudulent misrepresentation can be made, s 138 of the Code provides that-

“A person accused of fraud or any other crime involving the making of a misrepresentation may be found guilty of the crime notwithstanding that—

(a) the person to whom the misrepresentation was made is not identified; or

- (b) the person whom the accused intended to deceive or prejudice, or whom the accused realised he or she might be deceiving or prejudicing, is not identified; or
- (c) the person to whom prejudice or potential prejudice was or would have been caused is not identified.”

The above provision is complemented by s 157 of the Criminal Procedure and Evidence Act which provides that-

“1) It shall be sufficient in any indictment, summons or charge in respect of—

- (a) forging, uttering, offering, disposing of or putting off any instrument; or
- (b) theft by means of false pretences; or
- (c) obtaining anything by means of a fraudulent trick or device or any other fraudulent means; or
- (d) inducing, by means of any such trick or device or fraudulent means, the payment or delivery of any money or thing; or
- (e) attempting to commit or to procure the commission of any such offence;

to allege that the accused did the act with intent to defraud, without alleging the intent of the accused to be to defraud any particular person.

(2) In the case of any offence referred to in subsection (1), it shall not be necessary to mention the owner of the property in question or to set forth the details of the trick or device.”

With s 138 of the Criminal Code in mind, what we know is that the appellant dealt with an unidentified person at Tribac (Pvt) Ltd. It was not a requirement that the person to whom he made the misrepresentation be identified. As for the person whom the appellant intended to deceive or prejudice, it is actually Tribac (Pvt) Ltd and not Farmtrack Farming (Pvt) Ltd. This is so because the offence of fraud is framed as follows in terms of s 136 of the Code-

“Any person who 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 another person to act upon the misrepresentation to his or her prejudice, or realising that there is a real risk or possibility that another person may act upon the misrepresentation to his or her prejudice;

shall be guilty of fraud if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person, and be liable to...”

Taking the above provision into account, it has been held that to defraud is to induce someone to act to their actual or potential prejudice because of the misrepresentation.¹ In the present case Farmtrack Farming (Pvt) Ltd cried foul after establishing that its resources were

¹ *S v Sithole* 1997 (1) ZLR 283 (SC)

to be used to service a personal motor vehicle loan for the appellant. But no fraudulent misrepresentation was ever made to Farmtrack Farming (Pvt) Ltd. What was perpetrated on Farmtrack Farming (Pvt) Ltd was a deception which is distinguishable from fraud. An intention to deceive entails making someone believe that something is true when it is false but that does not amount to fraud.² In that respect the deception of Farmtrack Farming (Pvt) Ltd was that the motor vehicle had been purchased by the appellant's parents and yet this was not true.

With the above observations there can be no doubt that the appellant made a fraudulent misrepresentation that was potentially prejudicial to Tribac (Pvt) Ltd. Even if Tribac (Pvt) Ltd are not the ones who reported the matter, it is evident that they were defrauded. It is only that the prosecution focused on the wrong victim. The fact of Farmtrack Farming (Pvt) Ltd being the complainant would have amounted to collateral damage. This reflects why the appellant was at pains to argue that restitution that was ordered by the trial court should have been awarded to Tribac (Pvt) Ltd and not to Farai Oliver Mashonganyika.

As regards prejudice, this is defined in s 135 of the Code as-

“prejudice” means injury, harm, detriment or damage of any kind whatsoever, including material or financial prejudice, prejudice to reputation and prejudice to good administration;”

Prejudice to Tribac (Pvt) Ltd was in two respects. Firstly, it is not known if the appellant had sufficient resources to secure a loan in his personal capacity. Secondly, in the event of the loan not being paid and Tribac (Pvt) Ltd demanding payment there was every risk of Farm Track (Pvt) Ltd disputing liability thereby exposing Tribac (Pvt) Ltd.

It is also necessary to comment on the ground of appeal on restitution. Although the ground is purportedly attacking the conviction it could only affect the sentence if it had merit. Apparently, in review proceedings instituted by the appellant against the trial magistrate and the Prosecutor-General in case number HC 10371/16 this court ordered that restitution be made to Tribac (Pvt) Ltd. In the matter before us there is nothing to correct as the order in HC 10371/16 is extant.

Disposition

² *S v Sithole supra*

The charge that was preferred against the appellant will have to be amended. In doing so, it is apparent that there will be no prejudice to the appellant. Therefore the charge is amended to read as follows-

“In that on a date to the prosecutor unknown but during the month of May 2013 and at Tribac (Pvt) Ltd, 99 Josiah Chinamano Road, Harare, Brian Harold Cocker unlawfully and with intent to deceive Tribac (Pvt) Ltd or realising that there was a real risk or possibility that Tribac (Pvt) Ltd might be deceived misrepresented that he had been mandated by Farmtrack Farming (Pvt) Ltd to obtain a motor vehicle for Farmtrack Farming (Pvt) Ltd’s farming operations under the tobacco contract farming scheme, whereas when Brian Harold Cocker made such misrepresentation he well knew that he had not been so authorised and by making such misrepresentation he induced Tribac (Pvt) Ltd to authorise the loan to its prejudice.”

In the result, the appeal is hereby dismissed.

CHATUKUTA J agrees

Venturas and Samukange, appellant’s legal practitioners
National Prosecuting Authority, legal practitioners for the state