FRANCIS PEDZANA GUDYANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO & MANYANGADZE JJ
HARARE, 27 July & 24 August 2022

Criminal Appeal

S M Hashiti, for the appellant
C Muchemwa, for the respondent

CHIKOWERO J:

INTRODUCTION

1. This is an appeal against both the conviction and sentence
2. The appellant was, following a full trial, convicted on 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 Criminal Law Code).
3. He was sentenced to 4 years imprisonment of which 18 months imprisonment was suspended on condition he paid restitution in the sum of US$25 228 on or before 30 April 2022. The sentence was passed on 18 February 2022.

THE PROCEEDINGS BEFORE THE MAGISTRATES COURT

4. The appellant was jointly charged with one Walter Kufakunesu Chidhakwa. The latter was the first accused.
5. The charge captured the allegations as follows:

> "… In that during the period extending from December 2013 to September 2016, and at Minerals Marketing Corporation of Zimbabwe (MMCZ), Harare, Walter Kufakunesu Chidhakwa and Francis Pedzana Gudyanga being public officers by virtue of their employment as Accounting Officers, as Minister and Permanent Secretary respectively in the Ministry of Mining and Mining Development and in the exercise of their duties as

> public officers connived to unlawfully and intentionally did that which was contrary to or inconsistent within their duties as public officers Walter Kufakunesu Chidhakwa appointed Francis Pedzana Gudyanga to assume the functions and duties of the MMCZ Board, after being unprocedurally appointed Francis Pedzana Gudyanga claimed and received Board fees and sitting allowances amounting to US$ 36 350 and in this way caused the MMCZ to suffer the actual prejudice of US$36 350."

6. In essence, the allegations were that Chidhakwa abused his power as the relevant Minister by appointing the appellant as the sole Board member of the Minerals Marketing Corporation of Zimbabwe (MMCZ). As for the appellant, the offence was that, abusing his power as Permanent Secretary , he claimed and received Board fees and sitting allowances in the sum of US$36 350 when he was not entitled to the Board fees and sitting allowances at all because he was and could not, as one person, be the Board of MMCZ. Since the two were jointly charged, the overall allegations were that they connived to have Chidhakwa appoint the appellant as the MMCZ Board and further connived in the appellant claiming and receiving the Board fees and sitting allowances, thus prejudicing the MMCZ in the amount already mentioned.
7. Chidhakwa's defence was that he did not appoint the appellant to be the MMCZ Board. Instead, since he (Chidhakwa), had dissolved the Board all he did was to advise the appellant of that fact and that, as Permanent Secretary, the appellant should assume the functions of the MMCZ Board pending the appointment of members to the MMCZ Board. As Minister, Chidhakwa asserted that he had nothing to do with the remuneration of Board members. In other words, his defence was that he did not even know that the appellant claimed and received Board fees and sitting allowances. He had nothing to do with such claim and receipt of funds, if ever the appellant claimed and received the same.
8. In his defence outline, the appellant stated that his office as Permanent Secretary of the Ministry of Mines and Mining Development meant that he was the Chief Accounting Officer of the Ministry and every other institution in which the Ministry had an interest. This included the MMCZ.
9. Consequently, he would sit in board meetings as an *ex officio* member and contribute to deliberations by presenting the government's position. Where the government was a shareholder, he would not only present its position but also play an oversight and supervisory role over the board.

10. In para 3 ,4,5, 7, 8 and 9 of the defence outline the appellant asserted:

> "3. Where a board was duly constituted he would get an emolument and a benefit as determined by the Ministry or by the board whichever case may be.
> 4. In the absence of a board, the functions of his office did not become suspended. He still had to direct the concerned state enterprises in a manner as to implement government policy and shareholder position for this contribution he would get the attendant benefits. These benefits were not dependent on the presence of the other members or their absence but on work done (underlining is ours)
> 5. The letter in issue did not appoint accused a board. It defies logic to suggest so since by mere definition a board is a congregate of several persons and not one person….
> 6……..
> 7. The letter in its contents also does not appoint SECOND ACCUSED to be a board. It clearly states that I was required to carry out the functions of the board and not to be the board. The functions are oversight and supervisory functions. These are reposed in me by virtue of being the Chief Accounting officer. The FIRST ACCUSED, as Minister responsible was simply advising me of the current events and the need to activate these functions. The state seeks to prosecute on the basis of its understanding of English. That is unfortunate. The letter never appointed me to be a board. Any interpretation that suggests so is malicious and ill informed. There was never an intention that I become the board and receive undue benefits. It is physically and literally impossible and is false.
> 8. Why would the letter say "until a board is appointed? It should have simply said until you are replaced. It does not say this because the context is clear that I was being appointed to be the board.
> 9. To amplify this, ordinarily when a board is there, the role of the Permanent Secretary is to then supervise the board as it does its supervisory work. When there is no board there is now only one supervisor and that becomes the Permanent Secretary. Because there will be no board he becomes actively involved in the affairs of the corporate entity until a board is involved. This is what transpired and adds to and explains the benefits that would accrue for carrying out work which more than six people would ordinarily do.''

11. Richard Chingodza, the Acting General Manager of the MMCZ at the material time, testified for the respondentin the court *a quo.* His evidence was this. The appellant was the MMCZ Board from December 2013 to August 2016. Thereafter, the witness did not know whether the appellant continued as the sole MMCZ Board member as the former had left MMCZ's employ. However, as between December 2013 and August 2016, the witness, as part of the MMCZ management, continued to operate. Where they needed guidance they would approach the appellant for the same. Where the management needed approvals that ordinarily required the board, they also approached the appellant who gladly obliged.

12. Where a board was in place, the members were paid monthly board fees. In addition, the members would also receive board committee fees when the board sat.
13. In 2014 the appellant requested the MMCZ management, through the witness, that management pays him monthly board fees and sitting fees for the work that he was doing as the board of the MMCZ. Management held the view that the appellant was not entitled to the payment because the Minerals Marketing Corporation of Zimbabwe Act [*Chapter 21:04*] set the composition of the board at a minimum of six members and a maximum of eleven members. Further, the statute was clear on where the members were to be drawn from in light of the skills required of them.
14. On meeting resistance from the witness, the appellant indicated that the witness should liaise with one Mark Mabhudhu, the General Manager of Marange Resources, so that both the management of MMCZ and Marange Resources pay the appellant's board and sitting fees. The appellant was also the Acting Board Chairperson of Marange Resources
15. Mabhudhu, having also noted the anomaly, did not do as per the appellant's bidding. Chingodza told the appellant that the management of MMCZ would not pay the appellant the board and suiting fees.
16. The appellant did not relent. In 2015, he continuously insisted that he be paid for the work he was doing and the time he was devoting to the affairs of the MMCZ. For good measure, he advised the witness that the Minister (Chidhakwa) had authorized that the MMCZ management should pay the board and sitting fees. The witness believed that the Minister had authorized that the monthly board fees be paid to the appellant. Accordingly, on 17 December 2015 the witness authored an MMCZ inter- office Memorandum instructing the Acting General Manager: Finance and Administration (one HT Chitate) to process the appellant's monthly board fees for October, November and December 2015. The gross monthly fee was captured as US$ 875, from which tax in the sum of US$175 had to be deducted. Accordingly, the net board fees over the three months was US$2100. The heading of the Memorandum reads:

"ACTING CHAIRMAN'S BOARD FEES PAYMENT".

17. Chingodza testified that the sum of US$2100 was processed and paid into the appellant's bank account. The memorandum and certified copy of the deposit slip were produced, by consent, as exhibit 2.
18. Also produced, as exhibit 3, was a schedule reflecting MMCZ board fees paid to the appellant for the period December 2013 and January 2015 as well as sitting fees for various meetings held with various stakeholders. The grand total was US$28 910 less withholding tax of US$5 782 to leave the net amount at US$ 23 128-00.
19. Mr *Mugiya*, who represented the appellant at the trial, did not dispute that the sums of US$2100 and US$23 128 were paid to the appellant. He confined the cross –examination of Chingodza to seeking confirmation that the state had not produced, through the witness, bank statements confirming that the two amounts had been paid into the appellant's bank account
20. Ambrose Made, the MMCZ Board Chairman from March 2017 to March 2018, testified that he recalled that the governing statute of the MMCZ provided that the board should have a minimum of six members and a maximum of about ten. His unchallenged evidence was that during his tenure board members were paid sitting allowances for the meetings that they held. Apart from this, the witness did not testify on the merits of the matter which was before the court. It will be remembered that the charge related to Chidhakwa and the appellant's alleged criminality over the period spanning from December 2013 to September 2016.
21. Newton Mushunguwasha, the investigating officer, also testified. It was through this witness that the appellant's warned and cautioned statement was produced as an exhibit. The matter under investigation, as per the warned and cautioned, statement, was the appellant's alleged contravention of s 174 of the Criminal Law Code:

> "….. which occurred at MMCZ, Harare during the period extending from December 2013 to September 2016, in which it is being alleged that during the said period you claimed and received Board fees and sitting allowances amounting to US$28 910 from Minerals Marketing Corporation of Zimbabwe (MMCZ) which were not due to you as the MMCZ

> had no Board during the period in question, thereby extending a favour to yourself contrary to your duty as a public officer.."

22. The appellant responded in these terms:

> "I deny the allegations in total. At all times during the time alleged I acted in terms of the mandate given to me by the appointing authority. I never breached that mandate. That is all I wish to say for now"

23. The learned magistrate discharged Chidhakwa at the close the of the case for the prosecution. She found that there was no evidence to prove essential elements of the offence as charged. In particular, the court found that there was no evidence led regarding to the manner in which Chidhakwa was supposed to discharge his duties pending the appointment of a new board. There also was no evidence to prove that what he did was contrary to or inconsistent with his duties. If anything, Made had made an indication that the tenor of the letter written by Chidhakwa was *in sync* with what would ordinarily happen when there was no board in place. Finally, the court *a quo* found that there was no suggestion that Chidhakwa intended to show favor or disfavor to anyone.
24. After the discharge of his then co-accused, the appellant made an unsuccessful application for his own discharge at the close of the case for the prosecution. The learned magistrate found that a *prima facie* case had been established against the appellant. This was so because Chingodza had testified that the appellant was not entitled to claim and receive the sums of US$ 2100 and US$23 128 as there was no board in place. Since there was no board, there could not be any sitting of the MMCZ Board. This meant the appellant was not entitled to the sitting fees. Chingodza paid only because he believed the appellant's word that Chidhakwa had authorized that payment be effected.
25. Chingodza also testified that the appellant was also not entitled to the monthly board fees, since there was no duly appointed board at the MMCZ at the material time. The court *a quo* found that the appellant had to be put on his defence to explain why he asserted, in the circumstances, that he was entitled to the board allowances and the sitting fees.
26. The appellant testified in his defence. He categorically abandoned his defence outline. He came up with a new defence. He denied claiming and receiving any board allowances and sitting fees at all from the MMCZ. He admitted that he was not entitled to board allowances and sitting fees since there was no board at the material time. He pointed out that had he

claimed the payments the MMCZ would have promptly advised the Minister (Chidhakwa) to whip him into line, so to speak.

27. The appellant closed his defence case.

28. Faced with this complete turn-around, the learned magistrate took matters into her own hands. She thought, as a court she needed documentary evidence from the bank reflecting that the MMCZ had paid a sum of US$23 128 into the appellant's account. The appellant, through counsel, had during the prosecution's case objected to the production of such evidence through Chingodza.
29. She directed the prosecutor to either bring the relevant bank official with the necessary bank documents, failing which an affidavit from such official plus the relevant bank documents had to be availed as "court evidence". All this was happening after the prosecution and defence cases had been closed.
30. Mr *Mugiya* objected, pointing out that the learned magistrate had effectively taken over the prosecution of the matter. Despite such objection, an affidavit from the relevant bank's official and copy of the appellant's bank statement were eventually produced, through the prosecutor, demonstrating that the amount in question had indeed been, deposited into the appellant's account on 11 September 2015. The affidavit and bank statement were marked as "court exhibit one".
31. Ultimately, the learned magistrate convicted the appellant as charged. She found that the appellant had criminally abused his duty as a public officer by exploiting the powers vested in him as the Permanent Secretary of the Ministry of Mines and Mining Development by "dropping" the name of the then Minister in claiming and receiving the total sum of US$25 228 (US$2100 +US$23 128). The payment, which was effected as board allowances and sitting fees, was not due to the appellant at all because the MMCZ did not have a board at the material time. In finding that the appellant received the sum of US$23 128 the learned magistrate also relied on "court exhibit one". She was satisfied that Chingodza was a credible witness. He is the one who testified that MMCZ management had paid the sums of US$2100 and US$23 128 as board allowances. The appellant had not disputed such testimony when afforded the opportunity to cross examine Chingodza. Having realized that his defence as outlined could not be sustained, the appellant then thought of a new

defence. In coming up with the new defence he had to and did (in my own words) destroy his own defence outline. Accordingly, the appellant's eventual defence that he neither claimed nor received the sum of US$25 128 as board allowances and sitting fees was beyond reasonable doubt false.

32. The sentence imposed is as we have mentioned in the introduction. We shall advert to the reasons thereof in determining the appeal against the sentence.

THE GROUNDS OF APPEAL

33. They are:

"A. Ad conviction

1. The court *a quo* erred in making a finding that the appellant demanded and received US$25 228 from MMCZ where the state failed to lead evidence in that regard. To the contrary the appellant proved otherwise.
2. The learned magistrate misdirected herself when she convicted the appellant on the basis of her sought evidence and not the evidence of the State in which she ordered the State to look for bank statements which she accepted contrary to the provisions of s 286 and 287 of the Criminal Procedure and Evidence Act and convicted the appellant on the basis of the evidence.
3. The learned magistrate erred when she failed to give the appellant the opportunity to interrogate the evidence relating to the bank statements which she ordered the State to supply her when she was writing her judgment.
4. The court erred when it failed to appreciate that the State failed to demonstrate the duty which the appellant breached to warrant the appellants conviction. In the result, the State failed to prove the essential elements of the offence.
5. The Court *a quo* erred when it failed to realize that the entries in the bank statements on which she convicted the appellant on did not demonstrate the appellant received the monies from MMCZ as board fees.
6. The learned magistrate misdirected herself when she ordered the appellant to pay US$25.228 as restitution after convicting him of same yet the amount is not the amount for which the charge relates and so is the payment.
7. The Court *a quo* erred when it convicted the appellant where all the State witnesses failed to link the appellant to the offence.
8. The Court *a quo* misdirected itself when it failed to realize that the appellant's co-accused, who was acquitted at the close of the State case, is the one who gave him the duties, approved payments and appointed him to do the duties of the board Chairperson of MMCZ and could not convict the appellant once the principal is cleared.
9. The Court *a quo* erred when it did not realize that all the duties the appellant did were lawful duties and the appellant did them as per mandate.

B. SENTENCE

10. The learned magistrate erred when she imposed a sentence which is clearly excessive in the circumstances and which induces a sense of shock.
11. The Court *a quo* erred when it failed to give effect to the appellant's mitigatory factors notwithstanding that she noted their relevance.
12. The Court *a quo* misdirected itself when it imposed a sentence of four years imprisonment with 18 months suspended on condition of restitution and failed to deduct any part of the sentence on condition of good behaviour.
13. The learned magistrate erred when she sentenced the appellant to pay US$25.228 for an obligation which arose before February 2019 contrary to Statutory Instrument 33/2019 and the Finance Act which fact added to the gravity of the offence needlessly."

34. In the event the appeal against conviction failed, the appellant prayed for the setting aside of the sentence and substitution thereof with a sentence of two years imprisonment of which six months imprisonment would be suspended on condition of restitution with the remaining eighteen months imprisonment being suspended on the usual conditions of good behaviour.

DETERMINATION OF THE APPEAL AGAINST THE CONVICTION

"COURT EXHIBIT ONE"

35. The second, third and fifth grounds of appeal raise the same issue.
36. It is this. The learned magistrate grossly misdirected himself in producing as an exhibit and through the prosecutor, Paul Mnyulwa's affidavit (First Capital Bank Limited's Operational Risk Officer) purportedly made in terms of s 288 as read with s 286(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA) and the appellant's bank statement for the period 7 September 2015 to 11 September 2015.
37. It is true that the entries in bankers books and bankers' documents are admissible in evidence on the affidavit of any director, manager or officer of the bank concerned in certain instances (s 286 of the CPEA)

38. It equally is true that a bank is not compelled to produce any books or bankers documents in any criminal proceedings unless the court specially orders such production (s 288 of the CPEA)
39. We think that Mr *Muchemwa* properly conceded that even if "court exhibit one" could otherwise have been properly placed before the Court *a quo*, it was a gross irregularity for the learned magistrate to do so:
    - after both the prosecution and the appellant had closed their respective cases.
    - through the prosecutor .
    - to prove a fact which the prosecution could have done if it thought needed further evidence.
    - without availing the deponent of the affidavit for questioning by the appellant.
40. In heads of argument, Mr *Muchemwa* had sought to support the procedure adopted by the learned magistrate on the basis that it was sanctioned by the provisions of s 232 of the CPEA. That section reads:

> "232 subpoenaing of witnesses or examination of persons in attendance by Court.
>
> The Court-
>
> a) may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness or may recall and re-examine any person already examined;
> b) shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case"

41. The learned magistrate said she needed the bank statement and an official from the bank to explain such bank statement failing which she required the production of an affidavit in lieu of the official. It appears she had the provisions of s 232(b) in mind. Needless to say, she did not subpoena Paul Mnyulwa.
42. In the circumstances, we accept that Mr *Muchemwa* eventually correctly conceded that we should exclude "Court exhibit one" in determining the appeal against conviction. We pause to record that, even then, he still argued that there remains on the record sufficient evidence to justify the conviction.

THE AMOUNT ORDERED AS RESTITURION IS DIFFERENT FROM THAT REFLECTED IN THE CHARGE

43. We think the sixth ground of appeal is misplaced. Therein, the appellant concedes that the conviction was in respect of the sum of US$25 228 and yet complains that the ordering of restitution in that sum was a misdirection because the charge spoke to a different amount.
44. This cannot be a ground of appeal against the conviction.
45. In the circumstances, we disregard it as it raises no issue in respect of the appeal against conviction.

IS THE CONVICTION JUSTIFIED ON THE EVIDENCE?

46. Our view is that this is the crisp issue arising from the remaining grounds to wit, the first, fourth, seventh, eighth and ninth grounds of appeal.
47. The ingredients of the offence of criminal abuse of duty as a public officer as defined in s 174 (1)(a) of the Criminal Law Code have been judicially interpreted by this court before. See *State* v *Taranhike and Ors* 2018(1) ZLR 399 (H); *Kasukuwere* v *Mujaya and Ors* HH 562/19.
48. Referring to the Hong Kong case of *HKSAR* v *Wong Lin Kay* [2012]2 HKLRD TSANGA J in *State* v *Taranhike* (*supra*) noted that the critical factor in determining, on the facts of each matter, whether there was criminal abuse of duty as a public officer is to:

> "…..examine what if any powers have been entrusted to the defendant in his official position for the public benefit, asking how if at all, the misconduct involves an abuse of those powers……"

49. The *dicta* was cited with approval in *Kasukuwere* (*supra*) where CHITAPI J then went on to say, at p 8:

> "The dicta in the above case is applicable to the interpretation of s 174 of the Code *in casu*. A charge arising there-from must allege the powers which the accused is entrusted with which basically is the duty to act in a certain way."

50. What this entails in our view is that what lies at the heart of the offence of criminal abuse of duty as a public officer is the criminal misuse of power by a person occupying a public office. If there are powers vested in a public office and the incumbent takes advantage of his occupation of that office to do anything that is contrary to or inconsistent with his

power, nay duty, to use such power for the public good (instead using such power for the purpose of showing favour or disfavor to any person), the offence is committed.

51. We think this is the reason why lay persons have called the offence "abuse of office " The point is that what is abused is actually the office in the sense of the powers vested in such public office and exercisable by any person occupying such public office (a public officer).
52. To fasten on endeavouring to identify the duty abused, in the sense of the precise responsibility or task breached was, in the circumstances of this matter, to miss the point. Yet the fourth and ninth grounds of appeal advocated such an approach.
53. The real issue was whether the prosecution proved that the appellant, taking advantage of his office as Permanent Secretary, claimed and received board allowances and sitting fees. An allied question is, if he so claimed and received such payment, was he entitled thereto?
54. The learned magistrate found against him on both aspects.
55. Even after we have excluded "Court exhibit one" we think the conviction is sound.
56. Exhibit 1, being the letter written on 10 December 2013 to the appellant by Chidhakwa on the Ministry of Mines and Mining Development's letterhead, reads as follows:

"Professor F P Gudyanga, Secretary for Mines and Mining Development".

DISSOLUTION OF THE MINERALS MARKETING CORPORATION OF ZIMBABWE (MMCZ) BOARD

> "Pleased be advised that the Minerals Marketing Corporation of Zimbabwe (MMCZ) Board is dissolved with immediate effect.
> You are hereby appointed to assume the functions and duties of the ZMDC Board until the appointment of a new Board.
> (signed)
> Hon W.K Chidhakwa (MP) MINISTER OF MINES AND MINING DEVELOPMENT
> Cc Hon F Moyo, Deputy Minister of Mines and Mining Development
> Dr M J M Sibanda, Chief Secretary to the President and Cabinet.
> Mr R Chingodza, Acting General Manager, MMCZ"

57. Through this letter, Chidhakwa did not appoint the appellant to be the MMCZ Board.
58. All that he did, on a reading of the letter, was to appoint the appellant, while still retaining his public office as Permanent Secretary of the Ministry of Mines and Mining Development, to assume, that is to perform, the functions and duties of the MMCZ Board

(reference to the ZMDC Board was an error which was understood to be such) pending the appointment of a new board.

59. Section 5 (1)(a) and (b) of the Minerals and Marketing Corporation of Zimbabwe Act [*Chapter 21:04*] provides that the MMCZ Board shall consist of the general manager and not fewer than six and not more than ten other members appointed by the Minister after consultation and in accordance with any direction the President may give. The "constituencies" from which the membership should be drawn are also set out. This is what Chingodza adverted to. His evidence went unchallenged.
60. Resultantly, not being the MMCZ Board (despite having assumed its functions and duties) the appellant could not have been under the illusion that he was entitled to claim and receive board allowances and fees.
61. The learned magistrate was correct in finding as a fact that the appellant claimed and received the total sum of US$25 128 from the MMCZ as board allowances and fees. The appellant did not challenge Chingodza's evidence in this regard. He was represented by a senior legal practitioner at the trial.
62. Having thus accepted that he claimed and received the amount in question, there was no need for the trial magistrate to resort to the mechanism of causing "court exhibit one" to be placed before her. The irregularity in so doing did not at the end of the day result in a gross miscarriage of justice.
63. As already observed, the appellant abandoned his defence outline the moment he opened his defence case. He did this by testifying, both in chief and under cross-examination, that he neither claimed nor received any board allowances and sitting fees from the MMCZ.
64. This was one of the reasons why the magistrate found that his new defence that he neither claimed nor received board allowances and sitting fees was false.
65. Before us, the appellant through counsel, again twisted and turned. On the merits, he argued the appeal not on the basis of the defence evidence but on the basis of the defence outline. It is on the basis of the defence outline that he cross-examined the prosecution's witnesses. Counsel urged us to find that the appellant was entitled to whatever he received because he performed the functions and duties of a board. We were not told what the amount is that the appellant received. But the appellant opened and concluded his defence

case by testifying that he neither claimed nor received any board allowances and sitting fees from the MMCZ, in whatever amount.

66. We think that the appeal against conviction is, with respect, a dog's breakfast. So too was the manner that the appellant defended himself at the trial.
67. We cannot disturb the finding that the appellant abused his powers as Permanent Secretary by claiming and receiving board allowances and sitting fees in the sum of US$25 128. He was not entitled to that amount because the MMCZ had no board at the material time.
68. The appeal against conviction is completely devoid of merit.

THE APPEAL AGAINST SENTENCE

69. We do not accept that the sentence of four years imprisonment, eighteen months of which were suspended on condition of restitution, is manifestly harsh and excessive as to induce a sense of shock. The appellant was afforded an opportunity to undergo only two and half years imprisonment if he restituted. The sentence compares favourably with that imposed in *Undenge* v *State* HH 222/18.
70. The learned magistrate gave effect to the appellant's mitigation. These included the appellant's advanced age, ill-health and lengthy service in government. The court *a quo* commented that had it not been for the last factor in particular she would have sentenced the appellant to five years imprisonment before suspending a portion thereof on condition of restitution.
71. Sentencing is a matter of discretion. We are satisfied that the learned magistrate judicially exercised her discretion by balancing the mitigating and aggravating circumstances. She gave sound reasons for excluding a non-custodial sentence. She referred to pertinent case law on sentencing in corruption cases. These include *Undenge* (*supra*) and *State* v *Chogugudza* 1996(1) ZLR 28(SC). In respect of the latter the passage relied on was this:

> "Any form of corruption is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any country, particularly in a developing one. It is difficult to detect and more so to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the appropriate penalty."

72. In opposing the appeal against the sentence, Mr *Muchemwa* in para 17 of his heads of argument highlighted that the same sentiments were aired in *State* v *Ngara* 1987(1) ZLR 91(SC)
73. Section 358 (2)(b) of the CPEA makes it clear that the power of a trial court to suspend the operation of the whole or part of a sentence on conditions is discretionary. We are convinced that the learned magistrate considered suspending the operation of the sentence on the basis that the appellant was a first offender but decided not to do so. Valid reasons were furnished for taking that course. Firstly, the appellant was no longer in government service. Accordingly, the need for a suspended sentence hanging over his head for purposes of individual future deterrence fell away. Secondly, a seventy-five year old first offender needed no further deterrence after serving a custodial sentence.
74. In the circumstances, there is no merit in the twelfth ground of appeal.
75. Finally, we do not think that the court *a quo* erred in ordering restitution in United States dollars. The case of *Zambezi Gas* v *NR Barber* SC 3/20 to which we were referred by Mr *Hashiti* is a civil matter. It interpreted the effect of the amendments to the Finance Act Number 2 of 2019 and Statutory Instrument 33 of 2019.
76. The present is a criminal matter. Restitution as part of a sentence is governed by Part XIX of the Criminal Procedure and Evidence Act [*Chapter 9:07*], in particular s 365 thereof. What the court may do is to order that an equivalent amount, if it be money, be paid to the injured party. This is meant to restore the injured party to the position it was in before the crime was committed. That is the meaning of restitution. The commission of the offence resulted in the MMCZ being prejudiced of US$25 128. To restore that entity to the position before the crime was committed the learned magistrate suspended the operation of eighteen months of the custodial sentence on condition the appellant restored, nay restituted, that which he unlawfully claimed and received. It was US$25 128. That was the thing. It was not anything else. The question of legal tender or parity of value of currencies does not, in our view, come into play.
77. We do not think that the Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time, Gross Settlement Electronic Electronics Dollars (RTGS Dollars)) Regulations, 2019, Statutory Instrument 33 of 2019,

the Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019, Statutory Instrument 142 of 2019 and the Presidential Powers (Temporary Measures) (Amendment of Exchange Control Act) Regulations, 2019 amended s 365 of the CPEA. The Regulations do not say so. Neither were they made in terms of the CPEA.

78. Section 2 of the CPEA defines "money" as follows:

> "money" includes all coined money, whether current in Zimbabwe or not, and all bank-notes, bank-drafts, cheques, orders or warrants or any other authorities whatever for the payment of money:"

79. We were not addressed on the meaning of this definition as read with s 365 of the same Act.
80. Since the last ground of appeal was not argued on the basis of the pertinent provisions of the CPEA no jurisprudential foundation was established, in criminal law and procedure, for us to find that the learned magistrate erred in ordering restitution in United States dollars.
81. The appeal against sentence is without merit.

ORDER

82. The appeal be and is dismissed in its entirety.

CHIKOWERO J:……

MANYANGADZE J:……

Madzima Chdyausiku Museta, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners