WILLIAM MUZALA CHIPANGO & OTHERS v THE PEOPLE (1978) ZR 304 (SC)

SUPREME COURT

BARON DCJ, BRUCE - LYLE JS AND CULLINAN AJS

3RD, 4TH, 5TH, 12TH, 13TH MAY 1977 AND 4TH OCTOBER 1978

SCZ 25 Judgment No 36 of 1978

Flynote

Evidence - Accomplice - Witness given usual indemnity by D.P.P. - Whether court entitled to decline to treat such witness as accomplice.

Evidence - Witnesses - Witness who may be accomplice or may have purpose of his own to serve - Proper approach to evidence of - Necessity for 30 corroboration or support.

Criminal law and procedure - Trial - Several accused joined in one information but cases against individual accused different - Trial court treating accused collectively and as if the cases against them were the same - Propriety of.

Criminal 35 law and procedure - Trial - Witness whose name on list of witnesses not called by prosecution - Request by defence for witness to be tendered for cross - examination - Prosecution declining to tender witness and court declining to call him as court witness - Propriety of.

Criminal law and procedure - Trial - Length of - Undesirability of long 40 trials.

Headnote

The appellants were charged with treason contrary to s. 43 (1) (a) of the Penal Code, Cap. 146. They were alleged to have prepared to overthrow the Government by unlawful means; the first twelve overt acts

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alleged that the various appellants, sometimes individually and sometimes with one or more of the others, recruited the persons named in the individual acts for the purpose of undergoing military training in South - West Africa. Overt act 13 alleged that all four appellants caused all the people named in the first twelve overt acts to go to South - West Africa for the 5 purpose of undergoing military training. The full facts are set out in the judgment.

The principal grounds of appeal were (1) that the learned judge erred in failing to regard the eighteen military trainees as accomplices or as witnesses with possible purposes of their own to serve, (2) that he 10 erred in failing to deal with the evidence against each appellant individually and in relation to each overt act individually, but simply lumped all the appellants and all the evidence together and found them all guilty, (3) that he failed to examine the conflicts and inconsistencies between the prosecution witnesses and consequently failed to consider 15 the weight and credibility of the prosecution evidence, and that he failed to examine the defence evidence as to alibis, and (4) that his refusal to grant the application for the remaining prosecution witnesses to be made available for cross - examination resulted in the appellants being denied a fair trial.

Held: 20

(i) Where the prosecution puts a witness forward as one who at the very least has an interest to exculpate himself the court cannot decline to treat him as such without some very positive reasons. 25

Muyangwa & Others v The People (1) followed.

(ii) Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an 30 interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded.

Musupi v The People (3) followed.

(iii) A decision as to the status of a witness based only on a belief in his honesty on the narrow issue i.e. as to the facts on which the decision as to his status turns - begs the question and is patently insufficient.

Dictum in *Muyangwa & Others v The People* (1) cited with approval.

(iv) The trial judge having appreciated that the witnesses in question might be accomplices or might have purposes of their own to serve, it was a misdirection to accept their evidence without looking for corroboration or support.

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(v) The cases for and against the individual appellants were not the same and they each gave their own evidence in respect of allegations against them individually and called their own witnesses in support. The approach of the trial judge in treating the four appellants collectively and as if the cases against them were the same was wrong and was one which is likely to lead a court into the error of glossing over evidence.

(vi) Where a witness whose name is on the list of witnesses under the summary committal procedure is capable of belief it is the prosecution's duty to call him even though the evidence that he is going to give is inconsistent with the case sought to be proved.

(vii) The prosecution having declined to call the witnesses whom the defence wished to cross - examine the refusal of the court to call those witnesses was an improper exercise of its discretion and resulted in the appellants being denied fair trial.

(viii) Trials should be kept as short as is consistent with the proper administration of justice.

Per curiam: For investigating officers to go to the lengths of repeated use of physical assaults and coercion, or for a trial court to lean heavily in favour of the prosecution, is almost certain to be counter - productive and may well result in the fatal weakening of an otherwise sound case. Such misguided enthusiasm, far from securing the conviction of the guilty, may well result in guilty men going free.

Cases cited:

(1) *Muyangwa & Others v The People*(1976) ZR 320.

(2) *Mhango & Others v The People*(1975) ZR 275.

(3) *Musupi v The People SCZ Judgment No. 32 of* 1978.

(4) *DPP v Kilbourne* [1972] 3 All ER 545.

(5) *Phiri (E) and*, *Ors v The People S.C.Z. Judgment* No. 1 of 1978.

(6) *Mulwanda v The People*(1976) ZR 133.

(7) *R v Turner & Others* (1975) 61 Cr. App. R 67.

(8) *R v Oliva* [1965] 3 All ER 116.

(9) *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 Comm. LR 279.

(10) *Simon Miyoba v The People* SCZ Judgment No. 29 of 1977.

(11) *Kalebu Banda v The People* SCZ Judgment No 31 of 1977.

Legislation referred to:
Penal Code, Cap. 146, s. 43 (1) (a).
M Ngulube, Lisulo & Co., for first and third appellants.
AP Annfield and M E Sitakana, Annfield & Sikatana, for second appellant.

RM Chongwe, Mwisiya, Chonywe & Co., for fourth appellant.
VKC Kamalanathan, Acting Senior State Advocate, and AG Kinariwala, *State Advocate,* for the respondent.

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Judgment

Baron DCJ: delivered the judgment of the court.

We very much regret the long delay in delivering this judgment, due in part to the length and complexity of the case and in part to other heavy commitments of the members of the court.

For brevity we propose to refer to the individual appellants as Al and so on, and to the prosecution and defence witnesses by number as PWs and DWs.

The appellants were charged with treason contrary to s. 43 (1) (a) of the Penal Code, Cap. 146. The particulars of the offence alleged that the four appellants with persons unknown did prepare to overthrow the Government of the Republic of Zambia by unlawful means by thirteen overt acts. The first twelve of such acts all alleged that the various appellants, sometimes individually and sometimes with one or more of the other appellants, recruited the persons named in the individual acts for the purpose of undergoing military training in South - West Africa so that after the training they would return to Zambia to overthrow the Government by force. Overt act No. 13 alleged that all four appellants caused all the people named in the first twelve overt acts to go to South West Africa for the purpose of undergoing military training so that when their training was completed they would return to Zambia to be used to overthrow the Government by force.

The proceedings were by way of summary committal in terms of Part VIII of the Criminal Procedure Code, and pursuant to s. 258 thereof a list of the proposed witnesses was furnished together with the statements of the evidence of each witness which it was intended to adduce at the trial. There were fifty - nine such witnesses, of whom thirty - six were men who were alleged to have been recruited and to have undergone military training. Of these only eighteen gave evidence, a matter with which we will deal more fully later; theirs was the principal evidence for the prosecution, and indeed for practical purposes the only evidence. They all alleged that at different dates between 19th December, 1972, and 10th January, 1973, they were approached by the various appellants and offered employment, and different groups taken to three different places on the bank of the Zambezi River where they were forced to cross the river at gun - point.

Having been forced to cross the Zambezi River the eighteen witnesses were taken to a camp in South - West Africa where, according to their evidence, they were forced to undergo military training. They said they protested throughout the nine months' period they were there, until finally the white instructors at the camp became weary of their protests and their lack of co - operation and caused them to be returned to Zambia overland west of the Zambezi River where it runs approximately south - south - east from Senanga to Sesheke.

The evidence was that one hundred men had undergone training and that one had died during the training. It is not clear whether they were all returned at the same time, but certainly the thirty - six named in the overt acts were

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returned at or about the same time. They crossed the border in small groups in October, 1973; the police, having received information long beforehand, were on the lookout for these men and some were apprehended almost immediately while others were not apprehended until a week later. All the men were found in possession of forged national registration cards, forged driving licences and forged UNIP membership cards, all in false names.

The witnesses made statements to the police in Mongu within a matter of days of their apprehension. They were then detained in Kabwe under the Preservation of Public Security Regulations, and interrogations went on for several months. Finally, identification parades were held in August, 1974, and thereafter the witnesses made further statements to the

police. The information was dated December, 1974, and the trial commenced in March, 1975.

In the meantime in April, 1973, the four appellants and one other had been charged with treason and misprision of treason; at an early stage a *nolle prosequi* was entered against the fourth appellant and the fifth man, and the trial proceeded against the first three appellants. The first batch of prosecution witnesses in that case were men alleged to have been recruiting agents of the accused, and they all repudiated the statements they had made to the police, which they alleged had been beaten out of them, and were declared hostile; their evidence in court was favourable to the accused. The second batch of witnesses were to have been the five men arrested in a car driven by A3 on the night of the 11th January, 1973, and alleged to have been recruits for military training; the first of these was called and following his evidence a *nolle prosequi* was entered against the first three appellants also. The record of that trial was an exhibit in the present case.

In the present trial eighteen of the thirty - six men named in the overt acts, and whose names appeared on the list of witnesses, gave evidence. The defence applied for the remaining witnesses to be made available for cross - examination; the prosecution objected and the application was refused. All the appellants gave evidence and between them they called over fifty witnesses to establish alibis.

The defence submitted that the military trainees were accomplices and that their evidence should not be relied upon without corroboration or support. The defence also relied strongly on the fact that some of the alibi evidence given by the defence witnesses had not even been challenged by the prosecution. The learned judge held that the eighteen military trainees were not accomplices; he dismissed the alibi evidence in one sentence, and accepted the evidence of the prosecution witnesses.

The appellants individually advanced several grounds of appeal, many of which were common to all four. In the view we take it is unnecessary to deal with each ground of appeal; we propose to deal with four grounds which raise issues of general importance. These are (1) that the learned judge erred in failing to regard the eighteen military trainees

as accomplices or as witnesses with possible purposes of their own to serve, (2) that he erred in failing to deal with the evidence against each appellant individually and in relation to each overt act individually, but simply lumped all the appellants and all the evidence together and found them all guilty, (3) that he failed to examine the conflicts and inconsistencies between the prosecution witnesses and consequently failed to consider the weight and credibility of the prosecution evidence, and that he failed to examine the defence evidence as to alibis, and (4) that his refusal to grant the application for the remaining prosecution witnesses to be made available for cross - examination resulted in the appellants being denied a fair trial.

The proper approach to witnesses such as the eighteen military trainees was dealt with in *Muyangwa & Others v The People* (1); that case was on all fours with the present. We said at p. 322:

"The witnesses may have been speaking the truth when they said that they underwent military training only because they feared for their lives; but they were bound to say this, and even if there were no other indications in the evidence that in this regard also they were exculpating themselves - and there are indeed such indications - where the prosecution puts a witness forward as one who at the very least has an interest to exculpate himself the court cannot decline to treat him as such without some very positive reasons. The learned judge has given no reasons in the present case save a belief in the honesty of the witnesses on the narrow issue - in other words, as to the facts on which the decision as to their status turns - which begs the question and is patently insufficient."

The judgment of the High Court in the present case was delivered some three or four months before the judgment of this court in *Muyangwa* (1).

However, *Mhango & Others v The People* (2), cited in *Muyangwa* (1), was decided in October, 1975; in that case we said at p. 277:

". . . we are frankly at a loss to understand how a court to whom a witness is presented by the prosecution as an accomplice, and must therefore be one whom the prosecution must have good reason to put forward as such, can simply on the basis of a number of very questionable inferences be held not to be an accomplice. The Director of Public Prosecutions does not grant indemnities lightly. We are satisfied that PW31 must be treated at the very least as a witness with an interest to exculpate himself."

The learned trial judge made no reference to Mhango (2). In relation to these eighteen witnesses he said this:

"First, having already found as a fact that the four accused caused the 100 men to be taken to South West Africa for military training under compulsion and threatening them with death if they refused, the stigma of treating them as accomplices falls away. I have approached their evidence with meticulous caution but I am now satisfied that they had no complicity in the commission of the offence charged; they were innocent victims of circumstances

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beyond their control. Secondly, the question of indemnity and the propriety of the State taking this course there is nothing basically wrong in the State indemnifying a person from prosecution if it considered he has valuable evidence to offer to the court for the conduct of a case. In the instant case the State had no other source of direct evidence apart from the recruits themselves."

There is here an important error of principle. Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness, that possibility in itself determines how one approaches his evidence; as we said in the very recent case of *Musupi v The People* (3):

"The critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence. Once in the circumstances of the case this is reasonably possible, or in the words of Lord Hailsham (in *DPP v Melbourne* (4)) 'can reasonably be suggested', the danger of false implication is present and must be excluded before a conviction can be held to be safe."

The learned judge appreciated that the witnesses in question might be accomplices, or might have purposes of their own to serve; he then proceeded to examine the facts and make a positive finding that they were not such witnesses, and proceeded to accept their evidence without looking for corroboration or support. This was a misdirection; once a witness may be an accomplice or have an interest there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded. This principle has been definitively laid down in the recent case of *Phiri (E.) v The People* (5):

"The question is whether the suspect evidence, be it accomplice evidence, evidence of a complainant in a sexual case, or evidence of identification, receives such support from the other evidence or circumstances of the case as to satisfy the trier of fact that the danger inherent in the particular case of relying on that suspect evidence has been excluded; only then can a conviction be said to be safe and satisfactory."

In the result this ground of appeal must succeed; all these witnesses should have been held to be witnesses with a possible interest to exculpate themselves. We must however stress that in the event this misdirection on the part of the learned trial judge does not affect the outcome of these appeals. As Lord Hailsham said in *Melbourne* (4) at p. 452:

"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible . . . If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise."

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As will be seen presently, these eighteen witnesses were not credible witnesses, and on the face of the record and quite apart from any questions of demeanour they should not have been believed. We will deal with the evidence in detail later; at this point it is sufficient to stress that quite apart from the misdirections concerning the proper approach to these witnesses the conflicts and inconsistencies in their evidence were so serious that convictions based on their evidence could not in any event stand.

The second ground of appeal was that the learned trial judge erred in failing to deal with the evidence against each appellant individually, and in relation to each overt act individually. It was pointed out by counsel for the appellants that there were thirteen overt acts and that, save in respect of the last, the individual appellants were not charged jointly with all the other appellants in all the overt acts; the cases for and against the individual appellants were not the same as the cases against the other appellants, and they each gave their own evidence in respect of the allegations against them individually, and called their own witnesses in support. These submissions are entirely valid; it is quite clear that the learned trial judge treated the four appellants collectively, and as if the cases against them were the same. In so doing he dismissed the evidence of fifty - two defence witnesses in one sentence, treating them as if their evidence related to the four appellants collectively. We agree with the submission that such an approach is wrong and is likely to lead the court into

the error of glossing over evidence. Precisely this position arose in the case of *Muyangwa* (1) to which we have already referred; our judgment in that case opened with the following passage:

" The appellants were convicted of treason. Although the acts alleged were such that the prosecution was entitled to join the three appellants in the one information in terms of section 136 of the Criminal Procedure Code, it will be necessary in the main to deal with the cases of the three appellants separately."

And on p. 322, at the end of the passage dealing with the status of the principal prosecution witnesses, we said:

"In the event, however, this misdirection" (the failure to hold that the witnesses had a possible interest) "does not affect the outcome in relation to any of the appellants, whose cases we will now consider individually."

In the result in that case the appeals of two of the three appellants were allowed on the facts, and in respect of the third the *proviso* was applied and his appeal was dismissed. That result underlines how essential it is in a case of this kind, where different overt acts are alleged against different accused, to deal with each accused individually.

Having said that, we are bound to say that we have considerable sympathy for the learned trial judge. The trial covered, on and off, a period of some nine months; judgment was delivered six months later; the record was precisely 1 600 pages in length; there was a total of ninety - one witnesses. There is no doubt that the task of analysing the evidence

in such a case was enormous, as is evidenced by the length of time it has taken the three members of this court to do so. It was in the hands of the DPP to reduce this case to manageable proportions. We repeat what we said in *Mulwanda v The People* (6) at p. 135:

". . . to charge an accused with thirty - five counts necessitating the calling of eighty - seven witnesses and the production of eighty - nine exhibits is fair neither to the accused nor to the court."

In *R v Turner & Others* (7) Lawton, LJ, commenting on the inordinate length of the trial, said:

"We find these facts disturbing. With hindsight it seems clear now that justice could have been done by confining the trial to the Wembley and Ilford robberies . . . what we do want to do is to invite the attention of both judges and counsel to the need to keep trials as short as is consistent with the proper administration of justice. Trials as long and as complicated as this one was are a burden upon judges, jurors and accused which they should not be asked to bear."

Perhaps the enormity of the task also led the learned trial judge into the errors which are the subject of the third ground of the appeal. Clearly he paid scant if any attention to the inconsistencies in the evidence of individual witnesses, and to the conflicts between different witnesses testifying to the same alleged events. We will deal with these inconsistencies and conflicts when we come to analyse the evidence.

The defence submits that the learned trial judge's refusal to grant the application for the remaining witnesses whose names appeared on the list to be made available for cross - examination resulted in the appellants being denied a fair trial. The record discloses that after the prosecution had closed its case and the court had ruled that each of the appellants had a case to answer, application was made on behalf of each of the appellants for the remaining witnesses to be tendered for cross - examination. The learned DPP does not appear to have objected in so many words, but to have questioned whether this course was competent at that stage of the proceedings. In this court Mr Kamalanathan submitted that once the prosecution had closed its case the witnesses could not be tendered since this involved calling them, if only to give formal evidence as to their names, addresses and occupations. We must confess our surprise that a point such as this should be taken even if it were valid. But in fact the argument is untenable, there can be no doubt that, as we shall demonstrate by authority in a moment, it was the duty of the prosecution to tender these witnesses, and if in order to do so it was necessary formally to re-open the prosecution case an application in this regard could and should have been made, and would obviously have been granted.

Archbold, 39th Ed., para. 444, discusses this subject in some detail. The text is based on the case of *R v Oliva* (8) in which Parker, L.C.J., considered the authorities in depth and at p. 122 came to the following conclusion:

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"Accordingly, as it seems to this court, the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross - examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."

The learned trial judge was referred to the relevant passages in Archbold, and the record discloses that he was specifically asked to call the witnesses in question as court witnesses. Nonetheless he declined to do so, but insisted that if the defence wished to present the evidence of the witnesses to the court they must call them as their own witnesses. This was, to say the least, a most unfortunate position for the court to take. Lord Parker in *Oliva* (8) cited the Australian case of *Ziems v The Prothonotary of the Supreme Court of New South Wales* (9) where Fullagar, J, said:

"The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness."

The learned judge was there referring to the discretion of the prosecutor; the comment applies with additional force to the discretion of the judge when asked to call a witness whom the prosecution declines to tender for cross - examination. Counsel for the various appellants pointed out to the learned trial judge that if they were required to call the witnesses themselves they would be placed at a disadvantage. Two possible disadvantages are immediately apparent, not only would the course on which the learned judge insisted have required the appellants to give evidence before the witnesses in question, but there was the further and more important problem of the actual nature of the evidence. It is true that if the statements supplied to the defence under the summary committal procedure had disclosed that the witnesses were entirely favourable to the defence then it might be said that there should be no objection to them becoming defence witnesses, since if they gave different evidence when in the witness box an application could then be made to declare them hostile, and cross - examination ensue. But such a clear - cut position seems unlikely to have existed; the very fact that the names appeared on the list of witnesses suggests that the prosecution intended at one stage to call them. The probabilities are that in certain respects the

statements were favourable to the appellants and in others unfavourable; it would be highly embarrassing for the defence to present such witnesses to the court as their own witnesses. At the risk of labouring the point we repeat and stress the dictum of Parker, L.C.J., in *Oliva* (8), already cited:

". . . where the witness's evidence is capable of belief, then it is [the prosecution's] duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved."

This ground of appeal, therefore, must also be upheld.

Before leaving this subject we must deal with a submission made by Mr Ngulube and adopted, as we understood them, by Mr Annfield and Mr Chongwe. It was submitted that this court had an inherent jurisdiction to see that justice prevailed and that in the exceptional circumstances of this case we should regard ourselves as at liberty to look at the statements of the witnesses in question to ascertain whether or not evidence favourable to the appellants or unfavourable to the prosecution had not been presented to the trial court and which, if presented, might have affected the outcome. We cannot accede to this proposition. We have made it clear in a number of cases (see for instance *Simon Miyoba v The People* (10) that this court cannot and will not look at depositions or the statements supplied under the summary committal procedure - or indeed any other statement alleged to have been made by a witness at some other time - unless that statement has been properly introduced into the record. We are of course very well aware that the present

case is not on all fours with *Miyoba* (10), where the issue was an attack on the credibility of the witness based on a previous inconsistent statement. Here there is no witness and therefore no attack on his credibility, we are asked in this case to look at the statements in order to see whether the appellants have been prejudiced, or may have been prejudiced, by the refusal of the trial court to call the witnesses for the purposes of cross - examination. But it is unnecessary for us to read the statements in order to arrive at that conclusion, and it would in our view be improper and a dangerous precedent for this court to take into account anything which was not properly before the trial court as evidence.

The foregoing misdirections are fundamental, and the convictions of none of these appellants can stand unless in relation to him the *proviso* can be applied. We turn then to examine the evidence to see whether the witnesses on whom the court relied for the convictions could reasonably be regarded as credible witnesses, and if so, whether there was in fact corroboration of or support for the evidence of those witnesses sufficient to enable this court to apply the *proviso*.

The various appellants were charged with treason on the basis of twelve overt acts alleging the recruitment of various people, and one umbrella overt act (No. 13) in which all four appellants were alleged to have caused all the alleged recruits under the first twelve overt acts to go

to South - West Africa for military training. Thus the various appellants either individually or with one or sometimes two others were alleged to have recruited various persons at various places and at various times, while under overt act No. 13 all four together are alleged to have transported all the alleged recruits or caused them to be transported into South - West Africa.

We must comment on the way in which not only overt act 13 but also some of the others were framed. Overt act 13 alleged that the four appellants "on a date unknown but between the first day of December 1972 and 31st January, 1973 (caused the various persons named) to go to South - West Africa for the purpose of undergoing military training . . . ". In fact however the date was not unknown. The evidence was that various persons named were recruited in various places and transported across the river on dates which they stated positively. Again, the various allegations of recruitment were all deposed to positively by the witnesses concerned, and yet some of the overt acts alleged that the recruitments took place "on a date unknown but between ...". We must express surprise that the charge should be framed in this way when the prosecution knew the dates on which the various acts are alleged to have been committed, and we must express also that the defence, to whom copies of the various statements had been furnished in accordance with the summary committal procedure, raised no objection on this point, particularly since alibis were likely to - and in the event did - play a vital part in the defence.

A case of this kind, involving as it does for the accused persons allegations sometimes to have acted with one or more of the others and sometimes individually, and involving numerous witnesses alleged to be the subject of different overt acts, must, if it is to be assessed satisfactorily, be approached from various different stand points, and the results then correlated, compared and cross - referred. The first twelve overt acts allege various incidents of recruitment on various dates at various places as far apart as Lusaka and Sesheke. Following such recruitment it was alleged that the various recruits were transported across the Zambezi River at three different points on six different dates, these separate transportations formed the basis of the umbrella overt act No. 13. The three places were at Mambova, over eighty kilometres west of Livingstone, at Mwandi, a further fifty kilometres west of Mambova and at Soka Village, which is five kilometres from Mwandi. Sesheke is a further sixty - five kilometres west of Mwandi.

The various alleged acts of recruitment and transportation may therefore be grouped together and tabulated chronologically in the following way:

1. Overt acts 9 and 12 followed by transportation on 19th December, 1972, at Mwandi and Soka Village.

2. Overt acts 2, 7 and 10 followed by transportation on 23rd December, 1972, at Mambova.

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3. Overt acts 1 and 4 followed by transportation on 26th December, 1972, at Mambova.
4. Overt acts 5 and 11 followed by transportation on 29th December, 1972, at Soka Village.
5. Overt act 8 followed by transportation on 2nd January, 1973, at Soka Village.
6. Overt acts 3 and 6 followed by transportation on 10th January 1973, at Mwandi.

In the first group, in support of overt act 9 PW9 alleges that he was recruited by A1 on 19th December, 1972, at Livingstone, that he was driven to the house of A4 at Namangu, about twenty - five kilometres from Mwandi, and then together with PWs 13 and 15 was driven by A4 to the river at Mwandi and transported across the river that same night by A2 and one Baxton Silume; but DW29, a member of both ANC and UP Youth, said that PW9 was assaulted and detained by UNIP youths at Mwandi on the 5th January, 1973, and was later that day released by the police. No effort whatever was made to rebut this evidence, and DW29 was in no way discredited nor even weakened in cross - examination; there was therefore no basis on which the trial court could reject his evidence. Yet the trial court accepted the evidence of PW9 without even considering the evidence of DW29, in the face of which it was impossible for PW9 to have been transported across the river on the 19th December, 1972, as alleged. No other evidence was adduced in support of overt act 9, which must therefore be held to have been a fabrication on the part of PW9.

Under overt act 12 A2 is alleged to have recruited PWs 13, 14, 15 and 16 at Sesheke on the 19th December, 1972, and thereafter to have transported them across the river that same night. In evidence however PW14 said that he was abducted in broad daylight by A2 and three white South Africans at Mwandi Harbour on 1st January, 1973. His evidence is therefore totally in conflict with the allegation in the overt act and must have taken the prosecution by surprise; it is not a matter of speculation that in the statement he made to the police PW14 must have alleged recruitment on a date between the 19th and 26th December, 1972, since this is the period alleged in the charge. No reliance can be placed on the evidence of this witness.

PW16 said in evidence that he and another man were ferried across the river by A2 at Soka Village where the second appellant had a house on the river bank. He said that he spent some time in A2's house and went directly from there into the boat in which he crossed. This evidence is in conflict with that of PW15 who said that he, PWs 13 and 16 and some others were ferried across together. PW13 also is in conflict with the other two since he says that he spent the afternoon in A2's house and was ferried across with A2's cousin (who was not called). It is of course possible for A2 to have made more than one trip across the river, but since all these alleged acts of ferrying were carried out after dark it is difficult to understand why a man would make two or three trips when one would suffice.

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However, even more telling reflections on the credibility of these witnesses comes from the evidence of DWs 37, 38, 39 and 43, some of whom were related to the witnesses and all of whom were respected members of their communities. The combined effect of their evidence was that these three prosecution witnesses were all still in Zambia on dates subsequent to those of their alleged recruitment. The cross examination of DW38 as to the movements of PWs 15 and 16 served simply to confirm his evidence, while DW39, whose evidence also dealt with the movements of PW15, was not cross - examined at all.

Thus we have the evidence of four witnesses as to this overt act, one of whom contradicts the allegation in the charge while the other three are in material convict as between each other; the evidence of the defence witnesses, if believed, proves that the prosecution witnesses cannot be telling the truth as to when they were transported across the river. Yet the learned trial judge without making any attempt to explain why he rejected the

evidence of the defence witnesses has held the evidence of the prosecution witnesses to be truthful and reliable. It clearly was not, and equally clearly the learned trial judge did not consider the evidence of the defence witnesses individually and the effect of that evidence on the individual evidence of the prosecution witnesses.

The second group of events alleged recruitment at three separate places on the 23rd December, 1972, followed by transportation across the river at Mambova. In respect of overt act 2 PW2 said that he was recruited by A1 after dark on the 23rd December, at Musokotwane in the Kalomo area, well over one hundred kilometres from Mambova. PW8 and PW11, although they differed as to the time, both said they were recruited by A1 early that day and taken to a rendezvous at Mambova where they found PW2 waiting for them. It was clearly impossible for A1 to have recruited PW2 at Musokotwane after dark and yet to have recruited PWs 8 and 11 earlier on the same day. A4 gave evidence that on the 21st December, he arranged with a fellow member of Parliament (DW50) to transport his furniture from Lusaka to Sesheke in the latter's vanette; the vehicle broke down near Pemba, which is nearly 450 kilometres from Sesheke. He failed to obtain alternative transport and consequently set off (without DW50 at this stage) for his home at Mwandi on the morning of the 23rd December, arriving there that day. If he was speaking the truth he could not possibly have been in the Mulobezi area since 0900 hours that day. His evidence was supported to an extent by that of his wife, DW51, but more importantly by DW50. Once again the learned trial judge accepted the evidence of the prosecution witnesses without considering that of the defence.

A3 was not charged with any of the overt acts in this group, but he was incriminated by PW8 as being present at the river bank. However, this witness failed subsequently to identify the third appellant and acknowledged an earlier statement to the police that "I cannot identify him at any time". As against this intrinsically unsatisfactory evidence PW11, who said that he had known A3 since his school days, testified that he was not present.

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The third group of events alleged recruitment on the 26th December, 1972, followed by transportation across the river at Mambova that evening. In respect of overt act 1 PW10 said that he was approached by one Kalimbwe in Livingstone on Christmas Day and taken to A1's house in Livingstone the following morning; A1 is alleged then to have driven him to Choma where PW1 and others were recruited, and the whole party left Choma for Livingstone at 1600 hours. Having returned to Livingstone A1 is alleged to have driven out to Maramba, a distance of about five kilometres and picked up Kalimbwe and four other recruits and then returned to Livingstone, and, having filled up with petrol at a garage where it was alleged they met A3 and yet more recruits, they proceeded to Mambova. At this stage there were fourteen recruits in the back of the Land - Rover which was being driven by A1 with Kalimbwe next to him in the cab, accompanying the Land - Rover was alleged to be a VW car driven by A3. The two witnesses both said that at some point on the way to Mambova, and apparently after having covered about half the distance, the two vehicles stopped, and A1 and A3 exchanged places and the journey continued; the transportation across the river was alleged to have taken place immediately on arrival at Mambova. The witnesses were specific that when they reached Mambova A1 was already there, obviously having made better time than the Land - Rover.

On the other hand, in respect of overt act 4 PW17 alleged that he was recruited by A1 in Livingstone at 2000 hours on that same evening and arrived at Mambova after the party in the Land - Rover; he specifically mentioned PW1 and PW10 and Kalimbwe as being already at the river.

It is clear that one or other of these stories cannot be true. If as alleged A1 and A3 changed places in the vehicles somewhere between Livingstone and Mambova and then simply proceeded as before, with A1 arriving in Mambova before the Land - Rover, it is quite impossible for the evidence of PW17 to be correct, conversely if PW17's evidence is true the evidence of PWs 1 and 10 cannot be correct.

The alibi evidence relating to these events is very strong. The precise day can hardly have been mistaken; the events covered Christmas Day and Boxing Day. There was the evidence of two customers of A1, the one testifying that A1 had delivered a bag of meal at his house shortly after 1700 hours on the 26th December, at which time according to the evidence of PWs l and 10 he must have been on the road from Choma to Livingstone; the other customer testified to having paid an account to A1 at his grocery at 1800 hours on that same evening. There was also the evidence of DW25, the wife of the Deputy Speaker of the National Assembly, who testified that she was staying with A1 and his family over Christmas and that she had seen A1 between 1400 and 1500 hours that afternoon and again at 2000 hours that evening when he returned home for the night. If the evidence of any one of these witnesses was true it was impossible for A1 to have done what the prosecution witnesses alleged that he did. There was no suggestion that any of these witnesses was not impartial. In addition there was the evidence of A1's sister and the assistant in his shop

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which also corroborated his alibi, but with which we do not deal because of their possible bias in his favour.

There was also the evidence of DW29, an ANC and UP Youth, who told the court that he had seen PW10 in Zambia in January, 1973; once again grave doubt is cast on the credibility of PW10 by that single piece of evidence. And once again the learned trial judge accepted the evidence of the prosecution witnesses without considering any of the foregoing matters.

A2 and A4 were not implicated in this group of events. A3 was not charged with either of the overt acts but was implicated by two of the three prosecution witnesses. PW10 said that he saw A3 at the garage in Livingstone and PW1 said that he saw him when the exchange of vehicles took place during the course of the journey to Mambova, but failed to identify him subsequently. On the other hand PW17, who said that he knew him, testified that A3 was not present at Mambova. In addition there is the evidence of three relatives of A3 giving him an alibi; in particular DW38, A3's sister, whose evidence if true makes it impossible for A3 to have been where the prosecution witnesses say he was, was not cross - examined.

The next group of events alleges recruitment under overt acts 5 and 11 and transportation on the night of the 29th December, according to two of the witnesses, and the 31st December, according to the third. PWs 4 and 5 alleged that A1, assisted by two recruiting agents, recruited them in Lusaka early in the morning on the 28th December. In the company of three other recruits and one of the recruiting agents they travelled by train from Lusaka to Livingstone leaving at 1000 hours. They said that A1, who in the meantime had driven from Lusaka, met the train in the evening and took them to his house where they spent the night and the following day. Their evidence is very seriously conflicting as to the occupants of the house - they were obviously cross - examined closely about the occupants in order to test whether they had been there at all - and also as to their movements the following day. The witnesses said that they left Livingstone some time after 1900 hours on the 29th and travelled to A2's house at Soka Village arriving there at 2200 hours; they found A2 there. They said that A2 and A3 transported them across the river and then went back. PW5 said that the following morning he met PW12 at the old Wenela air - strip in Kaprivi. PW12 on the other hand alleged that he had been recruited by A2 and A4 between Sesheke and Mwandi on the 31st December and was taken to A2's house (arriving before sunset) where he found PW4 and PW5. He said that they were all later taken across the river by A2 and A4. He was cross - examined closely and at length as to the date but firmly maintained that it was the 31st December, and that he and PW5 arrived at the old Wenela airport before dawn on the 1st January.

The conflicts in this evidence are apparent; it is difficult to see how a witness could be mistaken as to the precise date on which an important event took place, when according to him it took place on the last day of

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the year and during that night and continued on the first day of the new year. Once again therefore the doubt is raised as to precisely when the events took place and inevitably the doubt also as to who was involved.
Finally, there is a very strong alibi. DW25, who had been staying with A1's family over Christmas, testified that on the morning of the 28th December, A1 drove her to the railway station in Livingstone where she boarded the train at 0900 hours. Manifestly if her evidence was true the evidence of PWs 4 and 5 must have been a fabrication. The evidence of DW25 was not mentioned by the learned judge.
The evidence of these two witnesses against the other three accused is equally suspect. A2 was not charged with overt act 5 but was implicated in overt act 11 and the transportation across the river. But neither PW4 nor PW5 was able subsequently to identify A2 even in court, and both admitted that they could not identify him. As to PW12, he said that he had known A2 very well beforehand and any identification by him is valueless. In fact PW12 was one of the most patently dishonest of the prosecution witnesses and was completely discredited in connection with his membership of and activities in the ANC. Furthermore, a number of defence witnesses discredited P W 12, and in particular his aged father, DW. 32, said that the witness left home some time in 1973 leaving his four children to be cared for by D W 32, while DW41, a former ANC councillor in Sesheke, said that he saw PW12 some three days after new year in 1973.
A3 was not charged with either of the overt acts in this group; PWs 4 and 5 implicated him in the transportation. But neither of these witnesses identified A3 subsequently nor were they able to identify him even in court.
A4 was implicated only by PW12. Once again however the witness admitted that A4, his local Member of Parliament, was well known to him. In these circumstances an identification by a thoroughly discredited witness is valueless.
It should be said that there was also alibi evidence, with which however, in the light of the foregoing, it is unnecessary to deal.
The fifth group of events relates to overt act No. 8 and subsequent transportation across the river. The only prosecution witness called in support of this overt act was PW7, who said that he and three others were recruited by A1 at Livingstone at 1,500 hours on the 2nd January, 1973, and driven to Soka Village where A1 left them, and A2 then transported them across the river. However DW19, who regarded himself as a prosecution witness, said that he was recruited with PW7 and two others at 2100 hours on a day in January, 1973, which he did not specify; he said that he was recruited by one Kalimbwe and Anderson Sililo. In addition to this conflict PW7 was plainly discredited in cross - examination as to his connections with A1 and his family and he admitted that his statement to the police contained many mistakes.

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Both PW7 and DW19 said that they were transported across the river by A2. A2 gave evidence of an alibi in relation to the 2nd January, and the evidence of DW29 was that PW7 was still in Zambia several days after that date. Although therefore both the witnesses implicated A2 the evidence cannot be regarded as satisfactory; the evidence of PW7 is discredited in a number of respects particularly as to the date, and DW19 was unable to state the date and did not identify A2 on the identification parades.
A3 and A4 were not implicated in these events.
In the sixth group of events, overt acts 3 and 6 allege recruitment by A1 of a total of thirty - seven people at separate villages In the Kaoma District on the 9th January, 1973; it was alleged that they were then driven overnight in a lorry to Mwandi where, with the exception of one man to whom we will return in a moment, they were transported across the river by A2 and A4. Only three of this group gave evidence, PWs 3, 6 and 18, and named three separate villages as the places where they were recruited. Where precisely these villages are situated is not clear. But PWs 3 and 6 testified that A1 recruited them at their respective villages during the day on the 10th January, and drove them to a rendezvous where they met PW18; PW18 on the other hand said that A1 and one Mushala recruited him at his

village earlier on the same morning (indeed it seems that A1 and Mushala are alleged to have spent the previous night at that village) and driven him to the same rendezvous where they met PWs 3 and 6. It is clearly impossible for both these stories to be correct.
But even more strikingly, it is clearly impossible for A1 to have been at Mwandi between 2000 and 2100 hours on the evening of the 10th January, as alleged by these three witnesses. A1 said that at the conclusion of a long journey from Kaoma to Lusaka and then on to Livingstone he was involved in an accident in Livingstone at 1930 hours on the 10th January. He said that by the time statements were taken by the police it was 2300 hours and that he then drove his damaged Land - Rover to his home in Livingstone and went to bed. His evidence was corroborated by several defence witnesses some of whom were his relatives, but was corroborated also, and quite conclusively, by a Chief Inspector of Police called by the defence who produced the police docket dealing with the traffic accident. This docket discloses that at the time A1 was supposed to be at the river bank at Mwandi he was in fact in the company of the police in Livingstone, some 110 kilometres away.
Neither A2 nor A4 was alleged to have been involved in either overt act 3 or overt act 6, but they were alleged to have transported the group across the river. However, none of the witnesses subsequently identified the second appellant at an identification parade nor did they identify him in court. PW3 admitted that "Sishwashwa" was just a name to him and that he could not identify the person he saw; PW6 referred on several occasions to one "Mushashu", testifying that the man in question

said "if you don't know me I am Mushashu", and subsequently substituted the name Sishwashwa following a leading question put to him in court.
A4 testified that he attended a ceremonial opening of Parliament on the 10th January, 1973, accompanied by his wife; in the afternoon he attended the traditional reception given by the Speaker. He said that after the reception he and his wife returned to their home in Chilenje and that they remained in Lusaka until the 14th January. Apart from being corroborated by his wife, A4 was corroborated also by a fellow Member of Parliament and by an assistant accountant of the National Assembly who produced a payment voucher and a cashed cheque in respect of allowances covering the sitting in Parliament. The voucher and cheque were dated the 11th January and both were counter - signed by A4.
When it was put to PW6 that A4 could not have been one of the men who transported him across the river because he was in Lusaka on that day attending the opening of Parliament, the witness retracted and said that it was not A4 to whom he had intended to refer but to one Liwanga.
The three witnesses who testified to this group of acts were closely questioned concerning the dates on which the alleged events took place; they were very firm that they were not mistaken about the dates. It might be argued - and we make the point because although this argument was not advanced in the present case it was specifically advanced in identical circumstances in *Muyangwa* (1) - that particularly in relation to events which took place a long time ago witnesses are frequently mistaken as to precise dates, and we must not assume that the offence was in fact committed on that date. We repeat what we said in *Muyangwa* (1) in response to that argument:

> "There might perhaps be circumstances in which, as between two prosecution witnesses who in other respects are absolutely truthful but who differ as to a crucial date, a court might possibly say that one of the witnesses is obviously mistaken; but where, as here, the only evidence before the court is that an offence was committed on a particular day it is unthinkable that the court should assume adversely to the appellant that the witnesses were mistaken and that in fact it must have been committed on some other day."

In fact these witnesses could not have been mistaken as to the dates. As will emerge presently, the first three appellants were arrested in the late evening of the 11th January, in other words on the very day on which DW14 (whose evidence we are about to discuss) presented himself at the police station at Mwandi; if the witnesses were speaking the truth as to the involvement of the various appellants the events could certainly not have taken place on a later date. Equally, unless DW14 was lying as to the number of nights he spent

at a nearby village the events could not have taken place earlier. This therefore was a case in which the date on which the events in question took place was capable of being fixed and was in

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fact fixed; but the foregoing comments are nevertheless relevant to other overt acts where the dates of the events could not be so readily established.
Finally as to this group of acts, we turn to the thirty - seventh man who was brought to the river bank but was not transported across the river. It was alleged by the prosecution that this man presented himself at the police station at Mwandi early on the 11th January, saying that he was among thirty - seven people who were to be transported across the river but that he managed to escape from them, and that he came to report that they were "crossed by force". The defence very understandably argued that if this evidence was true and if the report made by this man was true he should have been the prosecution's star witness, since the very fact of his escape and report to the police negatives any suggestion that he should be treated as an accomplice or as a suspect witness. In fact he was not called by the prosecution, but was called by the defence and became DW14. In the witness box he gave a frankly incredible story as to how he came to present himself at the police station. He said that he was on his way to Livingstone from Kaoma District and was stranded at Mwandi when the vehicle in which he was travelling drove off without him; he said he spent the night at a nearby village and that the headman took him to the police the next morning to seek assistance to enable him to get back to his village, whereupon the police accused him of being one of the recruits and that he had been recruited by A1 and one Mushala. He said that he denied these allegations and that he was severely beaten to force him to admit them, and that in the course of continual beatings during the following week both his knee caps were injured so seriously that he required surgery on both knees. There was no attempt on the part of the prosecution to deny that the very serious injuries sustained by this witness were sustained as a result of assaults by the police while the witness was in their custody.
Needless to say, the evidence as to what DW14 is alleged to have said to the police is not evidence as to the truth of what he said; it is simply evidence that he said it. But there is direct evidence that in fact DW14 was among this group of thirty - seven recruits, that evidence having been given by his brother PW18 and his cousin PW6. The position therefore is that DW14's evidence in court on this point is discredited by its own inherent improbability and his previous statement to the police to completely different effect; there is direct evidence that he was one of a group of recruits and that he escaped at the last minute. Although therefore in other respects the brother and cousin are not credible witnesses, on this point they are corroborated by the evidence as to what DW14 himself said to the police and by the very fact that he was so severely beaten. Precisely what made DW14 escape literally at the last moment is a matter of speculation; it is impossible to accept that a group of thirty - seven young men who according to their story suddenly find themselves about to be ferried across the Zambezi at gun point would all meekly submit, particularly when one of their number has successfully made his escape, and there were only two men engaged in the operation of transporting. In our

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view, for this and a number of other reasons which it is unnecessary to detail the only possible inference to be drawn from the evidence is that the various recruits including DW14 were willing recruits. One can only assume that at the last moment DW14 himself had second thoughts and made a run for it. But whatever his reason for running, what is quite clear is that at no time did he implicate any of the appellants, and if in fact A1, A2 and A4 were at the river bank that night DW14's failure to implicate them is, to put it at its lowest, significant. And more significant still is his evidence that the police beat him severely in an effort to persuade him to implicate A l and Mushala.

In these circumstances it is impossible to attach any weight to the evidence of the three witnesses whom the prosecution chose to call in support of the alleged overt acts 3 and 6, and in support of that portion of overt act 13. And yet the learned trial judge, without considering any of these matters - and there are many others of a similar nature with which we refrain from dealing because it is unnecessary to do so - accepted the evidence of these witnesses as credible and reliable. This is a finding which cannot reasonably be entertained on the evidence; the witnesses were manifestly lying on the two important issues, namely the identity of the people who recruited them and their own involvement. It is necessary now, in order to complete the factual picture, to deal with the events of the 11th January when A1, A2 and A3 were arrested. The inference is overwhelming that it was the report by DW14 that alerted the police. As a result two cars were stopped and the occupants arrested; the one contained A1 and one Mwanamwali, who was the fifth accused in the abortive trial in April, 1973; the other contained A3 and five young men who were alleged to be recruits. The evidence of the Assistant Inspector of Police, PW32, who arrested A3 and the five occupants of his car was that he had searched the car and found a revolver pouch; he said that A3 admitted throwing a revolver out of his vehicle during the course of the two - mile chase along the dirt road near Mwandi immediately preceding the arrest. According to the witness the party was proceeding back along the dirt road in search of the revolver when the other car containing A1 and Mwanamwali was encountered and stopped.

PW32 said that after a search they found a loaded revolver which A3 said In the presence of A1 belonged to the latter. All this evidence was denied by both A3 and A1, and in particular the finding of the revolver and the pouch was denied.

The five occupants of A3's car were intended to be called by the prosecution in the trial in April, 1973, of the four appellants and Mwanamwali; as we recounted earlier, a *nolle prosequi* was entered against A4 and Mwanamwale after the alleged recruiting agents had proved hostile, and a *nolle* was entered against the first three appellants also after one of these five alleged recruits had been called by the prosecution and also proved hostile. The picture that has emerged from the evidence in this case is of a well organised campaign to recruit men for military training in a foreign

country with the object of overthrowing the Government of Zambia by force. That this recruitment and training took place is common cause. The evidence is overwhelming that the men were willing recruits; their stories of abduction at gun - point are inherently improbable, and In some instances quite absurd. The question is not whether the basic events took place but the identity of the people involved. The appellants all alleged that they were being falsely implicated at the instance of the investigating officers. In certain instances the allegation of false implication has been affirmatively proved, as where alibis were positively established or the recruits were still in Zambia after the alleged date of their transportation; in the remainder the prosecution evidence is conflicting and unsatisfactory. And the suspicion attaching to the whole of the prosecution evidence is heightened by three aspects of the case involving the investigation, namely the treatment of DW14, the investigation of what was described as a revolver but was in fact an automatic pistol and the circumstances in which it was allegedly found, and the length of time between the apprehension of the prosecution witnesses and the holding of identification parades and the taking of further statements thereafter from the witnesses. It is heightened further by the refusal of the prosecution to call half the recruits or to tender them for cross - examination.

As we have said, the inference is overwhelming that it was the report by DW14 that alerted the police and led to the arrest that same night of the first three appellants. According to PW32, to whom the report was made, DW14 said that he had escaped from a group of men who were to be transported across the river by force. One must ask oneself why such a witness should shortly afterwards be beaten to the extent that it was necessary to operate on both his knees. The inference is strong that the report and subsequent statements by

DW14 was not to the liking of the investigating officers, and since it is incontrovertibly established that the recruitment, transportation and subsequent military training in South - West Africa did in fact take place only the identity of the people behind the campaign can have been in issue.

The various trainees were arrested on their return to Zambia in October, 1973; they made statements at that time to the police. They were detained under the Preservation of Public Security Regulations. Yet it was not until the following August that identification parades were held and further statements made, although the four appellants had been in custody throughout the period. Many of the witnesses repudiated important aspects of their statements. It is difficult to avoid the conclusion that the witnesses did not for some nine or ten months implicate the appellants; one has to ask oneself why not, if their subsequent implication was the truth.

We have to comment also on the repeated evidence of violence and other forms of coercion used by the police in the investigation of this case. We have referred to the allegations by DW14. which were not challenged; we have the many allegations by defence witnesses, and also some by prosecution witnesses. And we have also the evidence of all four appellants that they made confessions after prolonged beatings; it is a

matter for comment that the prosecution made no effort to introduce the confessions in evidence, the fact of their existence (unchallenged) emerging only in the evidence of the appellants.

The evidence concerning the finding of the pistol and pouch and the subsequent investigation is unsatisfactory in the extreme. The offences of which the appellants were suspected were capital offences; and the investigating officers appear to have made no effort to establish who was the registered owner of the pistol, nor to test either it or the pouch for fingerprints; equally, neither the magazine nor the bullets (which were not produced as exhibits) were tested. DW32 said that he gave the pistol to very senior police officers at Force Headquarters. We find it inconceivable that the forensic staff at Headquarters would not have conducted these routine investigations to establish the ownership of the pistol and the persons who had recently handled it. We can only refer again, as we have had occasion to do so frequently, to the case of *Kalebu Banda v The People* (11) in which this court has laid down that where the failure to test an article for fingerprints is a dereliction of duty on the part of the investigating officers, as it most certainly was here, the rebuttable presumption is raised that the fingerprints of the accused persons were not in fact on that article. This presumption could be rebutted by strong evidence. However, there is no such evidence in this case; on the contrary, the account of how the pistol was thrown out of the vehicle and then found in the bush in darkness at a point two miles from the spot where A3 was arrested is inherently improbable. Furthermore, if A3 took the trouble to throw the pistol out of the car why did he not also throw out the pouch? And further, why should he immediately lead the police back to the spot where he had thrown it when he could so easily have led them to a quite different spot?

It must be said that the explanations given by Al and A3 for their presence near Mwandi on the night of the 11th January, were somewhat improbable. But however much suspicion one might feel concerning the events of that night, they were not proved to be connected with the overt acts charged or with any similar acts.

We repeat: the decision in this case does not depend on the failure of the learned trial judge to regard the recruits as accomplices or as witnesses with a possible interest. The decision rests on the thoroughly unsatisfactory evidence given by the prosecution witnesses, on the deep suspicion attaching to the investigation and in particular on the fact that repeated use of physical assaults and coercion by the police was proved, and on the fact that the trial was manifestly unfair. We share the anxiety of the law enforcement agencies to spare no effort to protect the society from the activities of those bent on its destruction. But for investigating officers to go to such lengths, or for a trial court to lean heavily in favour of the prosecution, is almost certain to be counter - productive, and may well result in the

fatal weakening of an otherwise sound case. Such misguided enthusiasm, far from securing the conviction of the guilty, may well result in guilty men going free.

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There can be no question of applying the *proviso* in this case; these convictions cannot possibly be upheld. The appeals of all four appellants are allowed and the convictions and sentences set aside.
Appeals allowed and sentences set aside

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