Judgment No. HB 102/06
Case No. HCA 145/03

**SIFISO SIBANDA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO, 18 JULY 2005 AND 12 OCTOBER 2006

*K Ncube,* for appellant
*Ms B Wozhele,* for the respondent

Criminal Appeal

**NDOU J:** The appellant is a 35 year old married woman with two children. She was convicted by a Bulawayo Magistrate of obstructing free movement of people on a pavement in contravention of section 3(g) of the Miscellaneous Offences Act [Chapter 9:15]. The brief facts are that on 16 September 2003 the appellant was standing outside some shops in the city centre of Bulawayo. She was standing on the pavement. Her actions, or most probably, the look of them, seem to have attracted the attention of plain clothed police officers. There might have been more, but the facts presented in court are silent. She said she was buying and selling foreign currency [in the street], a simple and common-place practice in this particular area of the city colloquially called "World Bank". According to her counsel she might have been chanting "*usiphatheleni bhudi/sisi*" (loosely translated "What have you brought us brother/sister" to persons passing, man or woman, a popular chant in the part of the city where the appellant was arrested. Or she might simply have silently rubbed the inside of her forefinger to the inside of her thumb in quick succession in universal sign language depicting money to every person who might as

much as gazed in her direction, even slightly, yet another popular action in that part of the city. No matter. But she seems to have appreciated that whatever it is she had done that had drawn the police to her, was unlawful and criminal because on 29 September 2003 she was arraigned before the Magistrates' Court and she pleaded guilty to a charge of obstructing free flow of (human) traffic. She was sentenced consequent upon her plea, to serve three months in prison, one of which was suspended on the usual conditions of good future conduct. She has noted an appeal against sentence only. She appealed in particular, against an effective term of imprisonment. The respondent does not support the sentence of imprisonment without the option of a fine for such a crime. This concession is properly founded. The learned trial magistrate over-emphasised the prevalence of fiscal offences involving the illegal exchange of foreign currency and the attendant prejudge to the economy. He, however, overlooked the basic fact that the appellant was not convicted and being sentenced for illegal dealing in foreign currency. Further, while the prevalence of the offence is a relevant factor in sentencing – *S* v *Meketiwa* HH-225-01; *S* v *Mupanduki* 1985(2) ZLR 169 (S) and *R* v *Makaze & Anor* 1969(1) RLR 97, it is not the overriding factor. The learned trial magistrate has misplaced faith in what he can achieve by sending offenders to goal even for relatively non-serious offences like the one for which the appellant has been convicted. That is why he said in his reasons for sentence,

> "Fines of $10 000,00 would not achieve any deterrence at all accused will pay these and smile it away" [*sic*].

With respect, it is not the function of the court to "support government and the

police in trying to control crimes committed along Fort Street and Hebert Chitepo" by imprisoning people accused of crimes the legislature, in its wisdom, considers trifling.



Whilst the courts should never be seen by the public to be trivialising serious offences, courts are equally enjoined not to make trivial cases serious [seriosizing trivial offences]. Either scenario is as much unjust as the other. The appellant pleaded guilty and showed some measure of contrition. Such a guilty plea merited some credit by way of modest reduction of sentence. Her plea of guilty contributed to the smooth and efficient justice – *S* v *Mpofu* HH-177-85 and *S* v *Kanhukamwe* HH-200-85. It is trite that imprisonment has various destructive consequences, thus if some other forms of punishment are available and appropriate they should be used. Every effort should be made to keep first offenders out of prison – *S* v *Sikunyane* 1994(1) SACR (TL), *S* v *Gumbo* 1995(1) ZLR 163; *S* v *Kashiri* HH-174-94; *S* v *Sithole* HH-50-95; *S* v *Sibanda* HB-49-83 and *Ndlovu* v *S* 1994(1) ZLR 290 (H).

Accordingly, the appeal succeeds and it is hereby ordered that the sentence imposed by the trial court be set aside and substituted as follows:

"$5 000,00 [old currency] or in default of payment 1 month imprisonment."

Cheda J …… I agree

*Job Sibanda & Associates,* appellant's legal practitioners
*Criminal Division of Attorney General's Office*, respondent's legal practitioners