OBERT TAFADZWA CHARAMBA
versus
STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND KWENDA JJ
HARARE 20 January, 2020 & 1 September 2021

S. Simango, for the appellant
A. Bosha, for the respondent

KWENDA J: The appellant appeared before the magistrate sitting at Beitbridge, facing a charge of Criminal abuse of duty as a Public Officer as defined in s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant was employed by the Zimbabwe Revenue Authority (ZIMRA) as a Loss Control Officer. He was jointly charged with a workmate who was employed as a Revenue supervisor. On the 23rd of December 2014, Beitbridge Boarder Post, a vehicle consisting of a horse and two trailers was duly cleared by ZIMRA officials in the normal course of business at the border post. The vehicle was carrying cargo belonging to a company known as Turkey Trading (Pvt) Ltd. The clearance involved physically verifying the consignment against the paperwork, assessment of duty payable and payment thereof. After undergoing all the formalities done by a registered clearing agent known as ASB Freight Services (Pvt) Ltd. The vehicle was allowed to pass. Before the vehicle could leave Beitbridge the appellant intercepted it. It was within his power as a Loss Control Officer to audit the process. He verbally directed his co-worker who was charged with him to ensure that the vehicle and its cargo were taken to the ZIMRA storage facility at Beitbridge known as the Container Depot until further notice. The appellant neglected to issue any paperwork indicating why the vehicle and the consignment had been impounded and maliciously refused to cooperate when requested to do so. His conduct in failing to issue paperwork indicating what was required to be done and declining to shed light on what was to be done was inconsistent with what was expected of him as the person who had triggered the process. The owner of the vehicles and the cargo suffered disfavour and prejudice in that it was not possible for them to obtain release of the vehicle, trailers and the goods,

despite spirited efforts and correspondences, until the 14th January 2015 when the property was released in terms of a High Court order. The appellant's conduct was inexplicable because the vehicles and cargo had been properly cleared.

The appellant and his co accused pleaded not guilty but were both convicted after a trial. The appellant's defence was that on the day in question he was carrying out his duties as the supervisor of the Scanner Unit when he got involved with the truck, trailers and consignment. After intercepting the truck, he instructed one Erick Gomondo, his subordinate, to make the necessary entries in the register and manifest referring the truck to the Container Depot for physical examination. When the entries were made the truck was escorted by another subordinate, one P Mutero, who handed it over to a certain Munyaradzi Matura at the Container Depot. His involvement ended, as it should have, at the stage the truck reached the container depot and was duly handed over. He was not required to do anything further. He said his employer absolved him of any wrongdoing.

The appellant and his co accused were convicted and sentenced, each, to pay a fine of $700 in default of payment imprisonment for 6 months. In addition to that imprisonment for 5 months was wholly suspended on conditions of good behavior. The appellant appealed against both conviction and sentence.

He attacked the conviction on 5 grounds. Grounds 1 to 4 were abandoned at the hearing. The appeal against sentence was also abandoned. The 5th ground of appeal against conviction which remained was to the following effect that the court *a quo* grossly misdirected itself by failing to take cognizance of firstly, that it was not the appellants' duty to issue detention documents but that of the Container Depot Supervisor and secondly, that the appellant's employer had cleared him of wrongdoing at a disciplinary hearing.

The trial Courts' response to that ground of appeal was that the charge did not only arise from the appellant's failure to issue detention documents but also from his neglect to give reasons for intercepting the truck, trailers and cargo and referring same to the Container depot yet it had fulfilled all customs clearance procedures and duty had been paid.

The State initially filed a concession in terms of s 35 of the High Court Act [Chapter 7:06] indicating that the conviction was not supported but withdrew the concession at the hearing submitting that the appellant unreasonably and inexplicably declined to cooperate with even his

own workmates and maliciously made it impossible for the truck and cargo to be processed for release.

The facts which the trial court found proved are the following: -

1. On the 23rd December 2014 Isaac Masharu the truck arrived at Beitbridge Border Post driven by Isaac Musharu. It was carrying a consignment of beer.
2. The truck and it consignment were duly cleared by a clearing agent.
3. On the day in question the appellant who was employed by ZIMRA as a loss control officer was the acting Supervisor at the Scanner Unit.
4. The appellant intercepted the truck and decided to refer it to the container depot as it was leaving the gate. He requested to see the clearance papers which were shown to him. The appellant carried out a physical inspection of the vehicle and the consignment. After the search he ordered the driver to take the vehicle to the Container depot.
5. The appellant instructed a junior officer to record in the register and the manifest that the truck had been referred to the container depot.
6. The driver complied. At the depot the vehicle and consignment were physically examined again by some ZIMRA officials. The driver had no clue why the vehicle was being subjected to the searches. He sought an explanation whereupon the appellant's co-accused told him that the vehicle had been impounded. He was ordered to disengage the trailer and leave it in the Container Depot. The trailer remained there until the 5th January 2015 when he left Beitbridge
7. When Christian Magwali, the clearing agent who cleared the truck and the consignment, learnt that same had been impounded, he approached the appellant who confirmed that he had impounded the vehicle and its consignment. The appellant told Christian Magwali to meet him at the container deport the following day. Christian Magwali proceeded to the container depot the following day but the appellant did not turn up. The truck and the consignment were physically examined again and still no anomalies were seen.
8. Christian Magwali failed to obtain the release of the truck and the consignment because the appellant had not endorsed on the bill of entry why the vehicle had been impounded and the appellant had not official reversed his decision to impound it.

9. Efforts by an employee of the clearing company, one Amleka Ndebele to obtain clearance for the release of the vehicle and its cargo hit a brick wall due to the non-cooperation of the appellant.

The clearing agent finally obtained release of the goods on 13 January 2015 in terms of a High Court order.

A supervisor in the anti-smuggling unit testified that the appellant acted in a manner inconsistent with duty in that he failed to follow laid operating procedures. He explained the inconsistence. The appellant was only empowered, as a member of the scanner unit, to refer goods to the container deport for verification of the quantity, tariff and physical examination only. His duties required him to enter the details of the vehicle and consignment, so impounded, and what was supposed to be verified in the depot register and ZIMRA electronic system. In the event that the system was down, the appellant should have made an endorsement at the back of the bill of entry before handing the endorsed bill of entry to the escort driver. The truck and the consignment would then be taken to the container depot for physical examination and verification processes and in the event of (an) anomaly(ies) a notice of seizure would be issued. He checked the system and there was no record of the transaction meaning that the appellant did not carry out his duty in the manner he was supposed to.

Having found that the appellant acted contrary to his duty,the trial court invoked the presumption in s 174 (2) of the Criminal Law Codification Act [Chapter 9:23]. The presumption is stated in the following terms: -

"**174. Criminal abuse of duty as public officer**

(1) …….

(2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person."

All the factual findings of the court as summarised above were not disputed in argument in the court *a quo*. It therefore came as a surprise that the State had filed a concession in terms of s 35 of the High Court Act. The only ground of appeal against conviction which was argued is therefore not borne by the facts conceded by the appellant. The evidence by the appellant's supervisor was not contested. Contrary to his assertion in the ground of appeal, the uncontroverted

evidence of the supervisor showed that it was the appellant's duty to record why he was impounding the truck and the consignment and to give clear instructions concerning what needed to be verified. He refused to cooperate. His conduct was malicious because he knew the vehicle would not be released without his cooperation. Section 174 condemns conduct which is either calculated to or causes either disfavour or prejudice to another. The owners of the truck and the consignment suffered obvious prejudice in that their properties were needlessly impounded and they had to go through the frustrating and costly process of obtaining release of the vehicle and consignment through a High Court order.

The appeal against conviction lacks merit and it is ordered as follows: -

The appeal against conviction be and is hereby dismissed.

CHATUKUTA J agrees ……