

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

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 26, 27, 28 September, 12, 13 & 17 October & 8 November 2023

Assessors: *B G Kunaka*
 T Gweme

Criminal Trial

W Mabhaudhi with *L Masuku*, for the State
B Chipadza with *T L Madondo*, for the 1st, 2nd, 3rd and 4th accused

CHIKOWERO J:

INTRODUCTION

1. The accused persons and one Ngonidzashe Mutsvene were charged with fraud as defined in s 136(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]

2. The allegations were that :

“On the 27th day of January 2017 at Forbes Border Post, Mutare Terrence Mukupe, Ngonidzashe Mutsvene, Same Kapisoriso, Joseph Taderera and Leonard Mudzuto or one or more or all of them unlawfully and intentionally made a misrepresentation by tendering transit clearance documents to Zimbabwe Revenue Authority Officials purporting that 138 979 litres of diesel which was loaded on four Zimbabwean trucks registration numbers Horse ABN 4008 Trailer ABN 9228, ACZ 9255 trailer AAS 6386, Horse ACZ 0771 trailer ABS 2889, Horse ACQ 6489 trailer ABZ 9835 were in transit and destined for the Democratic Republic of Congo whereas in actual fact the 138 979 litres of diesel were to be decanted in Zimbabwe with intention to deceive Zimbabwe Revenue Authority or realising that there was a real risk or possibility of deceiving Zimbabwe Revenue Authority and intended Zimbabwe Revenue Authority to act upon the misrepresentation by allowing the consignment to proceed into

Zimbabwe without paying duty to the prejudice of Zimbabwe Revenue Authority of 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*], to wit, “imports or attempts to import or assists in or is accessory to or connives at the importation or attempted importation of any goods illegally or without payment of duty thereon.”

4. In this respect, the allegations read:

“In that on the 27th day of January 2017 and at Forbes Border Post Mutare Terrence Mukupe, Ngonidzashe Mutsvene, Same Kapisoriso, JosephTaderera and Leonard Mudzuto or one or more or all of them unlawfully and intentionally imported or assisted in or an accessory to or connived at the importation of 138 979 litres of diesel without payment of duty thereon.”

5. The State could not locate Mutsvene. Accordingly, having failed to indict him for trial it made an application in terms of s 190 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the trial of the present accused persons to be separated from that of Mutsvene. It was not opposed. We granted the application. With that, the State also applied for the amendment of the charge sheet and the State outline to remove any reference to Ngonidzashe Mutsvene. The application, also unopposed, was granted.
6. All the accused persons pleaded not guilty to both the main and alternative charges.

SUMMARY OF THE ALLEGATIONS

7. In broad terms, the state in respect of the main charge, sought to prove the following. That the first accused facilitated the purchase of the diesel in question from Beira in Mozambique. The full purchase price was paid. Thereafter he nominated Tanom Logistics and Success Times Enterprises (Pvt) Ltd (“Success Times”), being Zimbabwean registered transport companies, to collect the diesel from Mozambique. In doing this, he forwarded the particulars of the second, third and fourth accused, (and, incidentally Mutsvene’s) to Independent Petroleum Group (IPG). IPG was a company domiciled in Kuwait but had an office in Harare, Zimbabwe. It was in the business of selling petroleum products. Between them, the second, third and fourth accused persons were drivers in the employ of Tanom Logistics and Success Times. The first accused also furnished IPG with the vehicle particulars of the trucks and trailers to be used by the quartet to collect the diesel from the loading port at Beira. All the accused persons knew that the diesel was destined for the Zimbabwean market. However, in sourcing the diesel from IPG, the first accused had indicated that he was acting as an

agent for a company called New Energy Corp, based in Lubumbashi in the Democratic Republic of Congo. Documentation for the purchase and movement of the diesel thus reflected that the consignment, on being loaded at Beira, would merely pass through Zimbabwe on its way to New Energy Corp in the Democratic Republic of Congo. This was a deception to avoid payment of customs duty to the Zimbabwe Revenue Authority (Zimra) at Forbes Border Post. In a nutshell, the State sought to prove that the documents presented at Forbes Border Post were intended to misrepresent the true destination of the diesel so as to evade the payment of duty in the amount mentioned in the charge sheet.

8. As for the alternative charge the state sought to prove that all the accused persons unlawfully and intentionally imported or assisted in the importation or were accessories to the importation or connived at the importation of the 138 979 litres of diesel without payment of duty. Put differently, the state simply alleged that the accused persons brought, or assisted in the bringing or were accessories to the bringing or connived in bringing the 138 979 litres of diesel from Mozambique into Zimbabwe without payment of duty.
9. We think it convenient to record at this juncture that it was common cause that when Zimra intercepted the four trucks at the Chirundu Border Post as they were crossing into Zambia and conducted a physical examination of the Cargo the same was found to be water and not diesel.

THE DEFENCE OUTLINES

10. The first accused makes the following assertions. He was not the owner of the diesel in question. He is surprised that he is facing charges arising from diesel which did not belong to him. There were two other agents more involved than him. Those have not been charged. He was a mere agent of New Energy Corp. He was neither in Beira (where the loading of the cargo occurred) nor in Chitungwiza where the trucks stopped. He appeared only at Chirundu where he requested that the tankers be unsealed in his presence. Zimra turned down this request. He is surprised that the owners of the four trucks and the owners of the diesel have not been charged.
11. The second, third and fourth accused persons averred that their duties were to drive the trucks from Mozambique through Zimbabwe en route to the Democratic Republic of Congo. The trucks were fitted with tracking devices. They had a defined itinerary declared to Zimra officials at Forbes Border Post which they did not deviate from. The

trucks were fitted with seals so that the Cargo could not be tampered with. They never opened the tankers. They were not present when the cargo was physically examined at Chirundu. They were confused on learning that what they had been carrying was not diesel but water.

OBSERVATION

12. We think that if we determine whether the state has proved its case beyond reasonable doubt against the accused persons in respect of the alternative charge that will also have the effect of enabling us to render a verdict on the main charge. The need to grapple with the evidence in so far as it relates to the main charge will fall away.

DEFINITION OF TERMS

13. S 2 of the Customs and Excise Act [*Chapter 23:02*] (“the Act”) defines the words “import”, “importer” and “smuggling”.
14. The word “import “ is defined thus;
“means to bring goods or cause goods to be brought into Zimbabwe.”
15. “Importer” is defined this way:
“in relation to goods, includes any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this Act fulfilled.”
16. As for “smuggling” the same Section reads:
“means any importation, introduction or attempted importation, introduction or exportation of goods with intent to defraud the state or to evade any prohibition of, restriction on or regulation as to, the importation, introduction or exportation of any goods required to be accounted for under this Act and “smuggled goods” have corresponding meanings.”
17. For purposes of the Act bringing goods or causing goods to be brought into Zimbabwe is to import the same. If we find that the second, third and fourth accused persons intentionally brought the diesel in question into Zimbabwe knowing that it was not destined for the Democratic Republic of Congo, thus assisting in the evasion of duty, their conduct would fall under the phrase “to import.” We bear in mind always that the section under which they are charged criminalises assisting or being an accessory to or conniving at the importation of goods without the payment of duty. Much the same would apply to the first accused. The definition of “smuggling” is very much self-explanatory.

OUR APPROACH

18. It seems to us that our decision to acquit or convict the accused persons of the alternative charge turns not just on our assessment of the circumstantial evidence. Instead, it depends on our treatment of the whole evidence. By this we refer to the circumstantial evidence as well as the direct evidence, the one in conjunction with the other.

19. In *S v Shoniwa* 1987(1) ZLR 215 (SC) DUMBUTSHENA CJ said at 224 D- E:

“In the instant case the state relied on the appellant’s confession which was confirmed by her admissions..... and circumstantial evidence. The totality of this evidence leads to one conclusion, although no dead body was found, that the appellant murdered her baby. All that is required is that the court should be satisfied of the guilt of the appellant beyond reasonable doubt.”

20. In *S v Masawi & Anor* 1996 (2) ZLR 472 (S) KORSAH JA said at 525 F:

“Where circumstantial evidence leads inexorably to a definite conclusion no direct evidence is necessary for their probative value save that things do not happen that way without reason or explanation.”

21. The head -note in *Attorney –General v Bennet* 2011(1) ZLR 396 (S) reads at 397 A-B as follows:

“..... in assessing the probative value of circumstantial evidence, the Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together. Only after it has done so is the accused entitled to the benefit of any reasonable doubt which the court may have as to whether the inference of guilty is the only inference which can reasonably be drawn.”

We reiterate that even in a circumstantial evidence case it would be wrong to examine the evidence on a piecemeal basis.

22. We think that *Muyanga v The State* HH 79/ 13 is a lucid exposition of the law regarding circumstantial evidence and the correct approach in determining a case which turns wholly or partly on circumstantial evidence. There, at pp 2-4 of the cyclostyled judgement, HUNGWE J with the concurrence of MAVANGIRA J (as they then were) said:

“The law regarding circumstantial evidence is well- settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (2) Those circumstances should of a definite tendency unerringly pointing towards guilt of the accused;

- (3) the circumstances, taken cummulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.....

Circumstantial evidence can be contrasted with direct evidence. Direct evidence is what a witness says he or she saw or heard or did. It may be a witness saying that he or she saw an accused person do the act which the state says constitutes the alleged crime charged. It may be a video recording showing an accused person committing an act that the State relies upon as part of its case or it can be evidence from a witness that he or she heard an accused person admit to committing the crime. In a direct evidence case, if the evidence is accepted beyond reasonable doubt, it is capable of proving the guilt of the accused.

In a circumstantial case, the State lacks direct evidence of that kind. This does not mean that a circumstantial case is for that reason weaker than a case based on direct evidence. Some direct evidence can be of a very dubious quality. For example direct evidence from a witness identifying an accused person as being the offender can be very unreliable because identification evidence can be honest but mistaken.

But in a circumstantial case no individual fact can prove the guilt of the accused. Where the State's case depends either wholly or in part on circumstantial evidence, then the court is asked to reason in a staged approach. The state first asks the court to find certain basic facts established by the evidence. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The court is then asked to infer or conclude from a combination of those established facts that a further fact or facts existed. Ultimately, the state asks the court to find based upon the basic facts that an accused person is guilty of the offence charged. A case based on circumstantial evidence may be just as convincing and reliable as a case based upon direct evidence. This will depend upon the number and nature of the basic facts relied upon by the State when considered as a whole (not individually or in isolation). And it will depend upon whether all of the evidence leads to an unavoidable conclusion that the State has established the guilt of the accused. It is important that the court approaches a circumstantial case by considering and weighing, as a whole, all the facts established by the evidence.”

23. In *S v Mtetwa* 2014 (2) ZLR 533 (H) HUNGWE J, with whom BERE J (as they then were) concurred, said at 536 F – 537A:

“I wish to point out that the appellant correctly states that the state case against him rested on circumstantial evidence. I would however wish to point out that even in the most straight forward of cases, one must ultimately nevertheless draw inferences..... Zeffert and Paizes South African Law of Evidence p 99 explain that: ‘All evidence requires the trier of fact to engage in inferential reasoning.’ Some evidence requires fewer inferences-this would be traditionally so called direct evidence; whereas other evidence, traditionally circumstantial evidence, will require more inferences. The point must be observed that the court is never free of drawing inferences and therefore the

rules that govern the drawing of inferences govern the court in its ultimate evaluation of all evidence. The question ultimately becomes: how is a court to evaluate the evidence? The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond reasonable doubt, depending on the facts of the case.”

24. With all the foregoing sentiments in mind, which we adopt, we turn to the matter before us.

PROCUREMENT OF THE DIESEL

25. The first accused was, at the material time, the Member of the House of Assembly for the Harare East Constituency and the Deputy Minister of Finance in the Government of Zimbabwe.
26. In January 2017, as agent of New Energy Corp, he made enquires with IPG on the availability of diesel. The latter confirmed that it had the required quantity of the product, which would be available for collection from a storage facility in Beira Mozambique, on IPG’s receipt of proof that New Energy Corp had paid for the diesel. The first accused forwarded the requisite invoices to New Energy Corp. It effected payment through a bank account held in Switzerland. On receipt of proof that the sum of US \$67 805 had been paid for the 138 979 litres of diesel IPG requested details of the trucks and the drivers who would collect the diesel from Beira. Whether he got those details from New Energy Corp or he nominated the transporters himself the bottom line is that the first accused sent emails to IPG reflecting details of the trucks in the form of the registration numbers of the horse and trailers, their carrying capacity, the names of the drivers and their passport numbers. This enabled IPG to issue Product Release Orders authorising In Petro Beira to release the diesel via the aforementioned transporters. Dumisani Mlandu, an employee of IPG, told the Court that the first accused indicated that the customer, New Energy Corp, would receive the diesel in Lubumbashi in the Democratic Republic of Congo. Indeed all the documentation reflected that the diesel was destined for the Democratic Republic of Congo.

THE LOADING OF THE PRODUCT AT BEIRA

27. There is no direct evidence on what exactly was loaded into the four trucks at Beira.
28. However, accused persons two, three and four were present and saw that process being carried out. The third accused person, whose evidence was adopted by the second and

fourth accused, testified that he was not sure whether all the four trucks were loaded with diesel or water at Beira.

29. We have no difficulty in rejecting such evidence as manifestly false. Elaborate processes had been followed in sourcing the diesel, paying the huge sum of US \$67 805 for the equally enormous amount of 138 979 litres of diesel. And four trucks all with trailers had been driven from Zimbabwe to Beira to collect the diesel the paperwork of which indicated, that it would all be delivered as far afield as the Democratic Republic of Congo. Further, as we have indicated the trip itself commenced in Zimbabwe, the product was collected in Beira, the trucks would have to be driven through Zimbabwe again, Zambia and thence the Democratic Republic of Congo if indeed that was the destination of that which was collected in Beira. Huge costs would no doubt have to be incurred in undertaking this very long trip. We cannot for a moment accept that the three international drivers (accused two, three and four) would be so idle and naïve to the extent of allowing water to be loaded into their trucks so that they would ferry it from Beira in Mozambique to Lubumbashi in the Democratic Republic of Congo, a journey of no doubt thousands of kilometres.

138 979 LITRES OF DIESEL WAS BROUGHT INTO ZIMBABWE

30. We have already made this finding of fact.
31. Indeed the Bills of Entry presented to Zimra at Forbes Border Post on 21 January 2017 as were the Customs Road Manifests (the latter in respect of two out of the four trucks) indicated that the cargo was diesel. The commercial invoices issued by IPG also reflected that the cargo of all the four trucks was diesel, and that the destination was New Energy Corp, Lubumbashi in the Democratic Republic of Congo.
32. Victor Mayisiri, who was the Station Manager at Chirundu One Stop Border Post at the material time told the Court that the full duty in the sum of US \$ 55 591-60, a penalty and storage fees for the period that the four trucks were held at Chirundu have since been paid. This evidence was not disputed by the accused persons. Mayisiri testified that Southern Business Services, the clearing agent at Forbes Border Post in respect of the diesel in question held a bond in terms of which it undertook to pay the duty if the diesel which it declared as being in transit to the Democratic Republic of Congo was decanted in Zimbabwe. When physical examination of the cargo at Chirundu revealed that the diesel had in fact been decanted in Zimbabwe, Zimra then called upon Southern Business Services to ensure that the duty, the penalty and the

storage fees for the trucks themselves were paid. It was immaterial for Zimra, so said Mayisiri, to know out of whose pocket or account the payments had been made. For Zimra, the buck stopped with Southern Business Service, the clearing agent. Documentary evidence of the payments, in the event that such was generated, was not produced. What is important for our purposes is that the making of the payments in question is conclusive proof that 138 979 litres of diesel was loaded into the four trucks in Beira, brought into Zimbabwe on 27 January 2017 and thereafter decanted in this country by the time the trucks reached Chirundu One Stop Border Post around 19 00hrs on 30 January 2017.

THE ELECTRONIC SEALING OF THE TANKERS AT FORBES BORDER POST

33. At the material time, Zimra had at this border post, a facility in terms of which it would electronically seal the inlet and outlet valves of trucks containing precious cargo. On mounting of such electronic seals, the revenue collectors Command Centre in Harare would automatically be able to electronically track the movements of the trucks in question. The truck horse registration number ACQ6489 with trailer registration number ABZ 9835, which was driven by the fourth accused, was not electronically sealed at Forbes Border Post. So was horse registration number ACZ 0771 with trailer ABS 2889, driven by the third accused. The explanation for this undesirable state of affairs, as given by Maria Chabata, was connectivity challenges at Forbes Border Post. Anyway, the net effect of this loophole was that the movements of these two particular trucks could not and were not electronically tracked from Forbes Border Post to Chirundu One Stop Border Post.

34. The truck driven by the second accused had electronic seals mounted on it at Forbes. This enabled Annie Mhekede at the command centre in Harare to track the movements of not only this particular vehicle but also the one driven by Mutsvene, who is not before us. The vehicle which Mutsvene was driving, so we were told, was also electronically sealed at Forbes.

DID THE VEHICLES GO OFF ROUTE ON 28 JANUARY 2017?

35. Mhekede, then a revenue officer attached to the Cargo Tracking Unit, testified that on 28 January 2017 around 1400hrs she was monitoring the movement of the two trucks fitted with electronic seals as they made their way from Forbes Border Post to Chirundu. They then went off route by proceeding to Chitungwiza. She reacted to the system alarm by despatching two members of the Enforcement Team Region 1, who

included Braine Magore, to proceed to Chitungwiza to cause the drivers of the two trucks (accused two and Mutsvene) to bring their vehicles back into the geo- fencing area. We have no reason to reject Mhekede and Magore's evidence in this regard. Magore told the court that he and the other members of the reaction team found the two vehicles in question parked at a muddy and deserted place. They were off route. Also off route, and parked at the same place, were the two vehicles entrusted to the third and fourth accused persons. All the drivers were not at the scene. We do not accept the testimony given for the defence that the second, third and fourth accused persons did not deviate from their declared routes by driving into Chitungwiza. We do not accept their evidence that by driving into Chitungwiza, they were not deviating from their declared routes. There would be no point in declaring a route if a driver carrying precious Cargo could without Zimra's permission deviate from the route. What such unauthorised deviation does is to defeat the tracking by Zimra of such vehicles. In respect of the vehicles under charge of the third and fourth accused persons which had no trackers anyway, the opportunity to tamper with the Cargo, undetected, was simply compounded.

36. We accept that efforts were made to contact the second, third and fourth accused persons. We accept too that such efforts resulted in those accused persons driving their vehicles to Waterfalls, Harare which was with- in the geo- fencing zone. We proceed on the basis that the accused drivers, and Mutsvene, then left Harare for Chirundu on 30 January 2017 around 0600hours.

DID ONE OF THE FOUR TRUCKS GO OFF ROUTE IN CHINHOYI ON 30 JANUARY 2017?

37. Mhekede said it did. She said this happened around 11.00 am. The vehicle reappeared in the satellite system in the Chirundu area around 1900hrs. This disappearance occasioned the instruction to Andrew Bhunu, Anderson Hogo and Washington Taringa to travel from Harare to Chirundu to conduct a physical examination of the cargo of the four trucks.
38. It matters not in our view that the state was not able to pinpoint which of the two sealed trucks disappeared from the satellite tracking system in Chinhoyi. We do not accept that the disappearance was nothing but a failure of the tracking system at the command centre in Harare. If that were so, then the testimony placed before us would have been that both electronically tracked trucks disappeared from the satellite tracking system in

Chinhoyi, around 11.00am, only to resurface in Chirundu around 1900hrs on the same day. All four trucks were otherwise travelling together such that the answer to the anomaly we have accepted as fact is that the offending truck was deliberately driven off the declared route in Chinhoyi. This was not the first time that such an incident had occurred in respect of the same vehicle. It will be recalled that the first incident happened in Chitungwiza. The only difference was that the Chitungwiza incident, which transpired two days before, involved all the four trucks.

CHIRUNDU

39. It is necessary that we set out the evidence of Mayisiri in some detail. It is this.

Mayisiri

40. As we have already said, he was the Zimra Station Manager at Chirundu One Stop Border Post at the material time. He only knew the accused persons in connection with this case. On 30 January 2017 he was on duty. Around 1100hours he received a phone call. The caller was a Mr Manhire, the Zimra Electronic Cargo Tracking Manager based in Harare, stating that one of the trucks mounted with an electronic cargo tracking seal at Forbes Border Post in Mutare had disappeared from the satellite tracking system around Chinhoyi. Manhire disclosed the registration numbers of the four trucks and the respective trailers and instructed the witness that once the vehicles arrived in Chirundu a physical examination of their cargo should be conducted. Around 1900 hrs on the same date the witness received another call from Manhire advising that one of the two trucks fitted with the electronic tracking seal had reached the Chirundu area. As the witness was coming from the Zambian side of the border he met one of the four trucks crossing the bridge. The witness followed the truck to the Zimra acquittals desk. He instructed the officials at the desk to cause the driver to park it as it was counted among the four trucks whose goods were to be physically examined. Within ten minutes the other three trucks arrived at the border. He ordered the drivers to similarly park their vehicles. He then ordered the four drivers to drive to the Zimbabwean side of the border. Once there, the second, third, fourth accused and the one not before us (Mutsvene) parked the trucks at the search bay. One of the drivers claimed to have contacted the owner of the vehicles who was said to have instructed that no seal was to be broken and no physical examination of the goods was to be conducted until the owner arrived at the border post. Still at the search bay one of the Zimra inspectors received a phone call from someone claiming to be the owner of the trucks instructing

or requesting that no physical examination of the cargo was to be conducted until the owner of the trucks arrived at the border post. The witness told the second, third, fourth accused persons and Mutsvene that they were free to sleep inside the trucks. After the witness had left the border, he received a phone call around 2130 hours from somebody who introduced himself as Honourable Mukupe. The caller told the witness that he had been informed by his drivers that his trucks had been detained at the border. He told the witness that he was coming to the border post the following day and that, therefore, no physical examination of the goods had to be done before his arrival. The following morning, around 8.12am, the first accused walked into the witness' office. He introduced himself as Honourable Mukupe. He asked why his trucks had been detained at the border post. The witness answered that he had received an instruction from his superior in Harare to intercept and detain the trucks to facilitate a physical examination of the goods. The first accused requested to know who was to conduct that examination. The witness answered that there were Zimra officers who had come from Harare the previous night and, since they were the enforcement officers, it was them who would carry out the physical examination of the cargo. At that moment, the three enforcement officers entered the witness' office. These were Washington Taringa, Anderson Hogo and Andrew Bhunu. The witness made the necessary introductions whereupon he then told the first accused to direct all questions to the three as they had come to Chirundu to conduct the physical examination. The interview which ensued was conducted by the enforcement officers. The witness was present, as the interview was held in his office. On being asked who the owner of the trucks was, the witness told the court that the first accused's response was that those vehicles were his. To the question relating to the ownership of the cargo, the witness testified that the first accused told the interviewers that the cargo was his. On being asked how many trucks they were, the witness testified that the first accused said they were four. The discussion also traversed the nature of the goods with the first accused's response being that it was diesel. The enforcement officers then requested to carry out a physical examination of the goods. The witness recalled that the first accused insisted that he knew that the trucks had diesel and that, therefore, there was no need to physically examine the consignment. The witness then exited the office in order to answer a phone call, leaving the discussion between the first accused and the enforcement officers in progress. On his return he found the enforcement officers still insisting that they wanted to carry out a physical

examination of the goods. The first accused would have none of it. The first accused announced that he was leaving. He made a disclaimer that he had not held an interview with the Zimra Officers and that he had not been in that office. As the first accused was about to leave one of the enforcement officers asked the former how then the physical examination could be conducted in the absence of the first accused. The first accused's response was that he would cause officials from the President's Office to ask the drivers to present themselves for the physical examination of the goods. With that, the first accused left.

41. Just after the witness had lunch one of the enforcement officers seated outside the witness's office told the former that one of the drivers had come to collect something from his truck. Seizing the opportunity the witness contacted the clearing agent from Southern Business Service; Criminal Investigations Department Officers, the Military Intelligence, the Border Control Unit and Officers from the President's Office, among other stakeholders, to present themselves to witness the physical examination of the goods.
42. In their presence, around 1700hrs, the tankers were opened and samples of the goods extracted for testing. To the witness the same looked like water, rather than diesel.
43. The witness told the court that he did not know whether the four drivers, who included the second, third and fourth accused persons slept inside their vehicles over the night immediately before samples were extracted from the trucks. However, what he knew was that all four went out into the small town of Chirundu for supper. The witness knocked off duty on 30 January 2017 without seeing the quartet again.
44. It was Mayisiri who told the court that the duty was eventually paid in full as were the penalty and storage fees.

Herbert Mataruka

45. There was no point in challenging the expertise of this witness and putting him to task on whether it was him or his subordinate who scientifically tested the contents of the four trucks. Ultimately, it was not disputed that those trucks contained water, rather than diesel, at the time of the physical examination and scientific testing of their contents. We have no difficulty in finding that Mataruka was a qualified and experienced Fuel Quality Technologist employed by the Zimbabwe Energy Regulatory Authority at the material time and that he tested the contents of the four trucks and

found the same to be water, and not diesel. Copies of the Laboratory Test Reports were produced by consent.

Washington Taringa

46. He was employed by Zimra as a loss controller at the material time. At the time of the trial he was now an auditor in Zimra's loss control department.
47. His evidence was this.
48. On 30 January 2017 he was on duty in Harare when he was summoned to the office of the Acting Director, Loss Control.
49. On presenting himself he was assigned to travel to Chirundu One Stop Border Post to intercept the four trucks in question to verify the nature of the goods in those trucks.
50. Together with Andrew Bhunu and Anderson Hogo the witness travelled to Chirundu. They arrived around 2135hours whereupon they presented themselves to Mayisiri. They told him that they were assigned to intercept the four trucks and to confirm the nature of the goods therein. Mayisiri told them that the trucks had already been intercepted and that they were parked at the border post. In other words, the trucks were already in the custody of Zimra. The witness' team and Mayisiri then parted, having agreed that they would look into the matter the following day, that is on 31 January 2017.
51. Come the morning of 31 January 2017 the witness and his team members proceeded to Mayisiri's Office. They found the first accused already in that office, talking to Mayisiri. After making the introductions Mayisiri then advised the trio that the first accused had arrived that morning.
52. Taringa, Hogo and Bhunu held a meeting with the first accused in Mayisiri's office. Mayisiri himself was also present, but was an observer. As the meeting commenced the witness asked the first accused to state the purpose of his visit to Chirundu. The first accused said he had come to seek the release of his trucks. On being asked whose trucks they were the first accused's response was that they were his. On being questioned on the nature of the goods in the trucks the first accused stated that it was diesel, being transported from Mozambique to the Democratic Republic of Congo.
53. The witness told the first accused that the former's team had travelled from Harare to Chirundu to inspect the goods in the trucks whereupon the latter asserted that there was no need for Zimra to do so. The reason tendered for that stance was that it was diesel

which was inside the trucks hence Zimra could release the trucks without conducting the physical examination of the goods.

54. The witness advised that it was Zimra's duty, mandate and responsibility to carry out physical checks on imported goods. The first accused insisted that the physical examination be put off. The witness pointed out that there was no way that his team could do away with the physical check of the goods.
55. Seeing that Zimra was insistent that the physical examination was to be carried out the first accused then said the trucks were not carrying diesel but water.
56. He said he had bought the diesel in Mozambique at 45cents per litre and had sold the same in that country at 63 cents per litre. Thereafter, he had filled the trucks with water which he was taking to the Democratic Republic of Congo.

Having realized that the witness and his team were bent on conducting a physical examination of the goods, the first accused announced that he was leaving. This prompted the witness to request the first accused to avail the truck drivers so that the physical examination would be done in their presence. To this, the first accused's response was that officials from the President's Office would bring the drivers to the ZIMRA enforcement team. The first accused departed.

57. The team waited for the drivers to come. We now know who these drivers were. The drivers did not do so.
58. Late in the afternoon the witness and his colleagues then beheld a man opening the door to one of the trucks. Convinced that he was one of the drivers, the team approached him. He confirmed that he was indeed one of the drivers, and that he was Leonard Mudzuto. He is the fourth accused.
59. The team waited a while expecting the outstanding drivers to pitch up. They did not. The police then apprehended the fourth accused.
60. Around 1700 hours the process of physically examining the goods commenced. Present were the following stakeholders among others: Officers from Criminal Investigations Department, the Military Intelligence, the Border Control Unit, the fourth accused and Emmanuel Ndoro, the clearing agent from Southern Business Services.

61. The witness and his colleagues physically inspected the truck one after the other. They checked the ZIMRA electronic seals on two of the trucks. It will be remembered that the other two trucks had no ZIMRA electronic seals mounted on them.
62. It was noted that the master seal on top of each of the two tankers was not mounted in such a way that it secured the inlet into the tankers. These two tankers (trucks) had, each, a master seal on the roof and two slave seals on the outlet valves. On top of both tankers were six openings, on the sides were three outlets but only two of those three on the sides were sealed. This meant that both trucks had a single outlet which was not sealed.
63. The enforcement team took samples of the goods from all four trucks. The sample appeared to be water. The police invited the Zimbabwe Energy Regulatory Authority (ZERA) to conduct a forensic examination of the goods. Although invited on 31 January 2017, ZERA'S Forensic Scientist, Mataruka, only managed to appear on 2 February 2017. The result of him subjecting the goods to a laboratory test is now known.

DISPOSITION

64. Due to the brevity of the defences advanced by the accused persons, we think it unnecessary to summarise their defence cases before disposing of this matter.
65. Instead, we will take their evidence into account, together with that adduced by the State, in rendering our verdict.
66. We are satisfied that the State has proved its case beyond reasonable doubt against all the accused persons as regards the alternative charge. We conclude that all the accused persons unlawfully and intentionally imported or assisted in or were accessories to or connived at the importation of the 138 979 litres of diesel without payment of duty thereon.
67. We have earlier in this judgment rendered our reasons for finding that the accused persons intentionally brought the said diesel into this country.
68. That it was never their intention to deliver that diesel to Lubumbashi in the Democratic Republic of Congo was established by the State. They were party to those who brought the diesel into Zimbabwe. In the language of s 174(1) (e) of the Act, the accused

persons intentionally imported or assisted in or were accessories to or connived at the importation of the diesel in question without payment of duty thereon.

69. The first accused was central to the process of procurement of the diesel. We see his involvement in the purchase and transportation of the diesel into this country. That the documentary evidence produced by the State does not reflect him as the person who was buying and paying for the diesel does not absolve him from criminal liability. That the evidence does not place him, physically, at both Beira and Forbes Border Post is inconsequential. He did not need to be at either of those places to fall foul of the provisions of the Act under which he was charged.
70. As regards the first accused, what we have is a combination of direct and circumstantial evidence pointing unerringly to his guilt. The same applies to the rest of the accused persons.
71. It is fact that the second, third and fourth accused persons were the drivers of three out of the four trucks which were used to bring the diesel into this country. The diesel did not miraculously land in Zimbabwe. Some persons drove the trucks carrying that diesel into this country, through the Forbes Border Post (Forbes). Four persons did that. Among them were the second, third and fourth accused persons.
72. The trucks which were driven by the third and fourth accused persons were not mounted with electronic seals by ZIMRA at Forbes. When one has regard to the fact that, having passed through Forbes laden with diesel only to be found carrying water instead at Chirundu the conclusion is inescapable that the decision not to mount electronic seals on those two trucks may well have been deliberate. It was in our judgment to facilitate the decanting of the diesel in Zimbabwe as well as to make it impossible for ZIMRA to track the movements of those trucks while inside Zimbabwe. This was to facilitate the decanting of the fuel in this country without triggering any alarm bells.
73. The truck driven by the second accused had an electronic seal mounted on its roof. We conceive of no basis to reject Taringa's evidence that such seal was ineffectual for the purposes of accessing the diesel. That seal was positioned in a manner allowing access to the contents of the truck between Forbes and Chirundu. Further, the same truck had a side inlet unsealed.

74. We now know, in any event, that whatever seals were on or absent from the three trucks which were driven by the second, third and fourth accused persons from Forbes to Chirundu, the fact is that diesel was decanted from those trucks in Zimbabwe and water fed into those vehicles instead.
75. What we shall henceforth, for convenience, call the second accused's vehicle was driven off-route on reaching Harare. The vehicle was driven into Chitungwiza and left there. In the light of all the evidence, we do not accept that this deviation was innocent.
76. That the fleet of four trucks was at some point left in Chitungwiza and Waterfalls by, in particular, the second, third and fourth accused persons does not introduce reasonable doubt into the case of the prosecution at all.
77. Another of the vehicles linked to the electronic cargo tracking system, barely two days later, disappeared from the system around Chinhoyi. It re-appeared in the Chirundu area. It matters not that the evidence is not clear whether this was the second accused's vehicle or Mutsvene's. What is paramount is the pattern woven by this team of drivers, as regards their traversing the territory between Harare and Chirundu.
78. Each time any of the vehicles went off route it must be understood that each such vehicle did not do so automatically, the person behind the wheel would be the brains behind that activity. Indeed, it would be the driver conducting himself in such manner.
79. We reject as manifestly false the second, third and fourth accused persons' assertions that they were chased away from their trucks at Chirundu Border Post. That the trucks were seized by ZIMRA for purposes of facilitating the physical examination of the goods could not have been a reason to chase away the drivers.
80. We agree with Mr Mabhaudhi that the second, third and fourth accused persons if they were innocently driving to the Democratic Republic of Congo, had every reason to be about their trucks, which supposedly contained precious goods. If the keys to all four trucks were also seized by ZIMRA at Chirundu, none of the accused persons explained how the fourth accused was then able to access his truck on the occasion of his apprehension. Indeed, the fourth accused, for whom an indication was made that it was necessary that he testifies, decided not to do so.

81. We are satisfied that the second, third and fourth accused persons disappeared at Chirundu once their vehicles had been seized. They knew that the chickens had come home to roost. They did not want to be present when the authorities discovered that they had decanted the diesel in Zimbabwe and replaced it with water. The unlucky one was the fourth accused. He stealthily returned to collect some items from his truck. His return not only resulted in his arrest but, more importantly, enabled the physical examination of the goods to be conducted.
82. If it be that the ZIMRA officials had struck an agreement with the second, third and fourth accused persons that the former would call the latter to avail themselves for the physical examination, then, if ZIMRA had not called, one would have expected the fourth accused himself, having returned on his own accord, to either have made phone calls to his colleagues or to remind ZIMRA officials to do so before commencing the process of physically examining the goods.
83. Mayisiri and Taringa were credible witnesses. They gave detailed evidence regarding their interaction with the first accused. We have set out their evidence. It has a distinct ring of truth. The two witnesses corroborated each other.
84. The first accused admitted under cross-examination that he had a sleepless night on 30 January 2017 on learning that the four trucks had been intercepted and detained at Chirundu Border Post. That was not all. He made a phone call to the then Chirundu One Stop Border Post Station Manager (Mayisiri) that night. He requested the latter not to open the seals and to stay physical examination of the goods until he arrived in Chirundu the following morning. He admitted that he caused his driver to travel at the scary speed of 200 kilometres per hour between Harare and Chirundu the following morning. Around 8.12 am the first accused was already in Mayisiri's office, demanding release of the trucks without physical examination of the goods. It does not make sense that the first accused would have endangered his life and limb by racing to Chirundu, a distance of over 300 kilometres from Harare only to leave without witnessing even the commencement of the process of physical examination of the goods if he had travelled there to make sure that ZIMRA undertook that process according to the book. If the condition precedent to him receiving his commission from New Energy Corp was the diesel being delivered in Lubumbashi, it was, in our judgment, in his financial interest that either him or the four drivers or all of them, be present as the goods were physically

examined so that the supposed journey to the Democratic Republic of Congo would be proceeded with.

86. Effectively, what the accused persons want us to accept as reasonably possibly true is that some unknown person or persons stole the diesel in Zimbabwe and, not being contended thereby, took the extra mile of filling not one but all the four trucks with water. That is fanciful to say the least. The only persons, on our assessment of the evidence, who had an interest in ensuring the trucks would pass through the Chirundu Border Post with such weight as would give the false impression that they were laden with diesel were the persons in possession of documents indicating that the goods they were ferrying to Lubumbashi was diesel and the one, also interested in those papers, who, at the eleventh hour, fought hard to derail any attempt by ZIMRA to discover that the consignment was not diesel but water. Realizing that he was on the receiving end, one of the first accused's parting shots was that he had bought and sold the diesel in Mozambique and filled the trucks with water. We take the view that, in making that utterance, the first accused was desperately accounting for what he knew would be found to be contained in the trucks. Taringa was clear that when that utterance was made Mayisiri had gone out of the office to answer a call.
87. We reject as false the first accused's explanation that he was merely an agent for New Energy Corp, and that he had nothing to do with the logistics of the transportation of the goods from Beira to Lubumbashi. What we have found as having been done and said by him in Mayisiri's office fortifies our view in this regard.
88. We reject also the second, third and fourth accused's suspicions that they either took delivery of water at Beira or that the diesel was decanted by persons unknown to them at Chitungwiza, Waterfalls or in the ZIMRA yard at Chirundu and replaced with water.
89. In the final analysis, the second, third and fourth accused persons are asking too much by urging us to find that it is reasonably possibly true that they were surprised that water was discovered in the trucks at Chirundu.
90. All four accused persons were a syndicate which worked together in importing or assisting in or as accessories to or connived at the importation of the 138 979 litres of diesel without payment of duty thereon.

91. Accordingly, we find all four accused persons not guilty and acquitted on the main charge but guilty as charged on the alternative charge.

Verdict: Main charge – accused one, two, three and four not guilty and acquitted.

Alternative charge – Accused one, two, three and four guilty as charged.

B Chipadza Law Chambers, accused one, two, three and four's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners