THE STATE
versus
CHRISTOPHER TICHONA KURUNERI

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 16 May 2005, to 10 June 2005, 5, 7, 12-14, 21 September 2005; 23 February 2006, 10 June 2006, 13-15, 25 September 2006; 2, 4 October 2006; 16, 19, 22-24, 26, 31 January 2007; 1, 6, 7 February 2007; 27 July 2007 and 1 August 2007

Assessors Messrs Msengezi and Mr Mashanda

Mr *Jagada*, for the State
Mr *Samukange*, for the accused

MAVANGIRA J: This is an application by the accused for discharge at the close of the State's case in terms of s 198(3) of the Criminal Procedure and Evidence Act (Chapter 9:07). The application relates to the charges in counts 2 and 3 and the alternatives and also to counts 4,5, 6 and 7. The accused pleaded guilty to, and was convicted of the charge in count 1, a contravention of the Citizenship of Zimbabwe Act [*Chapter 4:01*] on which he is still to be sentenced.

In count 2, the accused is charged with contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] as read with s 20(1)(b) of the Exchange Control Regulations, Statutory Instrument 109 of 1996 "in that on dates to the prosecutor unknown but during the period extending from March 2002 to March 2004, and at Harare International Airport, Harare the accused, without the authority of the Exchange Control Authority, exported from Zimbabwe foreign currency amounting to US$582 611,99, British Pounds 34 471 and Euros 30 000, to South Africa which amounts he gave to Christopher Hayman, a Director for Venture Projects and Associates and also his Projects Manager in South Africa to use in reconstructing and developing one of accused's properties, 38 Sunset Avenue, Llandudno, Cape Town, South Africa".

He is charged in the alternative, with contravening s 182 of the Customs and Excise Act [*Chapter 23:02*] "in that on (the) dates of the prosecutor unknown but during the period extending from March 2002 to

March 2004 and at Harare International Airport, the accused unlawfully smuggled goods, namely foreign currency in the amounts of US582 611, 99, British Pounds 34 471 and Euros 30 000'.

In count 3 the accused is charged with contravening s 5(1)(a)(i) of the Exchange Control Act, [*Chapter 22:05*] as read with s 20(1)(b) of the Exchange Control Regulations, Statutory Instrument 109/96 'in that on (the) dates to the prosecutor unknown but during the period extending from February 2002 to April 2004, at Harare International Airport, Harare the accused without the authority of the Exchange Control Authority, exported various amounts in foreign currency from Zimbabwe totalling 1 314 102,92 Rands, amounts which he deposited or caused to be deposited into his account number 9090528312 with ABSA Bank in South Africa'.

He is charged in the alternative, with contravening s 182 of the Customs and Excise Act [*Chapter 23:02*] "in that on (the) dates to the prosecutor unknown but during the period extending from February 2002 to April 2004, and at Harare International Airport, the accused unlawfully smuggled goods, namely different amounts in foreign currency totalling 1 314 102, 92 Rands, amounts which he deposited or caused to be deposited into his account number 9090528312 with ABSA Bank in South Africa".

In count 4, the accused is charged with 'unlawfully causing the Commercial Bank of Zimbabwe to telegraphically transfer ZAR 5,2 million to CB Niland and Partners Trust Account number 5005800916 with First National Bank, St Georges Mall Branch, Cape Town, South Africa, the said amount being payment to Dunmow Pty Ltd for the purchase of a property, house number 17 Apostle Road, Llandudno, Cape Town by the accused, when at the time of making such payment outside Zimbabwe he had no authority from the Exchange Control Authority'.

In count 5 the accused is charged with contravening s 5(1)(i) of the Exchange Control Act, [*Chapter 22:05*] as read with s 11(1)(a) of the Exchange Control Regulations, S.I. 109/96, in that on 22 April 2002 at Llandudno, Cape Town South Africa, the accused, being a Zimbabwean resident, unlawfully made payment of ZAR 2,7 million to Tadant (Pty) Ltd,

being the purchase price of house number 38 Sunset Avenue, Llandudno, Cape Town South Africa, when at the time of making such payment outside Zimbabwe he had no authority from the Exchange Control Authority.

In count 6 the accused is charged with contravening s 5(1)(a) of the Exchange Control Act, [*Chapter 22:05*] as read with s 11(1)(a) of the Exchange Control Regulations S.I. 109/96 in that on 22 April 2002 at Llandudno, Cape Town, South Africa, the accused being a Zimbabwean resident unlawfully made payment of ZAR 2,5 million to Shirley Joy Bernstein for the purchase of Unit B Ocean View, Sea Point, Cape Town, when at the time of making such payment outside Zimbabwe, he had no authority from the Exchange Control Authority.

Finally, in count 7, the accused is charged with contravening s 5(1)(a)(i) of the Exchange Control Act, [C*hapter 22:05)* as read with s 11(1)(a) of the Exchange Control Regulations, S.I. 109/96 in that on 3 February 2004 at Mercedes Benz, Claremont, Cape Town, South Africa, the accused being a Zimbabwean resident, unlawfully made payment of ZAR 547 743 to Mercedes Benz, Claremont as the purchase price of a Mercedes Benz ML 350 when at the time of such payment outside Zimbabwe, he had no authority from the Exchange Control Authority.

It is the defence's contention that there is no evidence justifying the placing of the accused on his defence as there is no direct evidence that the accused exported or smuggled the said foreign currency out of Zimbabwe to South Africa. The State, the defence contends, seeks to rely on circumstantial evidence on the basis of which it urges the court to make an inference. It is contended that on the evidence led by the State, the inference sought, that the accused must have exported or smuggled or did export or smuggle the said foreign currency is not the only reasonable inference that presents itself or that could be drawn. The defence pointed to the lack of evidence before the court that the accused acquired the foreign currency in Zimbabwe. Mr *Samukange* gave three different possible scenarios which, he contended, had they been established by any State witnesses, would then have assisted the State in establishing a *prima facie*

case against the accused. The first scenario, he said, would be where the witness would tell the court that, being ordinarily resident in Zimbabwe, he sold foreign currency to the accused in Zimbabwe and that he (the witness) was then paid in Zimbabwean dollars, after handing the foreign currency to the accused. If the accused thereafter, upon being questioned by the authorities, failed to explain how he had dealt with the foreign currency, then there might be justification to assume that the foreign currency that he was found with in Cape Town was the foreign currency referred to by that witness and that therefore the accused must have illegally exported or smuggled it to South Africa.

The second scenario, he contended, would be where there is documentary evidence indicating that the accused received a certain amount of foreign currency in the country, but its whereabouts cannot be traced and at some stage, the accused is then found with foreign currency in South Africa.

The third scenario, Mr *Samukange* said, would be where a witness tells the court that although not resident in this country, either whilst on a visit to Zimbabwe or while outside Zimbabwe, he met the accused who purchased a certain amount of foreign currency by using a tool or instrument to pay in Zimbabwe dollars. In such scenarios, he submitted, the court would be justified to suspect the accused and thus put him on his defence so that he may assist in establishing how the foreign currency was exported out of Zimbabwe.

Mr *Samukange* submitted that in the absence of any evidence showing any of the given scenarios it would be unjust for the court to even consider the principles of circumstantial evidence. He submitted that in this case there is no basis for the drawing of any inference because a foundation has not been laid for the court to draw that inference. He submitted that also pertinent is the evidence of Dr Gono who, when asked by Mr *Jagada* whether he had satisfied himself that the foreign currency (US$500 000) which had been brought to his office was the accused's and whether it was free funds, said that he would not have gone to the accused

in the first place if he did not know that the accused had free funds. In Mr *Samukange's* submissions this evidence by Dr Gono shuts the door for the court to even consider making the inference suggested by the State.

It was further submitted that the evidence of Felipe Solano further prevents the making of the inference suggested by the State, when he confirms providing the funds and that the accused earned the funds at a time when he was not ordinarily resident in Zimbabwe.

It was submitted that the State has failed to lead credible evidence to establish a *prima facie* case and that in terms of s 198(3) of the Criminal Procedure and Evidence Act, the court must therefore return a verdict of not guilty at the close of the State case. Reference was made in support of this contention, to the cases of *Attorney-General v Bvuma & Another* 1987(2) ZLR 96(S) and to *State v Kachipare* 1998(2) ZLR 271 at 276. Mr *Samukange* submitted that from the case authorities cited, it was clear that it would not be proper for the court to put the accused on his defence in order to bolster the State case in a matter where the State case standing alone cannot be proved, hence the amendment of s 198(3) of the Criminal Procedure and Evidence Act, by the deletion of the word 'may' and the substitution thereof with 'shall'.

He submitted that the section takes away the discretion of the court, whether to acquit or not to acquit in matters like the instant where there is no direct or even circumstantial evidence.

He submitted that *in casu* there was no need to discredit the State witnesses as their evidence in effect corroborates the accused's defence. He submitted that the State thus failed to prove the essential elements of all the charges.

In response Mr *Jagada* for the State submitted that whilst the two case authorities cited by the defence lay down that it is not proper for an accused to be put on his defence so that his evidence may bolster the State case where there is no evidence adduced upon which a reasonable court might convict, in the instant matter sufficient evidence has been led by the State to warrant the accused being placed on his defence. He also

argued that although the evidence led was circumstantial, it should not be treated as second best, as compared to direct evidence. He further argued that the evidence led should not be considered as separate pieces of evidence but should be looked at collectively and not independently of each other. It was also his submission that if such evidence is viewed, each piece on its own, a decision might be reached that the evidence presented is insufficient by itself to establish a *prima facie* case at this stage against the accused, but if looked at collectively it would meet the required standard. He submitted that the evidence led, being circumstantial, is such as to meet the standard of excluding any other reasonable inference other than that which is alleged.

He urged the court to consider the evidence before it as follows in order to appreciate the State's stance that the accused should be placed on his defence. Firstly, it is not in dispute that payments were made in South Africa and in some cases it is also not in dispute that the source of the funds later used to make certain payments was the accused. It was also not in dispute that such payments were not authorised by the exchange control authority. Furthermore, that all the funds involved in these counts were provided in hard cash. Furthermore, that there is documentary evidence showing that payments were made in South Africa, and all of them were connected to the accused. The cash found in South Africa was also in one way or another linked or connected with the accused.

He submitted that there has been no evidence at all provided by the accused either in document form or financial records, supporting his alleged source of funds or that he had done any consultancy work for which such huge amounts of money were owed. He also submitted that the State does not have to lead any evidence to show where the accused acquired the foreign currency from as it is not an essential element of the offences; on the other hand, the onus to do so is on the accused as such knowledge is peculiar to the accused. He further submitted that it was important to highlight that the evidence adduced by the State shows that

the accused provided all the funds which were either found in his safe or which were used to make payments in South Africa; and after payments had been made, the assets acquired would be registered in Choice Decisions 113 (Pty) Ltd's name, the accused being the sole director and shareholder in the said company.

It was also submitted by Mr *Jagada* that Norman Sanyanga's evidence buttresses the State case as he stated that the detecting machines then at Harare International Airport would not have detected any foreign currency that was being illegally exported as the money would appear as ordinary paper on the machines. Norman Sanyanga is the Operations manager at the Civil Aviation Authority of Zimbabwe.

Mr. *Jagada* also highlighted the fact that in his *curriculum vitae* the accused does not mention having done consultancy work for Talleres Felipe Solano S.L. in Spain. He also submitted that the deposits made into the accused's ABSA account would only be made after the accused had travelled from Zimbabwe to South Africa thus leading to the inference, as there was no evidence that he had a source of income in South Africa, that the funds were coming from Zimbabwe. He submitted that it was significant that the accused having invited Felipe Solano to come and give a statement to the police, Solano did not bring any documents or receipts confirming that they had contracted the accused to do consultancy work for them and/or that they had paid him any amounts related to that consultancy work. The submission was also made that the evidence adduced showed that Choice Decisions 113 (Pty) Ltd was the means by which the accused got *de facto* control of assets purchased in South Africa and that this is a proper case for the piercing of the corporate veil, in order to get to the person behind the company's activities, which person in this case is the accused. In the absence of proper company resolutions, the only inference is that the accused made and carried out decisions as the sole and exclusive owner of the company and must be held responsible for such decisions. Furthermore, that if the funds in question were free, and therefore legitimate funds, the accused would have found other means to

have such funds find their way to South Africa. The onus, however, to prove that these were free funds, rests with the accused. Reference was made, in this regard to the case of *Attorney-General v J.C. Makamba* S.C. 30/05. Mr *Jagada* argued that the onus on the accused cannot be discharged by the State's failure to show that the payments were not made with free funds and the accused must be put on his defence in order that he may discharge the onus. He further argued that even if the inference sought by the State that the funds were exported to South Africa from Zimbabwe is not made by the court, in terms of the *Makamba* case (supra), it remains the duty of the accused to show on a balance of probabilities that the amounts in question were free funds.

In his reply, Mr *Samukange* submitted that with regard to the charges relating to illegal export of foreign currency and the alternatives of smuggling, there is no reverse onus. He submitted that the concessions made by State counsel are very important, firstly that the evidence must be looked at cumulatively and not count by count. Secondly, that the State case is dependent on circumstantial evidence. He submitted that State Counsel had not shown the court, count by count, how that circumstantial evidence assisted the State in establishing a *prima facie* case but had rather urged the court to view and assess the evidence globally, which, he submitted, would be a serious miscarriage of justice. Furthermore, such an approach, he submitted would only be appropriate at the close of the defence case when the court can look at all the evidence that has been led and determine whether the State has proved its case beyond reasonable doubt. It would thus be premature to adopt that approach and would also be contrary to what was stated in the *Bvuma* case (*supra*) at 102 F where DUMBUTSHENA CJ stated:

> "It is in my opinion, not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case – a case which, standing alone, cannot be proved".

The court must thus at this stage look at the State case only, he submitted.

Regarding State counsel's submission that the accused has not provided any financial records to support the source of his funds, Mr *Samukange* submitted that this is so because the accused has not given evidence and that the court is not entitled at this stage to anticipate what the accused may say or establish. To do so would be trying to put the accused on his defence in order to bolster, or 'plug holes' in the State case.

He submitted that when Mr *Jagada* cited the case of *Dadoo Ltd & Ors v Krugersdorp Municipal Council* 1920 AD 530 in support of his contention that the court should pierce the corporate veil of Choice Decisions 113 (Pty) Ltd, he relied on the dissenting judgment and not on the majority judgment. He submitted that in terms of South African law as testified to by attorney, Lorenzo Bruttamesso and Captain Van Niekerk, no South African law had been contravened; there would thus be no basis for piercing the corporate veil. He submitted that Mr *Jagada* should have led *viva voce* evidence to lay the foundation for his contention that the corporate veil should be lifted. He submitted further, that through its witnesses the State has established that payments made in South Africa for the properties in issue, were made by Choice Decisions 113 (Pty) Ltd, yet the charges are made against the accused. The State had thus failed to establish an important element of the offence.

Mr *Samukange* submitted that s 5(1)(a)(i) of the Exchange Control Act and s 20(1)(b) of the Exchange Control Regulations, 1996 (S.I. 109/96) do not create a presumption for the accused to defend himself and that the normal rules of evidence apply. He said that it is part of the State case that the US$500 000 was brought into the country by a white man and this was not challenged by the defence. He proceeded, 'So if the courier can bring $500 000 to Zimbabwe what is so difficult for him to take it to Cape Town?' He cited *State v Masawi* 1996(2) ZLR 472(S) in support of his submission that the inference urged by the State has to be the only inference that the court can draw in order to justify a conviction. He submitted that the court must acquit the accused on counts 2 and 3, relating to illegal exportation and alternatively, smuggling.

Regarding counts 5,6 and 7 relating to the making of payments in South Africa, Mr *Samukange* submitted that the State cannot rely on the exception provided for in s 11(1)(a) of the Exchange Control Regulations, 1996 as it is imperative that the State establish a *prima facie* case first. He cited *State v Chogugudza* 1996(1) ZLR 28 at 33, in support of his submission. He submitted that the State has failed to establish a *prima facie* case and cannot therefore jump to the next stage and call upon the accused to prove its case. He submitted that the reliance placed on the exception, in the *Makamba* case, (*supra*) was justified as the case is distinguishable from the instant case. He submitted that in the instant case it is part of the State case that the funds in question were free funds. He also submitted that in *casu*, the funds were earned whilst the accused was not ordinarily resident in Zimbabwe whereas in the *Makamba* case the accused exported intellectual property in the sense that he provided service to an organisation outside Zimbabwe while he was ordinarily resident in Zimbabwe. He thus urged the court to also find the accused not guilty on these counts as well.

Mr *Samukange* submitted that after the accused had been asked for the source of his funds, he named the source and the police asked him or offered him the opportunity to bring the named Felipe Solano to Harare so that he could explain to the authorities. The police then interviewed Solano in the absence the accused. He submitted that it was up to the police to ask him if they needed an explanation about other funds besides what they interviewed him on. He also submitted that possibly, the US$500 000 that they asked him about was all they were aware of at the time. Furthermore, that it is possible that the language issue impacted on Solano's ability to comfortably articulate his evidence. He submitted that the police should have employed somebody from the Spanish Embassy in Harare which would have made Solano comfortable to give his explanation to the police. He submitted that it was unlikely that the police would have failed to ask Solano to explain the discrepancy or shortfall in respect of the funds

accounted for, if they were aware, at the time that there were other amounts involved.

He submitted that for as long as the State continues to claim that Felipe Solano is a State witness, the defence legal team cannot recommend that the accused contacts Solano with view to calling him to give evidence on his behalf as that would amount to interfering with State evidence. It was Mr *Samukange's* submission that on the evidence led by the State before this court, the accused is entitled to his acquittal on all charges in this matter.

This matter was then postponed to enable the court to consider the evidence placed before it and the submissions made by both counsel.

In *The State v Morgan Tsvangirai & Ors*, HH 119/2003, GARWE JP, as he then was, at pages 1 to 3 of the cyclostyled judgment stated:

> " 'It is, I think necessary to clarify once again the law applicable in an application of this nature. The issue is certainly not whether the State has proved its case beyond a reasonable doubt as to justify a conviction. In terms of s 198(3) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], the court shall return a verdict of not guilty if at the close of the State case:-
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> > 'the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon'.

The interpretation of s 198(3) has been considered in a long line of cases both in this country and South Africa. The position is now settled that:

> 'So far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution, it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence ....' *S v Kachipare* 1998(2) ZLR 271(S), 275.

In other words where the court considers that there is no evidence that the accused committed the offence it has no discretion but to acquit

him. In particular the court shall discharge the accused at the close of the case for the prosecution where:-

(a) there is no evidence to prove an essential element of the offence – *Attorney-General v Bvuma & Another* 1987(2) ZLR 96(S), 102;
(b) there is no evidence on which a reasonable court, acting carefully, might properly convict – *Attorney-General v Mzizi* 1991(2) ZLR 321, B; and
(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it – *Attorney-General v Tarwireyi* 1997 (1) ZLR 575(S), 576.

Whilst it is settled that a court shall acquit at the end of the State case where the evidence of the prosecution witness:

> 'has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it'. (practice note by LORD PARKER cited with approval in *Attorney-General v Bvuma & Another*, (supra) at 102, 103)

it is clear that such cases will be rare. This would apply:-

> 'only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed". (per WILLIAM J in *S v Mpetwa & Others* 1983(4) S.A. 262, 265 cited with approval by McNALLY JA in *Attorney-General v Tarwirei* (supra) at 576, 577' ".

Although the evidence adduced before this court and submissions made by both counsel, which submissions have been detailed above, related to all the counts that the accused stands charged with, the court will deal firstly with counts 2 and 3 and their alternatives. These relate to illegal exportation of foreign currency, alternatively, smuggling. The accused denies illegally exporting or smuggling foreign currency. The State has not led any direct evidence in relation to these counts. The State's case is based on circumstantial evidence.

Count 2 relates to the illegal exportation, alternatively, smuggling of US582 611, 99; £34 471 (British Pounds) and Euros 30 000. The charge and allegation is that the offence was committed at Harare International Airport on dates to the prosecutor unknown but sometime during the period extending from March 2002 to March 2004. It is then alleged that the accused gave these stated amounts to Christopher Hayman, a director of

Venture Projects and Associates and also the accused's projects manager in South Africa, to use in reconstructing and developing one of the accused's properties, 38 Sunset Avenue Llandudno, Cape Town, South Africa. The said foreign currency was then placed in a safe at No 38 Sunset Avenue. State witness Christopher Hayman bought the safe for R2000 on the accused's instructions. Hayman would then in terms of a schedule agreed between him and the accused, draw funds in foreign currency from the safe. Another State witness, Giles Alexander Rogers, also testified to having seen a huge amount of foreign currency in the safe when Hayman opened the safe to confirm to him that there were adequate funds to pay him and that these were in US dollars.

Count 3 relates to the illegal exportation, alternatively, smuggling of various amounts in foreign currency, which amounts have not been specified or proven by evidence but which allegedly total ZAR1 314 102,92 and which he then allegedly deposited in his ABSA bank account in South Africa.

The State also relied on the evidence of Norman Sanyanga the Operations Manager of the Civil Aviation Authority of Zimbabwe who testified that besides the Head of State all passengers at the Harare International Airport have to go through a metal detector and their luggage screened to ensure that there are no dangerous items which might endanger the safety of the aircraft, passengers and crew. He also stated that if there should be any money in notes in any denomination, in a passenger's luggage, the notes appear as ordinary paper on the screening machine which does not raise any alarm necessitating a search of the luggage or passenger. It is the State's contention that as the accused was at the relevant time a Cabinet Minister, no-one at the airport would have dared search his luggage. He submitted that all that the accused needed to do to beat the system was to ensure that he did not carry anything in his luggage or on his person that might raise the alarm and thus necessitating him to be searched.

The State also relied on the evidence of Lonwabo Theophilus Nqubelane, a Senior Immigration Officer with the South African Immigration Office, who at the request of the South African Police checked departmental records. He then said that the movement control system showed that a Mr Solano Felipe born 15 November, 1952 had entered South Africa on 2 December 1999 on a Spanish travel document and left South Africa on the same date. It is the State's contention that there is thus no evidence that Felipe Solano ever visited South Africa either during the period between 1976 and 1981 when the accused alleges in his warned and cautioned statement, that he was contracted to do consultancy work for a Solano family company called Talleres Felipe Solano S.L. or during the period relevant to the charges.

Giles Alexander Rogers, a concrete specialist employed by Prestine and Rodgers, Form Work CC also testified. He said that during April or May 2003 his company was approached by Venture Projects and Associates to construct a concrete structure at 38 Sunset Avenue, Llandudno, Cape Town. They commenced work in June 2003 and were paid a total of ZAR 1 300 000. The payments were made by Venture Projects. He met the accused at 38 Sunset Avenue and got to know that he was the owner of the property as Christopher Hayman said that he was the client.

When the witness spoke to Christopher Hayman about money, Hayman opened the safe in which he saw that there was foreign currency in the form of United States dollars which money was supposedly for the construction of the house. It was a large amount of foreign currency but he could not put a value to it. He said that 99% of their charges for the project was paid leaving an outstanding 1% which has still not been paid.

In his written submissions Mr *Jagada* stated: "It was also Mangoma's evidence that what caused him to look for Felipe Solano's travel profile from the South African Immigration authorities was the accused had indicated that the funds in question had been brought to South Africa by Felipe Solano for the accused and that records confirming the origins of the cash in foreign currency were with Hayman. All these claims by the

accused have turned to be false. Hayman at page 227 of the transcript disowned the claim relating to the records as described above by the accused. These discrepancies of the accused's story as to the source of the foreign currency are a clear indication that he is not telling the court the truth, therefore he should be put to his defence for the truth in his story to be properly tested'.

In the court's view, the accused can only be put on his defence if the court finds that he exported foreign currency or, alternatively, smuggled it through Harare International Airport from Zimbabwe to South Africa. Such a finding can only be made by this court by way of inference from the evidence led.

In *R v Blom* 1939 AD 188 at 202-3 WATERMEYER, JA stated:

"In reasoning by inference there are two cardinal rules of logic which cannot be
ignored:

1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".

The effect of the evidence led by the State can be summarised to the following effect. The accused travelled to South Africa from Zimbabwe through the Harare International Airport on several occasions during the relevant period. On 18 February 2002 he travelled to South Africa. On 20 February 2002 whilst in South Africa, he opened an ABSA bank account with a deposit of British Pounds 5000. He returned to Zimbabwe on 21 February 2002. On 19 April 2002 he left Zimbabwe for South Africa and on 22 February 2002 whilst in South Africa, he gave to Christopher Hayman US$490 870 in cash. He returned to Zimbabwe on the same day. On 16 December 2002 he left Zimbabwe and on 23 and 24 December 2002 whilst in South Africa, he deposited ZAR175 000 and ZAR530 000 respectively into the South African account. He returned to Zimbabwe on 28 December,

2002. All in all, in relation to these counts, he placed in the safe the various amounts of the different currencies stated in count 2 and deposited in the ABSA bank account ZAR1 314 102,92.

In his warned and cautioned statement in relation to the amounts in count 2, the accused stated that the funds were paid to him in South Africa by Felipe Solano. One Felipe Solano was confirmed to have travelled to South Africa from Spain on 2 December 1999 and he left South Africa the same day. There was no visit by Felipe Solano to South Africa during the relevant period of the alleged commission of the offences. Felipe Solano's affidavit is to the effect that the accused was paid in three tranches, in November 2000, March-April 2001 and June 2001; the total amount paid to him being US$550 000. Felipe Solano makes no mention of US$582 611, 99 claimed by the accused to have been paid to him by Louis Solano in March 2002.

It would appear to this court that whilst the facts before the court might not be inconsistent with the inference sought to be drawn, they cannot however be said to exclude other reasonable inferences from them save the one sought to be drawn. The fact that the accused is shown to have had foreign currency in his possession whilst he was in South Africa, and having recently arrived in South Africa from Zimbabwe, is not in this court's view, indicative of him having illegally exported or smuggled the said foreign currency through Harare International Airport at the times that he left Zimbabwe for South Africa.

In *S v Marange & Ors,* 1991(1) ZLR 244 (SC) at p248 H to 249 D KORSAH JA stated:

'...But from the circumstantial evidence adduced, inclusive of the similar fact evidence, all that one can really infer is that the first appellant was there for some unlawful purpose, possibly even with an intention to hunt, but does that constitute the offence charged? Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. LORD NORMAND observed in *Teper* v R (1952) AC 480 at 489 that:

> 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind

> may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' 'mouth of the youngest,' and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference'.
>
> I ask myself, is the inference that the first appellant was hunting at Twin Tops Ranch the only one to be drawn from the circumstantial evidence? While the circumstantial evidence leaves me with a strong suspicion that he was up to no good, it cannot be said that the circumstantial evidence proffered excludes any other conclusion. Even if the first appellant's explanation that he was on his way to purchase vegetables from the resettlement area does not have a ring of truth about it, it still is not inconsistent with the circumstantial evidence and remains a possible explanation of his presence on a public thoroughfare adjacent to the ranch. At best, the circumstantial evidence raised no more than a very strong suspicion that the first appellant was there to hunt. The learned trial magistrate could not have been satisfied that the explanation was false. *R v Difford* 1937 AD 370. The learned trial magistrate fell into error when he concluded that the circumstantial evidence adduced led irresistibly to the conclusion that the first appellant was guilty of a contravention of s 47(2) as charged".

In *Mugari v Machiri* 1987 (1) ZLR 164 at 169D-F McNally JA cited with approval, the words of Boshoff J in S v Cooper & Ors 1976 (2) SA 875 at 888 *in fine*:

> "When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

In his warned and cautioned statement which was produced, by consent during the presentation of the State case, the accused 'vehemently' denies the charge and states that the funds were part of his earnings when he was resident in Canada and consulting for one Felipe Solano (Pvt) Ltd. He also states that the funds were never brought into

Zimbabwe. The State also produced exhibit 36(a), a 'Verbal Note' in terms of which the legal representative of Talleres Felipe Solano S.L. Company confirms that the company requested for consultancy services from the accused and that they paid him a lot of money for his service, approximately an equivalent of 22 million pesetas. It is also stated that the accused was paid 'in different currencies, pounds and dollars', and that he was paid in different countries, 'Canada, Colombia, Venezuela, Algeria, Paris and possible other places, which I may not remember'. (sic)

The services requested from and provided by the accused are also spelt out in the said exhibit. Exhibit 56 which is also part of the State case is an affidavit by Solano Martinez Felipe who identifies himself as the director of the company Talleres Felipe Solano Limited Society which is involved in consultancy work and manufacture of machinery and food packaging. He also confirms that the accused was contracted to do consultancy work by the company. The said consultancy services are said to have been provided in Chile, Venezuela, Cuba, Peru, Ecuador, Algeria and Morocco. The accused was paid in tranches in cash form in United States dollars almost three times and that even as at the date of the affidavit, that is, April 2004, they still owed him some money.

That the accused had earned, and had access to foreign currency before the dates of the alleged commission of the offences, is not in dispute. This in fact is part of the State's case.

The fact, therefore, of the accused having foreign currency in his possession whilst in South Africa and having recently visited that country from Zimbabwe, does not, in the circumstances, exclude other reasonable inferences therefrom, save the one that he illegally exported or smuggled the foreign currency through Harare International Airport, from Zimbabwe to South Africa. The accused's assertion that the funds were never brought to Zimbabwe cannot be disbelieved in the circumstances. His possession, legally, of US$500 000 cash in Zimbabwe does not discount the possibility of his having the same amount or equivalent in South Africa. Clearly, he is

a person who has capacity to possess foreign currency in large amounts, legally.

After Mr *Jagada* had made all his submissions, the court inquired of him as to what effect there would be on the State case if the court was unable to draw the inference sought. His response was that in the absence of any other explanation by the accused, and this he submitted the court did not have, relating to how he got such funds on such dates then the only inference must be that the funds came from Zimbabwe. He submitted that this would also be strengthened if the accused did not lead evidence to show any other source of funds in South Africa. He submitted that as the accused has not specifically explained, particularly in his defence outline, how he got US$582 000, British Pounds34 471, Euros 30 000 and ZAR 1300 000 which were in his safe, he still had the onus to show on a balance of probabilities, that these amounts were free funds and that this was so whether or not the inference is made that the funds were exported to South Africa from Zimbabwe.

It appears to this court that State Counsel entangled himself in making this submission. The accused is not charged in these counts with keeping foreign currency in a safe in South Africa. The charges are clearly illegal exportation, alternatively, smuggling and they are based, not on direct evidence that he did so but on circumstantial evidence from which an inference is sought to be drawn that he did so.

> In *S v Chogugudza* 1996(1) ZLR at 32 E to 33 E GUBBAY CJ stated:
>
> "'The presumption of innocence conferred by s 18(3) (a) of the Constitution of Zimbabwe upon every accused person charged with an offence lies at the very heart of criminal law. It finds expression in the fundamental and hallowed principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities)……'

There is, however, a qualification in s 18(13) (b) of the Constitution. It reads:

'Nothing contained in or done under the authority of any law shall be held to be in contravention of -

(a) ……
(b) Subsection (3) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts'.

The immediate questions that arise are:

"How far does this provision go? What particular facts are involved? What proportion of the facts could the accused be expected to prove? No indication is given as to where the line should be drawn. Yet what is clear is that, read in the context of the presumption of innocence, s 18(13)(b) cannot be construed as holding valid a statutory provision that in actuality imposes upon the accused the burden of proving his innocence or disproving his guilt.

In the resolution of these questions I have examined many cases dealing with the extent to which it is permissible for legislation to create presumptions, commonly referred to as 'reverse onus provisions', against an accused. From them the following guidelines emerge:

1. The presumption must not place the entire onus onto the accused. There is always an onus on the State to bring the accused within the general framework of a statute or regulation before any onus can be thrust upon him to prove his defence. See *S v Broughton's Jewellers (Pvt) Ltd* 1971(2) RLR 276(A) at 279 E-G, 1971(4) SA 394 (RA) at 396 E-F; *S v Marwane* 1982(3) SA 717(A) at 755 H-756 C.'"

At the onset of the trial Mr *Jagada* stated that the State would be relying on the presumption provided in s 3(3) of the Exchange Control Act, [*Chapter 22:05*]. The section provides:

"3 Evidence and presumptions
(1)……..
(2)…….
(3) Any person charged with any act or omission which is an offence under this Act if the act is done or omitted to be done without a permit, exemption, permission or other authorization, shall be presumed to have done or to have omitted to do such act without such permit, exemption, permission or other authorization, as the case maybe, unless it is proved that he was in possession of such permit, exemption, permission or other authorisation, as the case may be, when he performed or omitted to perform the act in question".

In *casu* and specifically in relation to counts 2 and 3 the State has failed to overcome the first hurdle of bringing the accused within the general framework of the statute or regulation before any onus can be thrust upon him to prove his defence. The presumption that Mr *Jagada* places reliance on, only becomes operational once the State has established that the accused did the act or made the omission complained of. The presumption is thus not available to the State. An essential element of the offence has not been proved *S v Kachipare* (supra).

However, it is the court's view, for the reasons discussed above, that the accused be and is hereby found not guilty and acquitted on both counts 2 and 3 and the alternatives.

The court will now deal with count 4. The State led evidence from Dr Gideon Gono, the Governor of the Reserve Bank of Zimbabwe who was asked to tell the court as much as he remembered, what transpired relating to this case. He answered, '... allow me in responding to the question to lay an analogy. Why an analogy, because .... A lot has been said about the case and because ... it is important that a firm foundation be laid to clarify ... a great deal of what could be information that only myself would possess, ... Secondly, ... I make an analogy because the provisions of the Official Secrets Act, [*Chapter 11:09*] has precluded the dissemination of the true facts as opposed to opinion behind the whole matter when it comes to the specific transaction involving the 500 000 US dollars and its transfer in equivalent value....' (Transcript 605). He proceeded at 607, '..... if I was to be allowed the opportunity <u>in camera</u> to reveal the exact circumstances, then I would brief your ladyship in detail ..... I have been saying this in order to clarify why .... My former staff at CBZ would not have known anything about the transaction because one is not allowed to divulge confidential situations that if such information gets into the wrong hands, can be prejudicial to the interests of the State and put the nationals of the State in danger'. At 608, '... to date I have not

divulged the nature of the extraordinary circumstances of a national nature behind this transaction ….'

When asked to relate the circumstances relating to the actual transaction he answered, '…. The bank that I had the privilege to lead was at the centre of rescue missions for this country …. Coming therefore to this specific transaction …. I phoned the accused to relate the predicament that the bank as relied upon by its principals and its chief executive as relied upon by his principals, found themselves at the edge of failing to deliver. Upon relating that predicament I requested the accused to assist as he had done on other previous occasions and circumstances involving national matters. The next day the accused came to my office in the company of someone else and in the short space of time available, accused said, 'Here you are. I have done my part'. That delivery was still not sufficient to fulfil the entire national requirement at stake. But I was very grateful to him and to the accompanying person whom I did not speak to except exchanging pleasantries, and making a commitment that within the shortest possible time I will on behalf of the State recompense …. And deliver it to the destination so wished'. He also said that indications were made that he would receive a phone call from South Africa. Some two or three days after what he termed the 'consummation of the transaction' he received a phone call from a lawyer who he conversed with and then requested to send him details of the destination of the funds and this was done. He then stated, 'I emphasise and underscore my gratitude for the assistance that was rendered to my office and my duties by the accused at that time. Until proven otherwise, I remain grateful for that support and remain at peace with my conscience'.

On further leads by Mr *Jagada* for the State, the witness said that at the time of the transaction the accused was the Deputy Minister of Finance and Economic Development, under which Ministry the banking sector fell. The Registrar of Banks and Financial Institutions then resided in the said Ministry, a situation which has since changed as the powers to grant or take away licences now resides in the Central Bank which he now heads as

Governor. At the time of the transaction the witness was the Chief Executive of the Commercial Bank of Zimbabwe (CBZ). He said that at the relevant time the accused was thus his boss in the sense described above and that he was well known to him. The CBZ was thus at the time, one of the financial institutions that administered powers or provisions that were delegated from the Central bank.

The witness was asked whether the white gentleman who accompanied the accused to his offices was ever related to the money at all at that stage when they met. He answered, 'If I recall correctly, he was the party from whom the funds were actually coming. But those are not matters which. exercised my mind, given the one hour scenario I am talking about' . When asked if he was informed of the purpose for which the money needed to be transferred to South Africa or if he inquired he answered, 'no', and proceeded to state that given the source of the funds and the rules and regulations of this country in terms of exchange control pertaining to free funds there would not have been any obligation on anybody's part to inquire as to the destination or purpose for which the funds were to be utilized. He was asked what made him say these were free funds and he answered that 'these were funds in bulk in the possession of supposedly a visitor to this country' and that trying then to inquire beyond what is reasonable 'puts human relations back to the start of times'.

The witness was asked whether he could comment on the evidence led earlier to the effect that the said funds were used to purchase shares in a company Choice Decisions 113 (Pty) Ltd whose sole asset was the immovable property at 17 Apostle Road, Llandudno, Cape Town, South Africa and in which, the accused became the subsequent sole shareholder with 100% shareholding in the company. He said that he was unable to comment on it and that he did not have knowledge of this at the time of the transaction at CBZ. He was asked whether this was ever hinted to him by the accused and his answer was that it might and it might not have, but given the lapse of time of about three years, and given the circumstances

which he described, he was not in a position to say. He also said that the funds 'were almost like a loan, albeit for a few days'. He said that the intended purposes of the transfer of the funds were not part of his concerns 'immediately or soon after'.

The witness said that the funds were brought to him in a brown bag. Asked whether it was a suitcase, briefcase or traveling bag, he said that it was just a briefcase. He was also asked, 'Do you still recall how much exactly you compensated the 500 000 US?' and his answer was, '…. It was the equivalent of that amount in South African currency known as Rands at the ruling exchange rates at that time.

The witness was cross-examined only on one aspect relating to a document which the witness had indicated that he had a faint recollection of and would not say with certainty that he was aware of it. The State refrained from producing the document even though Mr *Samukange* indicated that the defence had no objection to its production by the State. No further comment is necessary on this aspect.

The State also produced, in relation to this count, exhibit 38(b), a document reflecting that the Commercial Bank of Zimbabwe sent to Firstrand Bank Limited in Johannesburg ZAR5 200 000 on 4 March 2002 the ordering customer being a Mr C.T. Kuruneri and the beneficiary customer being CB Niland Trust Account CB Niland and Partners.

In this court's consideration of the evidence led by the State on this count, it appears to the court that the State speaks with a forked tongue; for whilst the charge alleges that the accused unlawfully caused the Commercial Bank of Zimbabwe (CBZ) to transfer the funds in question, the evidence of Dr Gono was that the transfer was above board as these were free funds which had been lent for the State's benefit at the request of the State, through CBZ, particularly Dr Gono himself. As Dr Gono was being led in evidence-in-chief, there was a clearly discernible difficulty for State Counsel who appeared to be at pains to get Dr Gono to say something that he was not saying but which the State expected him to say. However, there was at no stage any indication made that the witness had departed

from his written statement as State Counsel would have been expected to do if that had been the case. Yet, after leading this evidence, it was State Counsel's submission in his closing address, that the State was not, presumably he meant, no longer, taking issue with the transfer itself but with the allegedly illegal payment to CB Niland and Partners Trust account. It would appear however, that that particular allegation in the charge is not an essential element of the offence in terms of the section under which the accused is charged. The allegation that he unlawfully caused the CBZ to transfer the funds in question is of no consequence or value to the offence charged. This aspect of the matter thus needs no further debate or consideration.

As far as Dr Gono was concerned, the funds involved in this count were free funds and there was thus no obligation on his or anyone else's part to ascertain the purpose for the transfer or payment into the stated account in South Africa. Furthermore, that the payment to the bank was 'above board and' therefore legal in all respects. It would appear to the court that if these free funds belonged not to the accused but to the white gentleman with whom the accused went to Dr Gono's office, then they would not cease to be free funds because they have been paid to an account linked with the accused or for the accused's benefit. In any event Dr Gono's evidence as read with exhibit (38)(b) does not help the State in substantiating or proving this charge. If the payment that was made was made illegally, it would not be amiss to expect CBZ, and more particularly Dr Gono, to be facing the State's 'wrath' either by itself or himself or co-charged with the accused. In such a situation, the court would presumably, and expectedly, have been advised by State Counsel that the witness was being treated as an accomplice witness who might then have had to be appropriately warned in terms of the Criminal Procedure and Evidence Act.

The State must place before the court evidence establishing a *prima facie* case against the accused and in this case, it appears to have failed to do so.

This court is unable therefore to put the accused on his defence on this count also. In the result the accused is found not guilty and acquitted on count 4.

The court will now deal next with counts 5, 6 and 7.

With regards to count 5 involving payment for 38 Sunset Avenue, Llandudno, Cape Town, Ronel Straughan, a practicing legal practitioner with the law firm Bowman, Giffilan Incorported, testified to the effect that sometime in May 2002, she attended to the transfer of immovable property Number 333 Houtbay from Tadant Limited to Choice Decisions 113 (Pty) Ltd on the instructions of attorney *James Kotze* who was representing Tadant Limited, the seller. She then prepared an account for the costs to be incurred in the transfer and remitted the same together with the transfer documents to Choice Decisions 113 (Pty) Ltd by registered mail. She also sent copies of these to *Lorenzo Bruttamesso*, the attorney acting for Choice Decisions. Later, on 9 July 2002, she received a letter from auditors KPMG Services (Pty) Ltd to which was attached the signed auditor's report, company certificates and director's resolution relating to Choice Decisions. She later received the originals of these documents. The letter from KPMG Services confirmed that the company Choice Decisions 113 (Pty) Ltd was still in existence and that as at the date of the letter, 8 July, 2002, the accused was the sole director of the company. Furthermore, there was a transfer of 100 shares to the accused.

The witness also stated that they had initially drafted the documents showing Mr Caldera (the previous director) as the signatory for the company but had amended the papers on the advise of *Lorenzo Bruttamesso* to the effect that there had been a change in the shareholding and directorship in the company and this is what had then been confirmed by the documents from the auditors, KPMG Services. She stated also that she later received confirmation from the attorney, *James Kotze*, that Choice Decisions had paid a deposit of ZAR 270 000 in respect of the purchase price and *James Kotze* had retained this amount in his trust account.

The next witness who gave evidence in relation to count 5 was Giles Alexander Rogers. His evidence has already been summarized above.

On count 6, the State led evidence from Neil Bernstein, who stated that his wife Shirley Bernstein was at one point the owner of, or held the entire shareholding in Ocean View Unit B (Pty) Ltd. The accused was introduced to them when he accompanied certain estate agents to view the property at Ocean View Flats, Beach Road, Sea Point, Western Cape in South Africa, with a view to purchasing it. They briefly discussed the transaction. A Mr. Bruce Marvin who introduced the accused stated that the accused was looking for investment opportunities in South Africa.

The discussion was brief and thereafter he did not have further discussions with the accused, despite efforts made by his South African representatives, Mr Christopher Hayman and Mr Lorenzo Bruttamesso. Matters were thereafter handled by the legal firm C B Nilands & Partners and the witness' auditing firm A M L Management Services. They had agreed with the accused that payment would take place through his firm of attorneys C B Nilands & Partners. He also stated that the purchase by the accused was for 100 shares, which was the entire share capital of the company. At all times of the transaction the witness represented his wife. The offer was presented to his wife by estate agents, Home News and he was present when his wife signed. The accused said that he already had the funds with his lawyers, C B Nilands & Partners.

Under cross-examination the witness said that the registered owner of the property, Unit B Ocean View is a South African Company called Unit B Ocean View (Pty) Ltd and that the director of the company is the accused but he does not know who the shareholders are. He said that he was given a copy of the company's register of directors by the conveyancers when transfer was effected. This was given to him for purposes of proving that transfer and change of directorship had gone through, thus relieving the previous directors of any responsibility or liability upon the said transfer of shares.

Lorenzo Ronaldo Dominico Bruttamesso also gave evidence. He is a practicing lawyer in the High Court of South Africa. He is also a partner in the legal firm C B Nilands & Partners. He said that at the time that the Zimbabwean and South African authorities interviewed him he received instructions from the accused to assist the authorities and give them his full co-operation. He said that he represented the accused in certain transactions related to this case. This was in relation to transactions for the acquisition of the shares in Ocean View Unit B (Pty) Ltd, the acquisition by Choice Decisions 113 (Pty) Ltd of the property at 38 Sunset Avenue, Llandudno and in respect of the transaction relating to number 17 Apostle Road, Llandudno. In the transaction relating to number 17 Apostle Road, he represented the seller and the accused was the purchaser. The accused purchased the shares in Choice Decisions 113 (Pty) Ltd on loan account from Dunmow Limited. The selling company was the registered owner of number 17 Apostle Road, Llandudno.

The accused arranged for payment of the purchase price through bankers, the Commercial Bank of Zimbabwe. He advised the accused that in terms of South African law, he, as an attorney, had an obligation to ensure that the monies being paid were not proceeds of illicit gain and had to be paid in accordance with all relevant laws. The accused requested him to liaise with Dr Gono, the Chief Executive Officer of the Commercial Bank of Zimbabwe and he did so.

The accused also advised him that the funds had been derived from consultancy services that he had rendered in respect of interests overseas. Communication that he received from Dr Gono corroborated what the accused had indicated to him.

After the transaction relating to number 17 Apostle Road, the accused requested the witness to represent him in other acquisitions. The next transaction related to Ocean View Unit B (Pty) Ltd which owned a flat in Sea Point. The agreement was brokered by an estate agent in Cape Town, Home News and it was also a share transaction, the selling company being the registered owner of a sectional title unit. Payment of the

purchase price was effected by Venture Projects and Associates. He said that "Venture Projects and Associates" is a trading name. The proper name is C J H Joint Venture, CC trading as Venture Projects and Associates. One of the members is Christopher Hayman and instructions were given to him to effect payment of the purchase price and this was paid to the legal firm, Sonnenberg, Hoffman & Golombick. The witness then met with the accused who signed the share transfer and consent forms for the appointment of director forms. The accused also gave instructions that the same auditors for Choice Decisions 113 (Pty) Ltd, being KPMG Services be appointed the auditors for the company, Ocean View Unit B (Pty) Ltd. The accused then signed lease agreement forms with Mrs Bernstein, for the lease of the said property for a period of one year.

The witness said that the next transaction he was involved in on behalf of the accused was in respect of 38 Sunset Avenue. At the time that the transaction was being considered, he was asked to advise the accused whether the shares in the public holding company Tadant Limited should be acquired or whether the property itself should be purchased. He advised the accused to acquire the shares in the company. An agreement of sale was then completed between Tadant (Pty) Limited, the seller, and the purchaser Choice Decisions 113 (Pty) Ltd. At the time of the signing of the agreement the accused had departed from South Africa and had given authority to Mr Hayman to sign on behalf of the purchaser. The witness also held a watching brief to ensure that the property was properly registered in Choice Decisions 113 (Pty) Limited's name. He confirmed to the conveyancers that the accused was the director of the company. Asked as to what kind of business Choice Decisions was conducting in South Africa, he said that it is a property owning company, or property investment company in South Africa. Asked if he was aware of its source of income, he said that it rented out 17 Apostle Road at certain times and may have received income from that source. He was however unable to say where the initial funds used to purchase shares came from except to

say that payment was made through Venture Projects and Associates. He was not involved in these funds.

Christopher John Hayman also testified. He is a partner in CJH Joint Venture CC trading as Venture Projects and Associates. Around the year 2001 the accused was introduced to him by an estate agent as a prospective buyer of a property of one of his clients Georgio Calderra; the property being number 17 Apostle Road. The accused eventually purchased the property through a bank transfer that was handled by lawyers C B Nilands & Partners.

He assisted the accused to open a holding account with Standard Bank. He was instructed by the accused to purchase a safe which he did and installed it at 38 Sunset Avenue. The accused kept foreign currency in the safe. According to the accused, he had generated the funds from consultancy work done outside South Africa and Zimbabwe.

The witness also stated that before he assisted the accused to open a bank account at Standard Bank, he met the accused at the President Hotel. He had a large sum of foreign currency in a suitcase. After the funds had been banked, they were subsequently used by attorneys for the acquisition of two properties and improvements to number 17 Apostle Road. On the instructions of the accused he would make transfers to attorneys for the deposits required for the properties and subsequently for the payment. The accused instructed them to demolish and reconstruct 38 Sunset Avenue. The safe was relocated to the witness' house during this period. The witness did not count the funds that were in the safe but described them as a large amount of money.

The witness said that 17 Apostle Road was purchased through a bank transfer whilst Flat 2B Ocean View and 38 Sunset Avenue as well as the renovations to 17 Apostle Road were paid for using foreign currency from the safe which was then deposited at Standard Chartered Bank. After what the witness described as an inflammatory newspaper article printed and published in South Africa, he telephoned the accused for his comments. The accused assured him that all the transactions that were performed

were entirely legal and he provided him, on his own volition, through the offices of Felipe Solano, with a letter confirming that he had done consultancy work for them and had thus earned free funds which he could dispose of as he wished. He said that he cannot confirm that the accused arrived in South Africa with these funds as he was not present during the accused's travelling arrangements.

The witness confirmed that the safe was opened in Mr Rodgers' presence to make a withdrawal of foreign currency and he was also made aware that sufficient funds were lodged for the payment of his workers.

The witness also said that the accused requested him to source a reputable dealer in Mercedes Benz vehicles and introduce him to somebody who would be able to sell a vehicle to him. The witness did likewise and on the accused's instructions, transferred the funds to effect payment for the vehicle. He met with Mr Van Heerden on two occasions to discuss the sale of the vehicle. The vehicle was purchased by the company. They were instructed to issue a purchase order on behalf of the company. The instruction was given by the accused.

Under cross-examination, the witness said that the accused advised him that the funds he had, were paid in respect of consultancy services that he had rendered outside Zimbabwe and that these were free funds which were not subject to exchange control regulations in Zimbabwe. Thus, in the witness' discussions with Dr Gono he wanted assurance that there was no problem in these funds being transferred into his trust account. He wanted assurance that Zimbabwean laws had been complied with. He was aware of the South African laws. He said that he discussed the issue of the Exchange Control Regulations with Dr Gono and he was assured that there was no problem with the funds being transferred to his account in South Africa. He said that he advised Dr Gono why he wanted these funds; that he was involved in the stated transactions and he was phoning on behalf of the seller and that he had been requested to communicate with Dr Gono for the payment of the funds. He said that he told Dr Gono that he was involved in the share acquisition transaction in respect of which the

accused was acquiring the shares of the property holding company, being Choice Decisions 113 (Pty) Limited. There was no indication at all, in their discussion, that Dr Gono would be transferring the funds on behalf of a third party who was not the accused. At the time the accused was not his client. He was receiving the purchase price on behalf of the seller from the accused. When he spoke to Dr Gono, it was on 26 February 2002 and the funds were not immediately available. Dr Gono said the transfer would be done by 4 March 2002 but it only reflected in their account on 6 March 2002. He also asked Dr Gono to transfer the funds in Rands.

Andre Van Heerden gave evidence relating specifically to count 7. He is employed by Mercedes Benz Claremont in Cape Town, South Africa. He is a sales consultant. He met the accused on two occasions. Sometime in May or June 2003 Christopher Hayman had visited their showroom enquiring about the Mercedes Benz ML range. Hayman later came with the accused. An order by e-mail was later sent specifying the vehicle that the accused wanted. The accused also specified a number of additional features that had to be fitted at the factory, these being, a command and navigational system, tow bar, protective side mouldings on the side of the vehicle, third row seat fitted in the boot compartment converting it into a seven seater, the spare wheel to be fitted on the rear of the vehicle on the back door, heated front seat, cell phone kit and parktronic to assist when parking the vehicle. The vehicle was thus manufactured for the accused according to those specifications.

In December 2003 Mr Hayman e-mailed him a copy of the company Choice Decision 113 (Pty) Ltd’s registration documents so that he could register the Mercedes Benz ML 350 for the accused. The company registration certificate was needed by the South African Licence Department to register the vehicle. The full price was ZAR 547 743-00. Hayman and the accused came to inspect the vehicle before payment was made. In about January or February 2004, Mercedes Benz Claremont was paid the full amount. It was paid electronically by RMB (Private) Bank from account name Joint Venture C.C. trading as Venture Projects and

Associates. The vehicle was then registered in the name of Choice Decisions 113 (Pty) Limited on 16 February 2004.

On the evidence adduced before the court, including documentary evidence produced, it is clear that the properties and vehicle purchased in counts 5, 6 and 7, are held or registered in company names and that the accused is the sole shareholder and director in the concerned companies. It also appears to the court that the accused cannot be separated from the payments made for the respective purchases. It is also virtually common cause that these payments were made outside Zimbabwe. The State contends that these payments were made without exchange control authority and were therefore made in contravention of s 5(1)(a)(i) of the Exchange Control Act as read with s 11(1)(a) of the Exchange Control Regulations, 1996. The accused could lawfully make such payments only if the funds used for such payment were free funds, being funds he lawfully held outside Zimbabwe and which he acquired otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe. This exception is provided for by s 11 of the cited 1996 regulations.

On the evidence placed by the State before this Court, with particular reference to the evidence of Lorenzo Bruttamesso, Christopher Hayman, the statements, including the affidavit recorded in Zimbabwe and the statement given to the Spanish authorities by Felipe Solano, the accused owned and had access to free funds.

In view of the court's verdict in relation to counts 2 and 3 in particular, it would appear to us that the State's argument that the indicated amounts of funds paid to him for consultancy work done for Talleres Felipe Solano SL fall short of the various amounts involved in the various counts against the accused, further loses the lustre, if any, that might have been attributed to it. The accused's access to free funds, besides being mentioned by the accused in his warned and cautioned statements produced as part of the State case, is also acknowledged by the State through the evidence of the State witnesses specified above, that

is, Brutamesso and Hayman and the statements by Solano. As we have also commented in relation to count 4, the State appears to be seeking to have its cake and eat it. It cannot blow both hot and cold to the prejudice of the accused.

This matter appears therefore to be distinguishable from the matter of *The Attorney General* v *J C Makamba* SC 30/05 precisely because of the State's own evidence which, on the face of it not only corroborates the accused's explanation in his warned and cautioned statement, but also tends to establish that the accused has had, and at the relevant time would have had, access to free funds. The State therefore was aware of the fact of the accused's access to free funds but nevertheless decided to proceed against the accused despite this knowledge. The issue of the lifting of the corporate veil appears to this court to be irrelevant in the determination of this matter because it is not the company that is before the court, but an individual. Had it been otherwise, the provisions of section 385(6) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] would have been available to the state.

It does not appear to this court that in counts 5, 6 and 7 the State has established a *prima facie* case against the accused for the reasons discussed above. This court is on these counts also unable to put the accused on his defence and must also return a verdict of not guilty as the State has not discharged the *onus* on it.

Accordingly the accused is found not guilty and discharged on counts 5, 6 and 7.

Byron Venturas & Partners, legal practitioners for the accused.