LYNETTE KARENYI

versus

THE STATE

HIGH COURT OF ZIMBABWE

HUNGWE & BERE JJ

HARARE, 29 May 2014

**Criminal Appeal**

*D Tandiri,* for the appellant

*I Muchini,* for the respondent

HUNGWE J: After hearing counsel in argument we allowed the appeal and indicated that our reasons for allowing the appeal will follow. These are they.

 The appellant was convicted of contravening s 25 (5) of the Public Order and Security Act, [*Cap 11:17*], (“the Act”) or (“POSA”). She was sentenced to a fine of US$200, 00 or in default of payment four months imprisonment. In addition a further three months were wholly suspended for five years on condition the appellant did not commit any offence involving contravening any section of the Act for which she is sentenced to imprisonment “without any option.”

 The main ground of appeal, out of a possible four grounds put forward by the appellant, was that the trial magistrate erred in holding that the appellant was the convener of the meeting as contemplated in s 25(5) of the Act.

 The appellant was convicted on the basis of the following findings of fact. She, at the time, was a member of parliament for a constituency in Chimanimani for the Movement for Democratic Change (“MDC-T”). On 24 November 2012 she attended a meeting convened in a rural village within her constituency. When a police patrol unit led by the officer in charge of Nyanyadzi police station, arrived at this meeting, the appellant was addressing the meeting. The officer-in-charge, who holds the rank of inspector, approached the gathering. He heard her chant political slogans. Some of the people gathered wore their political party regalia. This was a political meeting for which there had not been the requisite notice filed with Nyanyadzi police station as required by law. The police inspector called upon the appellant and enquired with her whether the meeting she was addressing had been sanctioned by the police. The appellant intimated to the officer-in-charge that she believed that one Freddie Dziwande, who was later to be her co-accused, had made the requisite application to the regulating authority. Appellant, in the presence and hearing of the officer-in-charge and his subordinates, called the said Freddie on the latter’s mobile number. Freddie Dziwande advised the appellant that he had forgotten to notify the police. Three other police details who were in the officer-in-charge’s party testified to this effect. In their evidence which was not seriously disputed, the appellant was addressing a gathering which had not been sanctioned by the regulating authorities. They all confirm that she had called one Freddie Dziwande in their presence who advised her that he had forgotten to notify the police.

 Section 25(5) of the POSA provides thus:

“**25 Notice of processions, public demonstrations and public meetings**

(1) The convener shall not later than—

(*a*) seven days before the date on which a procession or public demonstration is to be held, give notice of the procession or public demonstration in writing signed by him or her to the regulating authority for the district in which the procession or public demonstration is to be held:

(*b*) five days before the date on which a public meeting is to be held, give notice of the public meeting in writing signed by him or her to the regulating authority for the district in which the public meeting is to be held:

Provided that—

(i) if the convener is not able to reduce a proposed convening notice to writing a regulating authority shall at his or her request do it for him or her;

(ii) during an election period the period of notice referred to in paragraph (*b*) shall be three days.

(2) The convening notice shall contain at least the following information—

(*a*) the name, address and telephone and facsimile numbers, if any, of the convener and his or her deputy;

(*b*) the name of the organisation on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener;

(*c*) the purpose of the gathering;

(*d*) the time, duration and date of the gathering;

(*e*) the place where the gathering is to be held;

(*f*) the anticipated number of participants;

(*g*) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;

(*h*) in the case of a procession or public demonstration—

(i) the exact and complete route of the procession or public demonstration;

(ii) the time when and the place at which participants in the procession or public demonstration are to assemble, and the time when and the place from which the procession or public demonstration is to commence;

(iii) the time when and the place where the procession or public demonstration is to end and the participants are to disperse;

(iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;

(v) the number and types of vehicles, if any, which are to form part of the procession;

(vi) if a petition or any other document is to be handed over to any person, the place where and the person to whom it is to be handed over.

(3) If a gathering is postponed or delayed, the convener shall forthwith notify the regulating authority thereof, and section 26 shall, with such changes as may be necessary, apply to such postponed or delayed gathering as it applies to gatherings that are not postponed or delayed.

(4) If a gathering is cancelled or called off, the convener shall forthwith notify the regulating authority

thereof and the notice given in terms of subsection (1) shall lapse.

(5) Any person who knowingly fails to give notice of a gathering in terms of this section, shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[Section substituted by section 4 of Act 18 of 2007]”

It will be seen from the above that, for example, a convener who fails to give the requisite five days notice of a public gathering is liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year. Only the organizer or convener of a public gathering is guilty of an offence where, as here, the convener fails to give notice of a public gathering, notwithstanding that those attending may be aware that no notice has been given. Nothing renders a meeting called without notice in terms of s 25 unlawful. In order to secure a conviction the State would have to prove one of two things; (1) that the appellant of her own accord convened a gathering of people at the meeting in issue; or, (2) that the MDC-T appointed appellant as the convener of the meeting of 24 November 2012. This much is clear from the wording of s 25(5) when read with s 2 of the Act. By s 2 the “convener” is defined as;

1. Any person who, on his own accord , convenes a gathering; and
2. In relation to any organisation, any person appointed by such organisation in terms of s 23(1).

The learned trial magistrate at the beginning of his judgment correctly framed the issues relevant to the matter before him when he stated that the court had to determine first whether the appellant was the convener, and, if she was, whether the meeting fell into the category of meetings to which certain exemptions applied. Unfortunately, later in the judgment, the learned trial magistrate reformulated the issues to be whether the meeting was a political meeting and whether the appellant was the convener of that meeting. The issue, in my respectful view, remained whether the appellant was the convener of that meeting since, if she was, then she was obliged to have notified the police prior to convening the meeting. The record reflects that upon being quizzed by the police on whether there was notification to the regulating authority filed, appellant expressed her belief that the person who had convened the meeting had done the necessary preparatory work. This ought to have indicated to the investigating officer that the real issue was whether the appellant was the convener. This was never investigated as the police proceeded on the assumption that the appellant was the convener because she was addressing the meeting. The court seems to have laboured under the same belief that since she was addressing the meeting, she was the convener. Yet the evidence was that she had called one Freddie Dziwande to ascertain whether the processes had been complied with. As I have demonstrated above, even if appellant had known that police had not been notified of this meeting, her addressing it did not constitute an offence in terms of the Act. She therefore would not have been liable for prosecution. As for Freddie, the court found that there was insufficient evidence against him hence his acquittal. That acquittal was proper.

At the outset, the appellant excerpted to the charge as disclosing no offence. In dismissing the subsequent application to amend the charge brought by the State, the learned trial magistrate took the view that there was no need to amend the charge. In the learned trial magistrate’s reasoning, the use of the word “sanction” in the charge instead of the word “notify” as would have been required by the Act was just a matter of terminology or semantics. In the view of the court, there was no defect in the charge as it stood and to which the appellant had pleaded.

Quite clearly the learned trial magistrate missed the point raised in the application to amend. The averments in the charge related to lack of authorisation to hold a political meeting rather than failure to notify the regulating authority. The learned trial magistrate’s reasoning reflect a serious misconception of the issues before him in the trial. Had he taken time to reflect on the proposed amendment sought at that early stage he most likely would have realised what the real issue in the trial was. He would have proceeded to deal with that issue more competently than he did. Whatever powers the police wielded prior to the 2007 amendment to the principal Act, the power to sanction a political gathering was no longer one of the powers which police had on 24 November 2012. Consequently, if political parties did not require permission from the police to hold their meetings, it was vexatious, when charging an accused for contravening s 25(5) of the Act, to aver in the charge that the accused “unlawfully and intentionally held an unsanctioned political meeting.” Section 25(5) of the Act does not create such an offence, but that of failure to notify the regulating authority. A convener of such a meeting would be criminally liable for this offence. As a result, the trial was aimed at establishing whether the appellant addressed a meeting for which no police authority had been granted, instead of whether the appellant had convened a political gathering or meeting without notifying the police. The key word was “convene.” The learned trial magistrate fell into error when he found that the appellant had convened the meeting since no evidence was led to establish this as fact. The fact that she had attended and addressed the meeting did not elevate her to being the convener. The State was obliged to prove that she had convened this meeting in order to secure a conviction. It did not secure such evidence and as such her appeal ought to succeed.

In the result her conviction is set aside and the sentence quashed. The judgment in the court *a quo* is substituted with the following:

“The accused is found not guilty and acquitted.”

HUNGWE J: ………………………………….

BERE J agrees…………………………………..

*Zimbabwe Lawyers for Human Rights,* appellant’s legal practitioners

*National Prosecuting Authority*, respondent’s legal practitioners