

THE STATE
versus
STEPHEN MUSIMIKE

HIGH COURT OF ZIMBABWE
MUSAKWA & MUZOFA JJ
HARARE, 9 September 2019

Criminal Appeal

M. H. Chitsaka, for the appellant
T. Mapfuwa, for the State

MUZOFA J: On the 8th of July 2019 we dismissed this appeal against conviction and sentence. The appellant has requested for the written reasons for the purposes of an appeal, we provide them herein.

The appellant was convicted on a charge of contravening s 174 (1) (a) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*], (Criminal abuse of duty as a public officer). He was sentenced to pay a fine of \$700 or in default of payment 6 months imprisonment. A further 5 months imprisonment were suspended on the usual conditions. He noted an appeal against both conviction and sentence.

The grounds of appeal were set out as follows:-

“Ad conviction

1. The court *a quo* misdirected itself on convicting the appellant when there was no evidence led beyond reasonable doubt that the appellant committed the offence.
2. The court *a quo* erred in convicting the appellant when all the essential elements of the offence were not proved, in particular the *mens rea*.
3. The court *a quo* misdirected itself in basing its conviction of the appellant on the grounds that the appellant had overall say on the issuance of detention documents when in fact evidence to the contrary had been led by the appellant and not disproved by the respondent.
4. The court *a quo* also misdirected itself in (*sic*) failure to consider the appellant’s defence which was not disproved by the respondent.

Ad sentence

1. The court *a quo* erred in imposing a fine which was unduly harsh without enquiring into the appellant’s ability to pay the same.
2. The court *a quo* erred in imposing a fine which as unduly harsh to the extent of inducing a sense of shock.”

The appellant appeared before the trial magistrate jointly charged with his co-accused who was not before this court. The state case was that the appellant and his co-accused were employed by the Zimbabwe Revenue Authority (ZIMRA) based at the Beitbridge Border Post. Appellant was a revenue supervisor. On the 23rd of December 2014 a truck owned by Turkey Trading (Pvt) (Ltd) (the company) with a liquor consignment from South Africa *en route* to Zimbabwe was cleared at the Beitbridge Border by a clearing agent known as ASB Freight Services (Pvt) (Ltd) on lender bill entry number C93285. After the clearance, the truck was intercepted by the appellant's co-accused who referred the truck to the container depot for further examination. At the container depot, the truck was examined and nothing untoward was detected. However the appellant insisted that the detention of the truck continue, no reasons were given for the decision. The appellant and his co-accused did not complete any documentation to show why the truck was detained and why ZIMRA continued to detain it. The truck was subsequently released on the 14th of January 2015 after the company applied to this court in an urgent chamber application for its release.

When the matter was heard before us, the appellant withdrew the appeal against sentence. This judgment therefore is confined to the appeal against conviction only.

Section 174 (1) of the Criminal Code provides:

- “1. If a public officer, in the exercise of his or her functions as such, intentionally;
- (a) Does anything that is contrary to or inconsistent with his or her duty as a public officer; or
 - (b) Omits to do anything which it is his or her duty as public officer to do for the purpose of showing favour or disfavour to any person, he shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for a period not exceeding fifteen years or both.
- (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.”

A reading of the section shows that the essential elements of the offence are that,

- (i) the accused person must be a public officer
- (ii) the accused does an act contrary to his or her duty or omits to do anything which is within his or her duty as a public officer.
- (ii) the act or omission must be done intentionally

See also *R v Sacks* (1943) SALR 413. Once the state establishes an intentional act or an omission inconsistent with an accused's duties there is a rebuttable presumption that, the act or omission was intended to show favour or disfavour to another. At the centre of the offence

is an act or omission beyond mere negligence or just some neglect of duty. This is what the court in *S v Taranhike* HH 222/18 had in mind when it noted

‘ What emerges from the definition in s174 as to what constitutes abuse of office is the use of the word “intentionally” in carrying out the act an eschewed act of omission or commission. This means that the conduct constituting abuse must be deliberate, calculated or purposeful. Furthermore, the word abuse itself connotes misuse, exploitation, taking advantage and recklessness in the conduct. The 1979 English case of *R v Dytham* 1979 (2) QB 722 gives an indication of what is required in terms of arriving at an informed conclusion that there was abuse of or neglect of public office. As the court stated therein:

“The neglect must be wilful and not merely inadvertent; and it must be culpable in the sense that it is without reasonable excuse or justification.”

As further stated therein, the misconduct impugned must be calculated to injure the public interest so as to call for condemnation and punishment.”

In this case, the appellant was a public officer, no issue arises out of that requirement. The undisputed evidence in the record is that the truck in question was referred to the container depot by the appellant’s accomplice. The appellant was the supervisor at the container depot. Although there is evidence that the appellant did not personally receive the truck at the depot there is evidence of culpability in his conduct. Appellant confirms that his accomplice handed over the consignment note to him for verification. He confirmed that according to the systems procedure no documentation was made in respect of the truck. In short there was no official reason why the truck was detained by ZIMRA. Appellant did not deny that he gave instructions to the driver of the truck to disengage the horse from the trailer and park the truck. Isaac Masharu’s evidence, that the appellant advised him that the truck had been impounded was not disputed either in his evidence in chief or under cross examination. The utterances were made immediately after the truck was searched at the container depot. The information that the truck was impounded was “technically” correct because the truck spent 21 days under detention. However appellant communicated this, when there was no documentation to support it. If appellant did not know what was taking place, on what basis then did he communicate the information? He communicated the fact that the truck had been impounded yet no proper documentation was available. It was his duty to make sure that whatever communication and order were documented in terms of the procedures because at that point in time he was the authority that communicated the ZIMRA decision. He deliberately omitted to do his duty. That is not all. It seems the truck became an issue at ZIMRA. Christian Magwali engaged appellant with a view to release the truck. Amkela Ndebele also engaged the appellant about the release of the truck. What boggles the

mind and where inferences can be drawn is that at all relevant times of engagement the appellant could not release the truck yet there was no official reason why the truck was impounded.

From his evidence the appellant said he engaged his superiors and they agreed to send someone to South Africa to investigate the importer. If this was indeed the case at least the investigating officer should have been favoured with this information. No evidence was placed before the court about this investigation. In any event the appellant was seized with the matter, obviously he had access to all the documentation in respect of the truck, save for the reasons for impounding it. The appellant was well aware of the non- documentation and was complicit in the unlawful detention of the truck.

The issue that arises is whether his conduct was just an oversight or the conduct constitutes an abuse calculated to disadvantage the truck owner. There was evidence of the abusive conduct of the appellant towards the truck owner and the clearing agents. This kind of offence is sometimes difficult to connect the dots, because the public official would just sit on work in order to induce a consideration. In this case the appellant could not possibly take over an investigation of an impounded truck when in the first place the truck was not properly impounded. The Magistrates' reasons for convicting the appellant are very clear. The inconsistencies highlighted by the appellant are of no consequence, they do not go to the substance of the conviction.

It is for these reasons that we dismissed the appeal.

MUSAKWA J Agrees

Mutandiro, Chitsanga and Chituwa, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners