

REPORTABLE (89)

STEVEN MUSIMIKE
v
THE STATE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, UCHENA JA & KUDYA AJA
HARARE: 3 NOVEMBER 2020 & 30 SEPTEMBER 2022

Ms *F Chinwawadzimba*, for the appellant

T Mapfuwa, for the respondent

KUDYA AJA: The appellant appeals against the judgment of the High Court dated 9 September 2019, wherein the court *a quo* dismissed his appeal against conviction by the Magistrates' Court on a charge of criminal abuse of office under s 174 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*](The Criminal Law Code). **Judgement No. SC 104/22**
Civil Appeal No. SC 57/20

THE FACTS

The facts in this case are generally common cause.

On 26 May 2015, the appellant and Obert Tafadzwa Charamba (the co-accused) were jointly charged with criminal abuse of office at the Beitbridge Magistrate's Court. On 9 November 2015, they were convicted and sentenced to pay a fine of US\$700 or in default of payment 6 months imprisonment with an additional 5 months imprisonment suspended for a period of 5 years on the appropriate conditions of future good conduct.

The appellant and the co-accused were employed by the Zimbabwe Revenue Authority (Zimra) as a revenue supervisor and loss control officer, respectively. The appellant was stationed at the container depot at the Beitbridge border post. The co-accused was based in Harare but was on relief duties at the scanning unit at the same border post in December 2014.

On 23 December 2014, Isaac Musharu (the driver) cleared all the manual customs formalities¹ with the help of Christian Mugwali, a Beitbridge based freight and clearing agent. Duty was paid for the consignment in the sum of US\$29 303.88. He was driving a horse (Registration Number ABZ 4226), which was drawing two trailers (Registration numbers ACE 9470 and ACE 9471). The trailers were laden with 2 514 cartons of liquor (the consignment) imported from Musina in South Africa by the local Bulawayo based Turkey Trading (Pvt) Ltd (the importer). His last port of call was Beitbridge, where he handed over his manually cleared customs documents, inclusive of the bill of entry number C93285, to the co-accused at 11pm.

The co-accused made a cursory physical examination of the consignment. He directed Mutero, a ZIMRA escort driver, to take the truck to the container depot. At midnight and before the truck was driven to the container depot, the clearing agent attended at the scanning unit, at the behest of the driver. The co-accused referred the consignment to the container depot because the electronic clearance system had “red flagged” the importer for possible acts of smuggling previous liquor consignments into the country. He caused this reason to be entered into the “Referred to Container Depot Register” by his subordinate, one

¹ The customs clearance documents comprised, consignment note, the commercial invoice, road manifest and SADC certificate of origin issued by the South African exporter, the South African bill of export, the local bill of entry, and the gate pass or release order issued on entering Zimbabwe.

Eric Gorondondo. The driver and clearing agent, however, assumed that the consignment was being referred to the container depot for an accentuated physical examination.

The consignment was received at the container depot by the security guards on duty. On 24 December 2014, the driver and the clearing agent alleged that two of the appellant's subordinates inspected and reconciled the consignment with the commercial invoice and the bill of entry. No anomalies were found. The consignment was not released. Instead, the appellant, in colourful Shona prose (which the driver and clearing agent understood to mean "the vehicle has been impounded), impounded the consignment and ordered the driver to uncouple the horse from the trailers. The driver signed the "leave the consignment in the container depot form."

The appellant impounded the consignment in compliance with the instruction endorsed on the consignment note by the co-accused for the detention of the consignment as a lien *in lieu* of impending investigations of the purported smuggling activities undertaken by the importer in respect of previous liquor imports from Musina. He, however, did not pay heed to the co-accused's suggestion to raise, in terms of s 201 of the Customs and Excise Act [*Chapter 23:02*], an "embargo" against the consignment. He also rebuffed the requests, to similar effect, made on 25 and 27 December 2014, by Amkela Ndebele, the clearing agent's Bulawayo based managing director, to issue detention documents to the importer.

During Amkela's second visit, on 27 December 2014, the appellant asserted, firstly, that the consignment would be detained until the smuggling investigations were completed. Secondly, that the investigation was being conducted by his head of station (Acting Regional Manager Mungani), head of section (enforcement manager Dumbu) and the

technical manager (Chamboko). He further demanded copies of all the customs clearance documents (pertaining to the previous liquor consignments) issued to the importer between September and December 2014, to facilitate the timeous conclusion of the investigations. The same documents were also demanded by, and availed by the importer to, the Acting Regional Manager as a condition precedent to the release of the shipment consequent to the consensual order issued on 14 January 2015, by the Bulawayo High Court in case number HC 16/15.

It was also common cause that the appellant did not issue any detention documents despite demand from the importer for him to do so until the cargo was released pursuant to the consensual order.

It was further common cause that the co-accused was required by the dictates of his duties to enter the reason for referring the consignment to the container depot in the electronic clearance system, “Referred to Container Depot Register”, the “Inspection Act”, and if the electronic system was down, endorse the reason on the back of the driver’s copy of the bill of entry. He was further required to enter the reason for doing so into the ZIMRA electronic clearance system. These entries, amongst other purposes, served to alert the officials at the container depot what to check for (values, tariffs or quantities). Likewise, the appellant was required to issue detention documents for the consignment. He could issue a notice of seizure, a receipt of items held (RIH) or Form 45 to the importer. In his testimony on the procedure pertaining to these documents, the Acting Regional Manager asserted that once a notice of seizure or an RIH was issued, the consignment would be carted to a warehouse for storage. Where, however, Form 45 was issued, the consignment would be detained at the container depot until the queries raised in that form were all cleared by the importer or his clearing agent.

It was also common cause that the appellant and the co-accused were public officers. It was further agreed that neither of them acted in accordance with the dictates of their respective public duties. Rather, by these indisputable omissions, they acted contrary to their respective duties as public officers.

The real issue that confronted the trial court and the court *a quo* was, therefore, whether the appellant (and his co-accused who did not appeal) had the intention to abuse his public office by disfavoured the importer when he failed in his sworn duty to issue the requisite detention documents between 24 December 2014 and 14 January 2015.

THE FINDINGS IN THE MAGISTRATES COURT

The trial court accepted the evidence adduced by the Acting Regional Manager on the procedures that the appellant and the co-accused ought to have followed in the referral of the consignment to and detention thereof at the container depot. It found that the prosecution had established beyond a reasonable doubt that the appellant had negated his duty of not only recording the results of the physical examination in the “Inspection Register” but also of issuing the requisite detention documents to the importer. Likewise, it found that the co-accused had acted contrary to his duties by not endorsing the reasons for referring the consignment to the container depot in the system and on the back of the bill of entry. The trial court found that their respective conduct was prejudicial to the importer and, accordingly, found them guilty as charged.

The trial court did not relate to the reverse onus and misconstrued the testimony of the regional manager. The regional manager asserted in his evidence in chief

that he never checked into the electronic clearance system but merely checked the back of the bill of entry and the “Physical Examination Register”.

THE GROUNDS OF APPEAL A QUO:

The appellant appealed to the court *a quo* on the following grounds of appeal.

- “1. The court *a quo* misdirected itself in convicting the appellant when there was no evidence led beyond a 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* erred and misdirected itself in basing its conviction of the appellants 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 failure to consider the appellant’s defence which was not disproved by the respondent.”

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THE ARGUMENTS A QUO

The appellant argued that the *mens rea* to commit the offence had not been established. He contended that the totality of the evidence led did not show that he deliberately or even recklessly and calculatedly utilized his position to injure the public interest by harming the co-related interests of the importer. He argued that his conduct was genuinely motivated by the noble intention of protecting the public purse, which was prejudiced in the sum of US\$195 000 by the previous smuggling activities of the importer.

He further argued that the trial court had failed to relate to his uncontroverted testimony that he acted on the instructions of the co-accused to check on the previous consignments that were purportedly smuggled into the country from Musina by the importer. He called for previous clearance documents from the importer, which he availed to his

superiors (the enforcement manager, the technical manager and the regional manager). His superiors in turn, invoked bilateral cooperation protocols with the South African Revenue Services (SARS). SARS then supplied ZIMRA with all the requisite customs clearance documents used by the importer to bring the questioned consignments into Zimbabwe. He argued that these investigations, which commenced with the red flagging of the importer on the night of 23 December 2014, belatedly revealed the misfeasance committed by the importer.

He therefore submitted that had the trial court related to his version, it would have found that it passed muster the “reasonably possible true” test and acquitted him of the offence.

Per contra, the respondent contended that the abrogation of ZIMRA processes by the appellant were established. He argued that the colourful police used by the appellant in impounding the consignment coupled with absence of detention documents betrayed his ulterior motive to injure the public interest by harming the importer’s interests. The injured interests were identified as the loss of income that could have accrued to the importer from beer sales during the festive season and the attendant loss incurred by the importer’s failure to use its trailers during the 21 days in question. The respondent also argued that the appellant’s contrary assertion that he was motivated by the smuggling allegations could not reasonably rebut the presumption against him that his abridgment of the consignment detention procedures was intended to harm the importer’s business interests. The respondent, therefore, submitted that the appellant was correctly convicted by the trial court.

THE FINDINGS OF THE COURT A QUO

The court *a quo* made the following findings. The appellant acted on the instruction of the co-accused to investigate the previous consignments that were alleged to have been smuggled into the country. Notwithstanding such instruction, he was obliged to issue the requisite detention documents. His failure over a period of 21 days, despite the promptings of the clearing agents, established the *actus reus* of the offence. His version that he was motivated by the higher ideal of preserving public revenues by investigating the purported previous smuggling activities of the importer could not reasonably possibly be true because “that intention to investigate was not properly documented” nor placed before the investigating officer and the trial court. He was, therefore, complicit with the co-accused in the unlawful detention of the consignment. He failed to rebut the presumption that his act or omission was intended to show disfavour to the importer. All the essential elements were, accordingly, established beyond a reasonable doubt.

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In the circumstances, the court *a quo* confirmed the conviction and dismissed the appeal.

THE GROUNDS OF APPEAL

Aggrieved by these findings, the appellant appealed to this Court on the following grounds.

- “1. The Court *a quo* grossly erred and misdirected itself in upholding the conviction of the appellant in the absence of evidence to prove that the appellant had committed the offence.
2. The Court *a quo* erred and grossly misdirected itself in dismissing the appeal against conviction notwithstanding the fact that the respondent had failed to place before the Court evidence to prove the essential elements of the offence.
3. The Court *a quo* erred and misdirected itself in upholding the conviction notwithstanding that the respondent failed to place before the Court evidence to disprove the appellant’s case.”

He sought the vacation of the conviction and its consequent substitution by an order upholding the appeal.

THE ISSUE

The sole issue that arises from the three grounds of appeal is whether the court *a quo* erred in upholding the appellant's conviction.

SUBMISSIONS BEFORE THIS COURT

Ms *Chinwawadzimba*, for the appellant, submitted that the court *a quo* erred in upholding the appellant's conviction when the totality of the evidence adduced before the trial magistrate clearly showed that the appellant did not intend to harm the importer in his business but sought to protect public revenue by recovering revenue lost through the alleged previous smuggling activities perpetrated by the importer. She argued that the court *a quo* failed to give proper regard to the common cause facts of the investigations of the previous liquor imports that the importer was alleged to have smuggled into the country. She contended that the proven existence of these investigations, which investigations constituted part of the appellant's duties, negated the finding that his failure to raise detention documents for the impounded consignment was actuated by an underlying ulterior or dishonest motive. She, therefore, submitted that the appellant lacked the *mens rea* to commit the offence.

Per contra, Mr *Mapfuwa*, for the respondent, submitted that the court *a quo* did not misdirect itself in upholding the conviction and dismissing the appeal. He contended that the appellant acted in common purpose with the co-accused in impounding the consignment. They both flouted the Zimra procedural requirements to endorse the reasons for the referral to, and issuance of detention documents at the container depot. He further argued that the fact that the appellant accepted the consignment without demur, impounded and

further detained it for 21 days without issuing the requisite detention documents demonstrated that he was acting in cahoots with the co-accused to harm the importer in his business. He also contended that the appellant's failure to avail the internal investigations to the investigating officer showed that he was raising them as an afterthought to ward off his proven intention to harm the importer's interests. He, therefore, submitted that as the respondent had overwhelmingly established all the essential elements of the offence beyond a reasonable doubt, the court *a quo* correctly dismissed the appeal.

ANALYSIS OF THE LAW AND FACTS

What constitutes proof beyond a reasonable doubt was pronounced by DUMBUTSHENA CJ in *S v Isolano* 1985 (1) ZLR 62 (S) at 64G-65A thus:

“In my view the degree of proof required in a criminal case has been fulfilled. *In Miller v Minister of Pensions* [1947] 2 All ER 372 (KB), LORD DENNING described that degree of proof at 373H as follows:

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‘..... and for that purpose, the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’

See Hoffman and Zeffertt: *South African Law of Evidence* 3rd ed 409-410.”

The approach to be adopted where, as in this case, a reverse onus is prescribed by statute was enunciated by this Court in a kindred offence of contravening s 4 (a) as read with s 15 (2) (e) (iii) of the repealed Prevention of Corruption Act [*Chapter 9:16*] in *S v Chogugudza* 1996 (2) ZLR 28 (S) at 42D, as follows:

“The *actus reus* of the offence of contravening s 4(a) of the Prevention of Corruption Act having been proved by the State, it was for the appellant to displace the presumption by satisfying the trial court that his purpose of showing favour was legitimate - that in doing what he did, he had acted with an innocent state of mind. It was not for him to establish that his evidence on this aspect was necessarily true - only that on a preponderance of probabilities it was true. See *S v Ndlovu* 1983 (4) SA 507 (ZS) at 510D-G; *Miller v Minister of Pensions* [1947] 2 All ER 372 (KBD) at 374A-B.”

The Court had earlier on emphasized at 34E that:

“The plain language of s 15(2) (e) mandates that the presumption will stand unless proof to the contrary is adduced by the public officer, who is the accused. It is a presumption rebuttable at his instance. It imposes a legal burden upon him which must be discharged on a balance of probabilities. It is not discharged merely by raising a reasonable doubt.”

The relevant provisions under which the appellant was charged provide that:

“174 Criminal abuse of duty as public officer

(1) If a public officer, in the exercise of his or her functions as such, **intentionally-**

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(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 a public officer to do;

for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for 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.**” (My emphasis)

The key word found in subs (1) of s 174 is “intentionally”. It constitutes the *mens rea* of the offence of criminal abuse of office. It further demonstrates that the

presumptive proof reposed in subs (2) does not create a strict liability offence. The onus to establish beyond a reasonable doubt the *actus reus* of the offence, which is prescribed in the opening words and in paras (a) and (b) of s 174 (1), lies on the State. The presumptive proof casts a legal onus on the accused person to show on a balance of probabilities that he did not have the intention of favouring or prejudicing any person impacted by his act or omission.

Thus, the *actus reus*, which must be established by the State is that:

- (a) The accused person is a public officer;
- (b) Who in the course of his or her duties or functions;
- (c) By commission or omission, breached his or her duties or functions

In its wisdom, the legislature cast the legal burden of disproving intention on a balance of probabilities on an accused person. See *Chogugudza's Judgment No. SC-D-104/22* **Civil Appeal No. SC 57/20**

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Now, “intentionally” is a synonym of “wilfully”, which in the context of the English provision equivalent to our s 174 (1) was defined by LORD BUNGHAM in *R v G* [2003] UK HL 50 to mean “deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not”.

The nature and scope of the intention cast on the accused person has best been described in two foreign cases cited by TSANGA J in *S v Taranhike & Ors* 2018 (1) ZLR 399(H) at 405G-406B. The first is the English case of *R v Dytham* [1979] 2 QB 722, in which the Court stated that:

“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, the misconduct must be

calculated to injure the public interest so as to call for condemnation and punishment.”

The second is the Australian case of *Northern Territory Australia v Mengel* (1995) CLR 307, which held that:

“It is the absence of an honest attempt to perform the functions of the public office that constitutes abuse of office. Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform functions of his or her office whereby loss is caused to the plaintiff. Malice, knowledge and reckless indifference are the states of mind that stamp on a purported but invalid exercise of the power the character of abuse or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete.”

It is against this backdrop that the sole issue for determination in this appeal falls to be decided.

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It is however trite that an appeal court may only interfere with a subordinate court’s factual findings or the exercise of its judicial discretion on established grounds of irrationality or in circumstances where that court has misdirected itself on the facts by failing to appreciate the import of the fact or by making a finding that is contrary to the evidence actually presented. See *RBZ v Granger & Anor* SC 44/15 at 5-6.

At p 161 of the appeal record the court *a quo* dismissed the appellant’s investigation version and his appeal thus:

“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."

Section 174 (2) required the appellant to lead evidence of his state of mind at the time he impounded the goods. He asserted the common cause fact that no instructions for a search, examination and clearance were ever relayed to the container depot by the co-accused. He testified that no physical examination of the consignment was ever carried out at the container depot. His version was confirmed, by two common cause facts. The first was that there was no record of such an examination in the inspection register held at the container depot. The second was that one of his subordinates, who was alleged by the driver and the clearing agent to have searched the consignment at the container depot, denied ever doing so in his statement to the police. The appellant's version on this aspect was controverted by the driver and the clearing agent who said the examination was held on 24 December 2014. These two State witnesses contradicted each other in a material respect. The driver stated that the examination commenced at "around 4pm". The clearing agent stated that it took place between 10am and 2pm. A further complication in the State evidence was that the Bulawayo based clearing agent testified that these two witnesses, contrary to their respective evidence, had told him that a minimum of 4 searches had been conducted at the container depot on that day. The court *a quo* held that these discrepancies "were of no consequence, they did not go to the substance of the conviction."

In my view, the discrepancies were material in that they confirmed the truthfulness of appellant's version and discredited the contrary version of the State's witnesses. The discrepancies, contrary to the finding *a quo*, also went to the root of the conviction. The appellant was convicted for detaining the consignment without probable cause and without issuing the requisite detention documents. The absence of probable cause was premised on the fact that he continued to detain the consignment after it had purportedly been cleared by the physical examination. The trial court and the court *a quo* then ascribed an ulterior motive to harm the importer's interests to his failure to proffer such a probable cause.

Ms *Chinwawadzimba* contended that the appellant established on a balance of probabilities that he did not have the requisite intention to harm the importer in his business. On the other hand, Mr *Mapfuwa* made the contrary contention that as the appellant had failed to proffer any reasonable justification for his admitted failure to issue the requisite detention documents, the conviction was unimpeachable.

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The justification proffered by the appellant was that he detained the consignment pursuant to the instruction endorsed on the consignment note by the co-accused for him to investigate the smuggling allegations that had been raised against the importer in the electronic clearance system. Ms *Chinwawadzimba* argued that the uncontroverted testimony of the co-accused to the same effect negated the ulterior motive ascribed to the accused by the trial court and confirmed by the court *a quo*.

The uncontroverted testimony of the co-accused, which both the trial court and the court *a quo* did not interrogate, was that he referred the consignment to the container depot for investigation after the importer had been red flagged for smuggling by the electronic clearance system. He caused the endorsement of the referral details into the

“Referred to the Container Depot Register” by his subordinate one Eric Gorondondo. He relied on the provisions of s 201 of the Customs and Excise Act for his actions. The section stipulates that:

“201 Liens and preferences

(1) The correct amount of duty payable in respect of any goods shall, from the time when it should have been paid, constitute a debt due to the State by the person concerned and shall, at any time after it becomes due, be recoverable in a court of competent jurisdiction by proceedings in the name of the Commissioner, and any goods in a bonded warehouse or in the custody of the Department and belonging to that person, and any goods afterwards imported or entered for export by the person by whom the duty is due, shall, while still under the control of the Department, be subject to a lien for such debt and may be detained by the Department until such debt is paid, and the claims of the State shall have priority over the claims of all persons upon the said goods of whatever nature and may be enforced by sale or other proceedings if the debt is not paid within three months after the date upon which it became due.” (My emphasis)

Section 201 (1) permits a customs’ official to detain the consignment, which is subsequently imported by an indebted importer and is still under the control or custody of the Commissioner of Customs and Excise, for the purpose of exercising a lien upon it.

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This provision imbues a customs officer with the power to detain properly cleared consignments of an importer which are in a customs area for unpaid duty incurred in a prior consignment. The underlying reason for conferring such a power is to ensure that every importer pays his or her or its correct duty. It is that underlying reason that prompted the co-accused and the appellant to act.

That the importer was aware of the reason for the detention of his consignment was confirmed by the testimony of its clearing agents. They were apprised of the reason by the appellant a day after he impounded the consignment. Indeed, in its letter of 27 December 2014, which was addressed to the Regional Manager, the importer disputed the smuggling

allegations, enclosed the requested previous customs clearance documents and implored the appellant to release the consignment. It was also common cause that the release of the consignment after the consensual High Court order was issued, was conditional upon the further submission of more of the previous customs clearance documents connected to the alleged smuggling activities.

Notwithstanding the investigation officer's failure to seek documentation on the smuggling investigation, the totality of the evidence adduced at the trial showed, on a balance of probabilities, that such an investigation existed.

These factors clearly showed that the appellant's failure to issue the requisite detention documents was motivated by the higher ideal of recovering lost revenue, rather than some amorphous and speculative ulterior motive.

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I agree with Ms *Chinwawadzimba* that the appellant discharged the onus on him to show on a balance of probabilities that he did not bear any ill-intention to disfavour the importer. Consequently, the State failed to establish that the appellant had the *mens rea* to commit the offence.

In the premises, all the grounds of appeal are meritorious and the appeal ought to succeed.

DISPOSITION

The co-accused did not appeal against his conviction or sentence to the court *a quo* or to this Court. His conviction has come to our attention in the present appeal. This is a

proper case for the exercise of this Court's review powers that are encapsulated in s 25 (2) of the Supreme Court Act [*Chapter 7:03*].

The trial magistrate made the following findings. The co-accused intercepted, inspected and did not find any anomalies with the consignment. He did not clear the consignment but referred the driver and the clearing agent Christian Magwali to the container depot, ostensibly for an accentuated physical verification of the consignment. He did not endorse the reason for the referral on the back of the bill of entry. His failure resulted in the detention of the consignment for 21 days at the container depot. The failure to endorse on the back of the bill of entry was inconsistent or contrary to his duties as a public officer. He failed to give a reasonable justification for his conduct. His conduct was prejudicial to the importer who failed to sell the consignment during the festive season. He was, therefore, guilty as charged.

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The trial court failed to relate to the evidence which was favourable to the co-accused. The clearing agent testified that the scanning unit was the last checkpoint for clearing the consignment. This was in consonance with the denial of the co-accused that he ever intercepted the consignment and his insistence that he dealt with the consignment at his workstation. He was, after all, the night shift supervisor. He instructed his subordinate Eric Gorondondo to enter the reason for the referral in the "Referred to Container Depot Register" and on the road manifest that night. The regional manager testified that an endorsement could only be made on the back of a bill of entry if the electronic clearance system was down. The impact of this evidence was that endorsement on the back of the bill of entry was not a mandatory requirement. The regional manager further testified that he did not check the electronic clearance system or any registers other than the inspection register at the container

depot. The testimony of the co-accused on what he did at his workstation was, therefore, uncontroverted.

That the co-accused referred the consignment to the container depot to facilitate the investigation of a possible smuggling racket engineered by the importer was confirmed by the appellant. The co-accused, further, testified that his actions were motivated by the provisions of s 201 of the Customs and Excise Act. He believed the consignment could be held as a lien pending investigations of the smuggling allegations. That he could have misconstrued the import of s 201 is irrelevant. His belief negated the finding that he was actuated by an ignoble motive to injure the importer in his business interest. He ought to have been acquitted.

The conviction and consequent sentence will therefore be set aside.

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Accordingly, the following order will issue.

1. The appeal be and is hereby allowed.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“The appeal against conviction and sentence be and is hereby allowed.”
3. Pursuant to the provisions of s 25 of the Supreme Court Act [*Chapter 7:03*], the conviction and consequent sentence imposed upon Obert Tafadzwa Charamba at Beitbridge Magistrate’s Court on 9 November 2015, be and is hereby set aside.

GWAUNZA DCJ : I agree.

UCHENA JA : I agree

Mutandiro, Chitsanga & Chitima, appellant's legal practitioners

National Prosecution Authority, respondent's legal practitioners

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