THE STATE
versus
TERRENCE MUKUPE
and
SAME KAPISORISO
and
JOSEPH TADERERA
and
LEONARD MUDZUTO

HIGH COURT OF ZIMBABWE
CHIKOWERO J:
HARARE, 9 & 16 November 2023

Assessors: B G Kunaka
T Gweme

Sentencing Judgment

W Mabhaudhi with *L Masuku* & *C Muronda*, for the State
T Madondo, for the first, second, third and fourth accused

CHIKOWERO J:

1. The accused and Ngonidzashe Mutsvene were jointly charged with the crime of fraud as defined in s 136(b) of the Criminal Law (Codification and Reform)Act [*Chapter 9:23*]
2. The allegations were that on 27 January 2017 and at Forbes Border Post Mutare the accused persons or one or more or all of them misrepresented to the Zimbabwe Revenue Authority ("Zimra") that 138 979 litres of diesel loaded on four trucks being driven by Ngonidzashe Mutsvene, Same Kapisoriso, Joseph Taderera and Leonard Mudzuto were in transit to the Democratic Republic of Congo, whereas in actual fact the diesel was destined for Zimbabwe. The misrepresentation was effected through the presentation of transit clearance documents to Zimra with the intention to deceive it or realizing that there was a

real risk or possibility of deceiving it and intended it to act upon the misrepresentation by allowing the diesel to proceed into Zimbabwe without paying duty to the prejudice of Zimra in revenue amounting to US$ 55 591-60.

3. The alternative charge alleged a contravention of s 174(1)(e) of the Customs and Excise Act [*Chapter 23:02*] ("the Act"). The allegations were that the accused persons and Mutsvene imported or assisted in or were accessories to or connived in the importation of the diesel in question without payment of duty, in the sum of US $55 591-60, on those goods.
4. The court granted an order for the trial of Ngonidzashe Mutsvene to be separated from that of the four before it. This was so because Mutsvene, not having been located, was not indicted for trial.
5. All four accused persons pleaded not guilty to the main and alternative charges.
6. The accused persons were found not guilty and were acquitted of the main charge. They were convicted of the alternative charge.
7. The court found that they had imported or assisted in or were accessories to or connived in importing the diesel in question from Mozambique without paying duty. They evaded the payment of duty to Zimra at Forbes Border Post by making use of transit clearance documents which reflected that the diesel was destined for the Democratic Republic of Congo. At the Chirundu One Stop Border Post the trucks were intercepted and examined whereupon it was discovered that they were filled with water. The court found that the accused persons were members of an organized criminal group and, as members thereof, had imported or assisted in the importation or were accessories to the importation or had connived in the importation of the diesel without payment of duty. This explained why,

having decanted the fuel in Zimbabwe, the accused persons replaced same with water. The substitution of water for the diesel was designed to give the false impression that that which would otherwise have exited Zimbabwe at the Chirundu One Stop Border Post was the diesel as the transit clearance documents still spoke to diesel destined for the Democratic Republic of Congo. The first accused's active involvement was, among other things, in initiating the procurement of the diesel and his spirited bid, which was thwarted, to prevent Zimra from conducting a physical examination of the cargo at Chirundu. The latter was explicable on the basis that he did not want the offence to be detected. The second, third and fourth accused persons had loaded the diesel into the three trucks at Beira whereupon they brought the same into this country through Forbes Border Post without duty having been paid. This state of affairs was enabled by the presentation of transit clearance documents at Forbes Border Post reflecting that the diesel was destined for the Democratic Republic of Congo.

8. Once inside this country, the second, third and fourth accused persons deviated from their declared route and on the trucks being intercepted at Chirundu, these drivers made themselves unavailable. The physical examination of the cargo was only conducted when the fourth accused was apprehended when he had stealthily reappeared to collect some items from "his" truck.
9. The court rejected as false the first accused's defence that his role was limited to being an agent for Independent Petroleum Group, the Democratic Republic of Congo Company which purchased the diesel in Beira, Mozambique. The court found that he imported or assisted in the importation or was an accessory to the importation or connived in the importation of the diesel without payment of duty thereon. This was proved, among other

things, by his role in facilitating the purchase of the diesel, its transportation into this country and his efforts to forestall Zimra from detecting that, although the transit clearance documents still reflected that the cargo was diesel destined to Independent Petroleum Group, Lubumbashi in the Democratic Republic of Congo, that cargo, at Chirundu One Stop Border Post, was no longer diesel but water.

10. Similarly, the second, third and fourth accused persons' defence that they were mere drivers who had loaded what they believed was diesel in Mozambique and were delivering the same to the Democratic Republic of Congo was false. Their claimed suspicious that the water could have been loaded at Beira were fanciful. They all deviated from their declared route in Harare. Although the evidence did not pinpoint which one, it was proven that one of the four trucks again deviated from the declared route in Chinhoyi.
11. At the end of the day, it was common cause that water had been loaded into the trucks in question by the time that accused two, three, four (and Mutsvene) arrived at Chirundu. The court found as far fetched the second, third and fourth accused persons' claimed suspicions that the Zimra officials decanted the diesel at Chirundu and replaced it with water.
12. All four trucks, on inspection at Chirundu, were found with not only some unsealed valves but even where such seals had been affixed, some of those were not properly positioned. In a nutshell, it was possible to tamper with the cargo in Zimbabwe between Forbes Border Post (the port of entry) and Chirundu One Stop Border Post (the port of exit).
13. But for the fact that the fourth accused was apprehended on the occasion of his unannounced return to his truck, the second, third and fourth accused persons had managed to delay Zimra's examination of the cargo. That process could not be conducted in the absence of the four drivers since the first accused had not only engineered his own non-

attendance but had left the Zimra enforcement team clinging onto his word that officials from the President's Office would bring the second, third, fourth accused and Mutsvene so that the cargo could be physically examined. Nothing came out of that utterance

14. The accused persons made themselves unavailable for the physical examination of the cargo because they knew that although the transit clearance documents indicated the cargo as diesel destined for the Democratic Republic of Congo, the facts, which they did not want to be unravelled in their presence, were that the diesel had been decanted in this country and replaced with water. That spoke to their state of mind in bringing the diesel into this country in the first place. All four intended to, and did, either import or assist in the importation or were accessories in the importation or connived in the importation of the diesel into Zimbabwe without the payment of duty thereon.
15. The penalty for contravening s 174(1)(e) of the Act is set out in s 174 (2a) (a) and (b) of the same statute. The latter reads:

> "(2a) Any person who is guilty of an offence in terms of subsection (1) or (2) shall be liable to –
> (a) A fine not exceeding level twelve or three times the duty paid value of the goods concerned, whichever is the greater; or
> (b) Imprisonment for a period not exceeding five years; or to both such fine and such imprisonment."

16. It is trite that where a statute provides for a fine as an alternative to imprisonment, the first option in sentencing an offender is a fine, with imprisonment being reserved for bad cases.
17. Where the justice of the case is such that the imposition of a custodial sentence is unavoidable, the minimum possible imprisonment term should be imposed. See *State* v *Katsaura* 1997 (2) ZLR 102 (H).

18. The sentencing court must strive to find a punishment which fits both the crime and the offender. In *S* v *Shariwa* 2003 (1) ZLR 314 (H) NDOU & CHIWESHE JJ (as they then were) referred with approval to S v Sparks 1972 (3) SA 396 (A) at 410 H where the court said:

> "punishment should fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy."

19. An appropriate sentence is determined by paying due regard to the merits of the particular matter before the court. This comes out clearly in *S* v *Allegrucci* 2002 (1) ZLR 674 (H) where SIBANDA J, with whom CHEDA J concurred, said at p 677A-C:

> "But the fact remains that they are all dishonest members of society. Thus each case must be considered on its own merits. I would neither subscribe to the notion nor view, that in all cases of accused convicted of theft of substantial amounts of money or goods of substantial value, for that matter, who have on their own initiative and accord prior to conviction and sentence made good their damage by paying full restitution and in circumstances that clearly indicate that the said accused is contrite, repentant and certainly reformed, should not be given the benefits of the option of a fine in punishment.
> In my respectful view, what should be of paramount consideration and importance are the individual accused and the facts of the case in respect of his conduct. The question in my submission ought to be, does his conduct subsequent to the commission of the offence, signify that of a contrite repentant and reformed individual. If all the relevant factors consistent with the above factors are found to be present then the individual ought to be rewarded by a non-custodial punishment."

20. At the pre-sentencing hearing, no reports and testimonials were produced.

21. The court could not find any case law speaking to the range and type of sentence for a contravention of s 174 (1)(e) of the Act. Mr *Madondo* did not refer me to any. So did Mr *Mabhaudhi*, for the State.

22. The latter drew my attention to the fact that Statutory Instrument 146 of 2023, Third Schedule, Table of Presumptive Penalties does not list the offence of contravening s 174(1)(e) of the Act, the aggravating and mitigating factors as well as the presumptive penalty. This appears to be a case of an inadvertent omission in the making of the Statutory Instrument.

23. In the circumstances, Mr *Mabhaudhi* urged me, in assessing an appropriate sentence, to be mindful of the guidelines provided in respect of the offence of smuggling as defined in s 182 of the Act and the presumptive penalty of 2 years imprisonment where certain factors of aggravation exist. He predicated his argument on the position that SS 174(1)(e) and 182 of the Act relate to kindred offences. I did not hear Mr *Madondo* to suggest otherwise, other than to argue for imposition of the sentence of a fine.
24. There is merit in the approach urged by the State. We propose to adopt it.
25. In line with ss 9 and 12(2) of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023 Statutory Instrument 146 of 2023 Mr *Madondo*, for all the accused, addressed the court in mitigation. The accused did not call the evidence of witnesses in mitigation. However, through counsel, they cross examined Washington Taringa, the Zimra Post Clearance Auditor called by the State.
26. All the accused are first offenders.
27. They are 47, 39, 51 and 41 years old respectively.
28. Accused one is married and is father to ten minor children the eldest of whom is 14 years old. Accused two is also married and is father to twelve minor children whose ages range from one month to seventeen years old. He provides for the upkeep of his sister's three minor children aged 2, 5 and 7 years old. Accused three is likewise married and blessed with seven children of whom four are minors aged 4, 6, 13 and 15 years old. He is a philanthropist providing transport services to several underprivileged school children in his community. The fourth accused, who is also married, is father to eight minor children whose ages range from 5 months to 17 years old. Accused one pays school fees for 1500 children in Hurungwe District and pays medical bills for various family members.

29. Mr *Madondo* submitted that there is a remote likelihood of the accused persons re-offending. He urged the court to bear in mind that the offence was committed in January 2017. Since then, he submitted, accused one (who was the Member of Parliament for Harare East and has always been a banker), has gone on to become a farmer and land developer. He directly employs one hundred and two individuals which means that one hundred and twenty families depend on him. He also served as the Deputy Minister of Finance and Economic Development in the Government of Zimbabwe.
30. Accused three, an international truck driver at the time of the commission of the offence, is now a business person managing his own fleet of trucks.
31. Accused four no longer drives haulage trucks at all. The court was also told that the second accused has also moved on in life. He got married after the commission of the offence and begat the 5 children already referred to.
32. Mr *Madondo* stressed that there was very little likelihood of the accused persons re-offending because their present circumstances reflect that they are already somewhat rehabilitated, having moved away from the business of buying and selling petroleum products.
33. The court records that, in the absence of previous convictions of any kind, there is no evidence suggesting that the accused persons are, in a real sense, likely to re-offend.
34. That they are first offenders is a strong mitigatory factor. This will count in their favour in the assessment of an appropriate sentence. So will the impact of the sentence on their persons, families, businesses (accused one and three) and members of the community dependent on them. The accused were not at liberty to disclose their savings and assets.

35. I find also that there was an inordinate delay before the matter was brought to trial. The period spanned from early February 2017 to late September 2023. The matter was into its seventh year when trial commenced. Nobody explained the delay which seems surprising considering that the evidence was quickly gathered and the matter itself was simple and straightforward. The anguish and anxiety occasioned to the accused persons over this period was akin to some kind of mental prison. The court proceeds on the basis that had the accused persons been brought to trial in or about 2017, and convicted, the sentence they would have received then would have been markedly different from that which the court will now impose upon them. Had they been brought to trial timeously they would have completed serving any sentences imposed upon them. This is mitigatory.
36. It is true that Zimra activated its mechanisms and managed to recover the full duty in the sum of US$55 591-60. Although the figures in respect of the penalty and the fine were not to hand and therefore not revealed both during the trial and at the pre-sentencing enquiry, it was common cause that it was not the accused persons who had paid the penalty, the fine and the duty. This means that while the financial prejudice to Zimra as an institution was cured, the accused cannot take credit for that.
37. There are factors of aggravation in this case.
38. The offence was premeditated, planned and executed to detail. The first accused's role is manifest in the procurement of the diesel, its importation and, after the offence had already been committed, in a courageous and sustained bid to prevent its detection. He flaunted his political clout in endeavoring to stand in the way of the law.
39. Between them the accused persons brought 105 797 litres of diesel into this country. The court has not considered the 33 000 litres loaded into Mutsvene's truck. 105 797 litres of

diesel is a huge quantity. The value therefore, again without considering the said 33 000 litres, stood at US$51 120. This value is substantial. The 105 797 litres of diesel was not recovered. Had it been, Mr *Mabhaudhi* indicated that the prosecution would have applied that it be forfeited to the State. The value of that fuel, being the sum of US$51 120, was not paid. This means the accused benefitted from the crime.

40. In view of the quantity of the unrecovered fuel, the court finds that the fuel was for either resale or some other business use.
41. Further, it is not everybody who is allowed to bring petroleum products into the country. Only those issued with permits or licences can do so lawfully. That which accused imported or assisted in importing or were accessories to the importation of or connived in importing were restricted goods.
42. Drawing inspiration from the sentencing guidelines as they relate to s 182 of the Act, the court accepts that the task of assessment of an appropriate sentence ought to regard 2 years imprisonment as the presumptive sentence.
43. The diesel was certainly not meant for personal use. It was not earmarked for either private or family use. The value of the goods was substantial. In light of the foregoing, there would have to be very strong mitigating circumstances and correspondingly thin factors of aggravation for the court to be persuaded that the sentence of a fine, or community service or both, would meet the justice of the case.
44. What moves the court to settle for a sentence beyond the 2 years imprisonment are the following aggravating factors.
45. The offence was committed by an organised criminal group. By its nature the offence itself was extra-territorial although the complete offence was committed in Zimbabwe.

Zimbabwe owes a duty to its neighbours and countries further afield to disrupt the proliferation of laundering of proceeds of crime. Countering extra-territorial economic criminal activity is not the obligation of one country. Organised criminal groups do not respect national borders and national laws. This court will be mindful of this in sentencing so as to deter not only like-minded Zimbabweans but also foreign nationals from evading the payment of duty to Zimra and in the process laundering proceeds of crime.

46. The court accepts that this is the kind of offence which impacts both Zimra, the State and the citizens of this country. Undetected, it contributes to Zimra's failure to meet its targets in respect of revenue collection. This in turn works against the State's constitutional obligations to deliver services to the citizenry. It affects the national budget, economic and social activities and occasions needless suffering to the people.
47. Undetected, it distorts the national data on trade. Incorrect statistics would be captured on the volume and value of international trade, thereby affecting planning, again at national level.
48. The crime creates unfair competition among players in the same industry. The court accepts Taringa's unchallenged evidence that an uneven pricing field would ensue the moment goods brought into the country without payment of duty are introduced into the market.
49. The offence also comes with the incurring of huge costs to Zimra and the State. This in the form of investing in extra measures to strengthen the function of revenue collection at ports of entry. There would be need to recruit and train more personnel, to purchase scanners, seals and product testing equipment to mitigate instances of improper declarations of goods being brought into the country.

50. The offence impacts on the facilitation of trade. The country's thrust to promote the ease of doing business gets affected by the delays occasioned by the need to confirm goods at ports of entry and re-confirm the same at ports of exit to minimize revenue leakages. The resultant delays have extra cost implications on importers and exporters. All this evidence went unchallenged.
51. Inadequate punishment of offenders in the accused's position encourages the non-adherence to the rule of law with more people being tempted to evade the payment of duty. If not nipped in the bud, lawlessness and chaos would reign supreme in the economy.
52. Mr Taringa testified, and this was not disputed, that the offence created the impression that Zimra is a corrupt institution and it being the revenue collecting arm of the State, that, by extension, the country itself is corrupt and hence unsuitable as an investment destination.
53. In light of all the foregoing factors of aggravation, some general and others specific to the matter at hand, the impact of the offence ought not to be viewed as being limited to Zimra's initial loss of revenue (later recovered) but transcends to the nation and the people of this country at large. Mr *Mabhaudhi*, both in written and oral submissions in aggravation, referred to the accused, in the circumstances of this matter, as persons who sabotaged the economy. They were economic sabotuers. All of them were gainfully employed. They were motivated by greed and not need. They subordinated the national interest to their own selfish personal interests.
54. All the accused were vital cogs in the group that made the commission of the offence not only possible but also difficult to detect.
55. We think that the unique circumstances of this case justify the imposition of both a custodial sentence and a fine. The purpose of the latter is to deprive the accused of their

illicit proceeds. Crime must not pay. The message ought to go out to would be offenders, and the accused, that crime will not be allowed to pay. Having balanced the reformative, retributive, deterrence and restitutive objects of sentence, the court finds that it is the deterrence and restitutive objects of the sentence which predominate over the others in this matter.

56. That said, we do not think it just and proportionate to build in the duty, although not paid by the accused, into the fine. The court thinks to proceed otherwise would be to punish without purpose and objective.

57. The fine will be in the sum of US$ 51 120, being the value of the unrecovered diesel. This amount is nowhere near three times the duty –paid value of the goods, which would be the maximum permissible fine in the words of s 174(2a)(a) of the Act. Having also determined that an imprisonment sentence is merited, it is not just and proportionate to settle for the maximum permissible fine. The court will not settle for the maximum imprisonment penalty of 5 years imprisonment. Although the accused declined the invitation to reveal what became of the diesel, thus demonstrating that they are not contrite even after they have been convicted, it still appears that the present may not be the worst case of a contravention of s 174(1)(e) of the Act. Consideration of much stiffer sentences, it seems to the court, ought to be left for the worst case scenarios.

58. Having striven to balance the aggravation against the mitigation the accused are sentenced as follows:

Each accused: $3\,^1/_2$ years imprisonment of which 6 months imprisonment is suspended for 5 years on condition the accused does not within the next 5 years commit any offence involving the bringing of good s into the country illegally or without payment of duty

thereon for which upon conviction the accused is sentenced to a term of imprisonment without the option of either a fine or community service.

In addition each accused is sentenced to pay a fine in the sum of US$12 780 through the Registrar of the High Court at Harare in default of payment 2 years imprisonment.

Chipadza Attorneys, the first, second, third and fourth accused's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners