

**FREDRICK MAGAYA**

**AND**

**AMOS MUTSAMBWA**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J AND CHEDA AJ  
BULAWAYO 18 FEBRUARY 2013 AND 7 MARCH 2013

*Mr Shenje* for the appellants

*Mrs Ndlovu* for the state

Appeal

**CHEDA J:** This is an appeal against both conviction and sentence, a decision made by the magistrate sitting in Bulawayo on the 20<sup>th</sup> November 2006.

The appellants were charged with contravening section 6(f) of the Miscellaneous Offences Act [Chapter 9:15] (hindering a Police Officer in the execution of his duties). They pleaded not guilty but were convicted and sentenced as follows:

“6 months imprisonment of which 5 months imprisonment is suspended for 5 years on condition of good behaviour accused and 1 month is suspended on condition the accused completes 35 hours of community service in 1 week.”

The brief facts of this matter are that the two appellants are members of the Christ Apostolic Church. On the 15<sup>th</sup> December 2005 the complainant who is a Detective Sergeant in the Zimbabwe Republic Police intended to arrest one Jervas Mutsambiwa who is second appellant's father at Tredgold Building, Bulawayo where second appellant was appearing as

an accused. When complainant tried to effect an arrest both appellants interfered and prevented him from carrying out his lawful duties as a police officer. While he was still trying to effect an arrest, members of appellants' church formed a circle around him, started shouting abscenties and made menancing gestures in a threatening manner. It is as a result of their actions that he abandoned his intention to arrest Jervas Mutsambiwa as the atmosphere was not conducive to effect a lawful arrest.

### **Conviction**

It is appellant's contention that they were not properly convicted because their actions were not a threat to the complainant to the extent of causing him to abandon the intended arrest.

The trial court made a finding that appellants and members of their sect mobbed and surrounded the complainant, thereby, preventing him from effecting an arrest. The law prohibits anyone, whatsoever, from preventing a Police officer from executing his lawful duties including effecting a lawful arrest.

In determining the question of whether complainant's failure to execute his duty was as a result of appellant's action the court must consider the circumstances surrounding the arrest. The police officer subjectively must have felt fear for his life or threat to his physical safety to an extent that the best way out was to abandon a lawful execution of his duties.

In *casu* it is on record that Jervas Mustsambiwa was on the Police wanted list. He was found at a place where the complainant was in a position to effect an arrest and indeed attempted to do so, but, was prevented by appellants.

Second appellant told the complainant that he was not going to allow the complaint to take his father away and grabbed his father's hand from the complainant, by so doing he released him from the complainant's hand. It was at that time that first appellant also joined in the fray specifically telling the complainant that he was not going to allow him to take away Jervas Mutsambiwa. The presence of an emotionally charged and rowdy crowd in the form of the members of the Christ Apostolic church was enough to cause shivers on the complainants'

spine and his abandonment of the arrest was reasonably expected. It is therefore clear that he was prevented from performing his lawful duties.

I agree with Miss *Ndlovu* for the respondent that the prevention by appellants was a clear contravention of the section of the miscellaneous offences Act (*supra*) they were charged with. The irony of the complaint is that this was at Tredgold Building, a seat of the magistrate court where even the worst criminal is expected to temporarily behave.

These courts will not entertain or gloss-over such unlawfulness clothed with barbaric behaviour and/or conduct against the police by anybody let alone by members of a supposed pious crowd masquerading as the Holy ones. Appellants' conduct smacks of the expected conduct associated with the expectedly-non-violent religious group of people. Nonetheless their behaviour indeed was offensive and deserved censure.

The learned magistrates' finding was in order and cannot be faulted. The conviction was therefore quite proper.

**Sentence**

Appellants derailed the smooth running of the wheels of justice. Their conduct was clearly unacceptable and therefore calls for punishment. In my view, they were lucky to have been sentenced to a non-custodial sentence. This is the case where a short, but, sharp term of imprisonment would have been appropriate. Their conduct towards a Police Officer and in the court premises goes against all the tenets of piety.

The need for severe punishment in the circumstances was called for. Again there was no misdirection on the part of the learned trial magistrate on both conviction and sentence.

The appeal is dismissed accordingly.

*Shenje and partners*, appellants' legal practitioners,  
*Criminal Division, Attorney General's Office*, respondent's legal practitioners

Cheda AJ.....