

SHAOLING CHEN  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & BERE JJ  
HARARE, 20 November 2014

### **Criminal Appeal**

*J Samukange*, for the appellant  
*S Fero*, for the respondent

HUNGWE J: The appellant, a Chinese national and a director of the complainant company, Wenzhou Enterprises (Pvt) Ltd, was convicted of theft of trust property as defined in s 113 (2) of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*]. He was sentenced to a fine and a wholly suspended term of imprisonment on 17 January 2014. He appealed against both conviction and sentence raising several grounds of appeal against conviction.

The National Prosecuting Authority filed a notice to the registrar of this court in terms of s 35 of the High Court Act, [*Cap 7:06*] indicating that it did not intend to support the conviction. The brief facts upon which the trial court convicted the appellant were as follows.

Appellant was a shareholder and director in the complainant company. He withdrew an amount of US\$32 800, 00 from the company account with Metropolitan Bank in Harare. He allegedly put it to his own use but after a trial, the court found him guilty of having converted the sum of US\$2 800-00 to his own use. In acquitting the appellant for the sum of US\$30 000, 00 the court reasoned that the explanation given in respect of that sum was reasonably possibly true. It disbelieved the evidence of the only State witness who was present when the withdrawal was made at the bank. In short, the court found the only State witness evidence unreliable in its material respect regarding the sum of US\$30 000-00. The appellant's evidence on the other hand was held to be reliable.

The appellant had maintained throughout the trial that he was innumerate in the English language used by the local banks. As such Kambarami, the State witness, would on each occasion a withdrawal was necessary, assist him complete the bank cash withdrawal slips. On the occasion relevant to the charge, he and Kambarami as usual, had proceeded to the bank. Kambarami completed the slip for the US\$30 000, 00. When he received the money from the bank teller, he passed it on to Kambarami as Kambarami was supposed to use it for the day to day company expenses as agreed. He maintained that this explanation throughout. The court disbelieved Kambarami when he attempted to deny it.

In short, the court convicted the appellant on the evidence of a single witness who was less than credible.

The evidence of the other State witness, Zhou Chiaixi, did not corroborate Kambarami's testimony. The matter remained strictly a single witness case. Section 269 of the Criminal Procedure and Evidence Act [*Cap 9:07*], permits a court to convict an accused person on the evidence of a single witness provided that the witness is both a competent and a credible witness. Having failed the credibility test, it was unsafe for the court *a quo* to convict the appellant. It is important to note that this witness, Kambarami, had denied ever having received the US\$30 000, 00 until a document with his own signature was tendered showing that in fact he had indeed received and had acknowledged such receipt. Where a witness is found to have lied on a fundamental issue in a trial, it is unsafe to believe him on other relevant aspects of the matter. The court could only have convicted the appellant if the merits of the complaint and the demerits of the appellant were without question. *S v Madzomba* 1999 (2) ZLR 214. They were not without question. The concession by the State was well taken.

It was for these reasons that upon perusal of the papers we quashed the conviction and set aside the sentence.

BERE J agrees \_\_\_\_\_

*Venturas & Samukange*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners