SHAMWANA AND 7 OTHERS v THE PEOPLE (1985) Z.R. 41 (S.C.)

EDWARD JACK SHAMWANA 1st Appellant.
VALENTINE SHULA MUSAKANYA 2nd Appellant.
GOODWIN YORAM MUMBA 3rd Appellant.
ANDERSON KAMBWALI MPOROKSO 4th Appellant.
THOMAS MAPUNGA MULEWA 5th Appellant.
DEOGRATIAS SYIMBA 6th Appellant.
ALBERT CHILAMBE CHIMBALILE 7th Appellant
LAURENT KANYIMBU 8th Appellant.
v THE PEOPLE Respondent

SUPREME COURT
SILUNGWE, C.J., NGULUBE, D.C.J., MUWO, J.S., BWEUPE AND SAKALA, AG. JJ.S.
(S.C.Z. JUDGMENT NO 12 OF 1985)

AUGUST 8-10, 13-17 , 20-24, 27-31, 1984
SEPTEMBER 3-7, 17-21, 24 1984 AND APRIL 2, 1985

Flynote
Criminal Law and Procedure - Autrefois acquit - Treason - Overt acts - Applicability to.
Criminal Law and Procedure - Charges - Amendment - Amendment by court on its own motion - Misdescription in overt act amended in ruling on no case without opportunity for accused person to argue - Whether injustice caused - Whether permissible.
Criminal Law and Procedure - charges - Amendment - Lateness of - Public interest - Consideration of.
Criminal Law and Procedure - Charges - Duplicity - Treason - Two or more conspiracy overt acts laid - Allegation in court was that the accused prepared to do something - Overt act was that the accused endeavoured to do something - Whether charge open to the objection of duplicity.
Criminal Law and Procedure - Charges - Uncertainty - Treason - Overt act of conspiracy - Particulars not set out - Whether charge uncertain.
Criminal Law and Procedure - Minor offence - Treason - Reduction to misprison in ruling on no case - Application of s.181C.P.C. - stage of trial when permissible.
Criminal Law and Procedure - Trial - Attorney-General as prosecutor - Whether entitled.

p42

Criminal Law and Procedure - Trial - Credibility - Final Finding on credibility of witness made in ruling on no case to answer - Propriety of.
Criminal Law and Procedure - Trial - Trial within a trial - Cross-examination by accused of prosecution witnesses relating to confession statement of co-accused - Whether permissible.
Criminal Law and Procedure - Trial - Unfair trial - Adverse pre-trial publicity - Whether trial unfair.
Criminal Law and Procedure -Trial - Unfair trial - Basis by court -audience granted to prosecutor and one member of defence team in absence of other accused or their advocates - Prosecutor obtains adjournment - Whether trial unfair.

Criminal Law and Procedure - Trial - Unfair trial - Executive has indicated a desire to secure convictions - Whether trial unfair.
Criminal Law and Procedure - Trial - Unfair trial - Improper conduct by police before trial - Whether unfair trial.
Criminal Law and Procedure - Trial - Unfair trial - Prosecutor also potential witness -Propriety of.
Evidence - Accomplice - Bargaining with Prosecution by - Whether evidence admissible.
Evidence - Accomplice - Ethical or legal grounds for exclusion of - Basis for exclusion or admission.
Evidence - Accomplice - Corroboration - Mutual corroboration - When possible.
Evidence - Confessions - Breach of Judges rules - Effect of.
Evidence - Corroboration - Evidence of accused implicating co-accused - Whether corroboration required.
Evidence - Hearsay - Documentary evidence - Incriminating documents found on farm previously occupied by some of the accused and their confederates - Whether contents hearsay - Whether documents admissible.
Evidence - Interrogation notes - Notes of interview taken in aid of police investigations - Not read over to or signed by suspect - Whether admissible in evidence - What use permissible at trial.
Evidence - Judicial notice - record of another court - Competency of trial court to take judicial notice of.
Evidence - Overt act of conspiracy - Evidence of distinct acts not laid as overt acts - When admissible.
Evidence - Overt acts - Evidence tendered in support of overt acts not made out applied to other overt acts - Whether permissible.

Headnote

Seven of the appellants were convicted of treason while one was convicted of misprision of treason. Originally, all of them were charged with one count of treason alleging that they prepared to overthrow the lawful Government. At the close of the prosecution case the trial court ruled that some of the overt acts had not been made out; the court amended the particulars of one of the remaining overt acts; it placed one of the accused on his defence on the lesser charge of misprision. On appeal, numerous grounds were argued alleging, inter alia, that the charge was bad for duplicity because two or more conspiracy overt acts were laid and because the evidence disclosed two different subplots for executing the coup plot; that the charge was bad for duplicity because while the court used the word "prepared", one overt act used the word "endeavoured". It was also argued that certain overt acts were bad for uncertainty; the conspiracy overt act was bad for uncertainty because detailed particulars of the acts of omissions of each accused were not given, the overt act alleging that one of the appellants was in command of "the said illegal army stationed at Chilanga", was bad for uncertainty because the illegal army was first mentioned in an overt act not alleged against the particular accused. Other complaints were directed against the amendments to the information effected at the close of the prosecution case. It was also argued that the trial was unfair; that the evidence of an accomplice who testified after bargaining with the prosecution should have been excluded; that certain documents were wrongly admitted and in any case their contents were hearsay evidence. Other misdirections were alleged concerning the admission of confessions and interrogation notes; and the talking of judicial notice of another court's case record. The learned trial judge made use of evidence tendered ostensibly in support of overt acts not made out; and he also relied in certain respects on the uncorroborated evidence of a co-accused. A key accomplice witness

told certain lies but a, final finding was made in the ruling on no case submissions that he was credible. There was a number of accomplice witnesses and the question arose whether there was corroboration for their evidence and whether they could mutually corroborate each other.

Held:

(i) Duplicity is a matter of form, not of evidence and, as such, it must be gathered from the count itself. Overt acts cannot render a count which is not double bad for duplicity. Although preparing is different act from endeavouring, the count could not be said to be double because it only alleged preparation to overthrow the Government. The allegation in the particulars of overt act that certain of the appellants endeavoured to persuade a witness to do certain things could not be transported into the count so as to make it allege a preparation as well as an endeavour to overthrow the Government and so make the count double;

(ii) An overt act of conspiracy to overthrow the Government need not set out detailed particulars of the acts or omissions of each accused person; such details and particulars are matters of evidence and their absence does not result uncertainty;

p44

(iii) Under section 273 of the Criminal Procedure Code, the trial court had power to amend of its own motion the particulars of an overt act in line with the evidence given. Since the amendment did not alter the substance of the allegation and merely corrected misdescription, the trial court had properly exercised that power. The accused suffered no injustice where they were offered an adjournment and a chance to recall witnesses;

(iv) It is competent for trial court, in a ruling at the close of the case for the prosecution, to place an accused on his defence on a lesser charge - the application of section 181 of the Criminal Procedure Code may arise either before or at the no case to answer stage, or even at the judgment stage;

(v) The trial was neither unfair nor was the verdict rendered unsafe or unsatisfactory where the executive expressed a desire to secure convictions and there was adverse pre-trial publicity since none of these factors was shown to have influenced the trial judge;

(vi) On the facts of the case, there was no bias on the part of the court when the triad judge granted audience in chambers to state prosecutor and one member of defence team and when the only business transacted was the granting of an adjournment to the prosecutor. Because one of the advocates in the defence team was present, no prejudice was suffered by the accused represented by other advocates or those representing themselves when they did not attend the brief transaction;

(vii) Since an extra curial statement is evidence only against the maker, unless it has been adopted by the co-accused, it was unnecessary for the non-makers of the confession statement to be accorded the opportunity of cross-examining witnesses in a trial within a trial. As it was competent for the court to exclude the non-makers of the confession from

participating in the trial within trial, their complaints that this was evidence of bias on the part of the court or that they were prejudiced could not be entertained; the trial was not thereby rendered unfair;

(viii) (a) Allegations of unfair and improper conduct on the part of the police during investigations had no bearing on the unfairness or otherwise of the trial itself, and did not render the trial unfair;

(b) The Attorney-General, who also happens to be the Minister of Legal Affairs, is allowed to prosecute; he is a Public Prosecutor by virtue of section 2 of the Criminal Procedure Code, and since he is also a legal practitioner, it was lawful for him to represent the Director of Public Prosecutions in that character;

p45

(c) Since the Attorney-General was potential witness for the defence, and in every case where prosecutor or defence counsel is given notice that he would be called as a witness for either side to give evidence other than formal evidence, it is desirable for such prosecutor or defence counsel to withdraw, though failure to do so is not illegal; because the Attorney General did not infact play the dual role of prosecutor and witness, there was no irregularity and no cause for complaint;

(ix) (a) An accomplice who has been charged, either jointly or alone, should not be called as a witness by the prosecution unless he is omitted frown the indictment or his plea of guilty is taken, or before calling him the prosecution either offers no evidence against him and secures his acquittal or enters a nolle prosequi. An accomplice who testifies after bargaining with the prosecution is still a competent witness;

(b) Though the practice of calling accomplices as prosecution witnesses has received condemnation on ethical grounds, it is unnecessary for the court to add to the weight of such condemnation or to dissipate it. If there remains a very powerful inducement, the court may decide to exercise its discretion in favour of exclusion of the accomplice evidence;

(c) In exercising its discretion, the covert must take into account all the factors, including those affecting the public; it is in the interest of the public that criminals, especially in serious crimes, should be brought to justice;

(x) (a) Documents found on a farm previously occupied by some of the appellants were admissible, and their contents not hearsay because they were published maps which are admissible as public documents. In any case, the maps had markings on them made by a prosecution witness who was at the form;

(b) Documents containing the names of the persons at the farm were admissible though the author was not called; because witness familiar with the author's handwriting had recognised them and lead made tracings on one of the documents. The requirements of proving private documents were met,;

(c) The rule against hearsay applies equally to documents found at the farm. However, the documents were admissible, and not hearsay, because the documents, as things, were real evidence and also because documents which are, or have been in the possession of a party are admissible as original circumstantial evidence to show his knowledge of their contents, his connection with, or complicity in the transactions to which they relate, or his state of mind with reference thereto;

(xi) On a charge of treason no evidence is admissible of any distinct or independent overt act not laid in the indictment unless it amounts to a direct proof of the overt acts that are laid; the evidence of distinct overt acts of the appellants in

p46

furtherance of the coup plot afforded direct proof of the overt act of conspiracy to overthrow the Government and was properly admitted;

(xii) Although statement made in breach of the Judges' Rules is admissible the breach raises rebuttable presumption of involuntariness and unfairness. Where a breach of the Judges' Rules has been admitted or established, it is for the prosecution to advance an explanation acceptable to the court for such breach: *Chilufya v The People* (1975) Z.R. 138 explained.

(xiii) Interrogation notes recorded by the police during an interview with a suspect who was not warned and cautioned, and who did not have the notes read over to him, or signed by him, and who was not even shown the notes which were recorded in aid of police investigations, cannot be the equivalent of confession and as such cannot be produced in court. Interrogation notes may at best be used only to refresh a witness's memory;

(xiv) In an appropriate case, particularly where facts may be judicially noticed after an inquiry has been made, a judge has power not only to look at his own records, but also those of another judge and to take judicial notice of their contents: *Fatyela v The People* (1966) Z.R. 135 overruled on this subject; Evidence tendered ostensibly in support of allegations of overt acts not made out is, if relevant, admissible in proof of the other overt acts which were made out;

(xvi) The evidence of an accused person who testifies on oath in his own defence which is against the co-accused should only be taken into account as against the co-accused if it is corroborated or supported by something more.

(xvii) Finality of assessment as to a witness's credibility, especially as to his truthfulness, should be reserved until the final judgment stage, after both sides have been heard; it was wrong to make final assessment in the ruling on no case to answer submissions;

(xviii) In some cases accomplices of a class may be mutually corroborative where they give independent evidence of separate incidents and where the circumstances are such as to exclude the danger of jointly fabricated story.

Cases cited:

(1) R. v Dawson (1960) 1 All E.R. 558
(2) Mulcahy v R. (1868) L.R. 3 H.L. 306
(3) R. v McCafferty (1867) 10 Cox 603
(4) Mattacka v Republic (1971) E.A. 495
(5) Lansana and Others [1970-1971] A.L.R. 186
(6) R. v Greenfeld and Others [1973] 1 W.L.R. 1151

(7) Mwandila v The People (1979) Z.R. 174
(8) The People v Kunda (1977) Z.R. 223
(9) Wright v Nicholson (1970) 1 W.L.R. 143
(10) Walbwork v R. (1958) 42 Cr. App. R. 153
(11) R. v Smith (1950) 2 All E.R. 679
(12) Mark Kaunda v The People (1982) Z.R. 26
(13) Harris v R. (1976) 62 Cr. App. R. 28
(14) R. v Johal and Ram (1972) 56 Cr. App. R. 348
(15) Hermes v R. (1961) R. and N. 34
(16) Kapowezya v The People (1967) Z.R. 35
(17) Sebugenyi v R. (1959) E.A. 411
(18) Phiri (C) v The People (1973) Z.R. 168
(19) R. v Secundo Mancinelli (1957) 6 N.R.L.R. 19
(20) Robert Ndecho and Anor v R. 18 E.A. App. R. Vol. VIII p.171
(21) R. v Justine (1962) R. and N. 614
(22) Haonga and Others v The People (1976) Z.R. 200
(22) Practice Note, Queen's Bench Division (1962) 1 All E.R. 448
(23) R. v Fulunete (1957) R. and N. 332
(24) Tembo v The People (1980) Z.R. 218
(25) Hahuti v The People (1974) Z.R. 154
(26) Muvela v The People (1974) Z.R. 20
(27) Chipango and Ors v The People (1978) Z.R. 304
(28) R. v Malik (1968) 52 Cr. App. R.140
(29) R. v Savundra (1968) 52 Cr. App. R. 637
(30) Bwalya v The People (1979) Z.R. 1
(31) R. v Bodwin Justices [1947] 1 All E.R. 109
(32) Myburgh v R. [1960]1 R. and N. 148
(33) R. v Tembo [1957] R. and N. 424
(34) Njekwa v R. (1958) R. and N. 770
(35) R. v Van Rensburg (1930) S.R. 119
(36) Sakafunya v The People (1968) Z.R. 86
(37) R. v Bryan James Turner [1975) 61 Cr. App. R. 67
(38) Winsor v R. [1985] L.R. 1 Q.B. 289, 390
(39) R. v Tomey [1909] 2 Cr. App. R. 329
(40) R. v Owen (1839) 9 C. and P. 83
(41) R. v Feargus O'Connor [1843] 4 St. Tr. (N.S.) 935
(42) R. v Pipe [1967) 51 Cr. App. R. 17
(43) R. v Rudd [1775] 1 Comp 331

(44) Subramanain v Public Prosecutor (1956) 1 W.L.R. 965

(45) R. v Gillespie [1967] Cr. App. R. 172
(46) R. v Van Vreden [1973] 57 Cr. App. R. 818
(47) R. v Lambert [1967] Crim. L.R. 480
(48) Ibrahim v R. (1914) A.C. 599, 609
(49) Commr of Customs and Excise v Harz and Power (1967) 61 Cr. App.
(50) Zondo and Ors v R (1963-1964) Z and N.R.L.R. 97
(51) Muwowo v The Peole (1965) ZR 91
(52) Zeka Chinyama and Ors v The People (1977) Z.R. 426
(53) Callis v Gunn [1963] 2 All E.R. 677
(54) R. v Payne [1963] 1 All E.R. 848
(55) Chilufya v The People (1975) Z.R. 138
(56) Chulu v The People (1969) Z.R. 128
(57) R. v Sang [1979] 2 All E.R. 1222
(58) R. v Renne [1982] 1 W.L.R. 64, [1982] 1 All E.R. 424
(59) R. v Prayer [1972] 56 Cr. App. R. 151,160
(60) R. v Houghton (1979) 69 Cr. App. R. 197
(61) R. v Cockley (1964) 148 J.P.R. 663
(62) Njobvu and Anor v The People (1978) Z.R. 372, 377
(63) Tapisha v The People (1973) Z.R. 222
(64) R. v Watson [1980] 2 All E.R. 293
(65) Kafuti Viongo v The People (1977) Z.R. 423
(66) R. v Fenon and Ors. [1980] 71 Cr. App. R. 307.
(67) Belemu v The People (1973) Z.R. 41, 42
(68) Ambrous Mudenda v The People (1981) Z.R. 174
(69) Commonwealth Shipping v Peninsular Branch Services (1923) A.C. 191 at P. 212; [1922] All E.R. 207
(70) R v Chona [1962] R. and N. 344
(71) Craven v Smith [1869] L.R. 4 Exch 146
(72) Fatyela v The People (1966) Z.R. 135
(73) Baldwin and Francis Ltd v Patent Tribunal [1959] A.C. 663
(74) Afred Mulenga v The People (1977) Z.R. 106
(75) Kuruma v R. [1955] A.C. 197
(76) Shamabanse v The People [1972] Z.R. 151
(77) R v Rudd [1948] 32 Cr. App. R. 138
(78) R v Prater [1960] 44 Cr. App. R. 83
(79) R v Stannard and Ors [1964] 48 Cr. App. R. 81

(80) R v Whitaker [19761 63 Cr. App. R.193
(81) Phiri (E) and Ors. v The People (1978) Z.R. 79
(82) Tembo v The People (1972) Z.R. 220
(83) Mulwanda v The People (1976) Z.R. 133
(84) Chimbo and Ors v The People (1982) Z.R. 20
(85) Likando v The People (1975) Z.R. 161
(86) Mwambona v The People (1973) Z.R. 28

(87) Miyoba v The People (1977) Z.R. 218
(88) D.P.P. Kilbourne [1973] 1 All E.R. 440
(89) R. v Baskerville [1916] 2 K.B. 658
(90) Credland v Knowler [1951] 35 Cr. App. R. 48
(91) R. v Thorne and Ors [1978] 66 Cr. App. R. 6
(92) Mulenga and Ors v R. [1960] R. and N. 12
(93) Butembo v The People (1976) Z.R. 193
(94) R. v Trigg [1963] 47 Cr. App. R. 94
(95) R. v Lewis [1937] 4 All E.R. 360
(96) R. v Griffiths and Ors [1965] 49 Cr. App. R. 279
(97) D.P.P. v Doot and Ors. [1973] 57 Cr. App. R. 600
(98) R. v Lucas (1981) 2 All E.R. 1008; (1981) 73 Cr. App. R. 159
(99) Kape v The People (1977) Z.R. 192
(100) The People v Swillah (1976) Z.R. 338
(101) Simutenda v The People (1975) ZR 294
(102) Chimbini v The People (1973) Z.R. 191
(103) Zonde and Ors v The People (1980) Z.R. 337
(104) Musongole v The People (1978) Z.R. 171

Legslation referred to:

1. Zambia:

(a) Penal Code, Cap146, ss 43 (1) (a) and (3), 44 (b), 62 and 219
(b) Criminal Procedure Code, Cap160 ss2, 82, 86, 88, 134, 137 (f), 181 (1) and (2) 183 (1), 182-188, 189, 206, 254, 255, 273 (2) and 291
(c) Preservation of Public Security Act, Cap.106
(d) Constitution of Zambia, Cap 1, Arts 20 (2) and (5) 57 and 58
(e) Supreme Court Act, Cap52, s.5 (1)

2. England:

Indictments Act, 1915, ss5 and (1); Schedule 1 r 9

3. Sierra Leone:

Treason and State Offences Act, 1963, s17.

4. Uganda:

(a) Penal Code, s.76A (1).
(b) Criminal Procedure Code, ss.213 and 213 (1).

For the 1st Appellant	In person.
For the 2nd Appellant:	Robert Gatehouse, Q.C.; with him Messrs John M Mwanakatwe and Bevin C. Willombe of M.M.W. and Company.
For 3rd Appellant:	In Person.
For 4th, 5th, and 8th appellants:	R.K.K. Mushota, of Lusaka Partners.
For 6th Appellant:	In Person
For the 7th appellant:	C P Sakala, Assistant Senior Legal Aid Counsel.
For the respondent:	The Attorney-General, Hon. G.G. Chigaga, S.C.; with him the

Director of Public Prosecutions Mr J.A. Simuziya; the Director of Legal Services Corporation, Mr G.M. Sheikh; and Principal State Advocate, Mr R.R. Balachandran.

Judgment

SILUNGWE, C.J.: delivered the judgment of the court.

The appellants, Edward Shamwana, Valentine Musakanya, Goodwin Mumba, Anderson Mporokoso, Thomas Mulewa, Deogratias Symba, Albert Chimbalile and Laurent Kanyimbu, hereinafter referred to as A1, A2, A3 A4, A5, A6, A7 and A8, respectively, were, together with four others tried before the High Court on an information containing one count of treason, contrary to section 43(1) (a) of the Penal Code, Cap146. The particulars of the offence were that, between April 1 and October 16, 1980 they, together with Pierce Annfield (who had since fled the country), had prepared at Lusaka, Mwinilunga and other places unknown in the Republic of Zambia, to overthrow by unlawful means the Government the Republic of Zambia as by law established, by eleven specified overt acts.

At the close of the case for the prosecution, the four other persons jointly charged with the appellants were all found to have no case to answer and were accordingly acquitted. However, all the appellants, with the exception of A4, were put on their defence as charged, save that the number of overt acts was reduced from eleven to four. The first of the overt acts alleged that, on divers dates between April 1st and October 16th, 1980, A1, A2, A3, A4, A5, A6, A7 and A8, together with Pierce Annfield, had conspired at Lusaka to overthrow by unlawful means the Government of the Republic of Zambia as by law established. In the second overt act, it was alleged that, between April 1 and July 31, 1980, A1, A2 and A3, together with Pierce Annfield, had endeavoured at A1's house in Kabulonga, Lusaka, to persuade Christopher Joseph Kabwe to make arrangements which would result in an aeroplane carrying the President of the Republic of Zambia landing at an unauthorised place where the President would fall into the hands of armed persons who would force him, at gun-point, to sign a declaration renouncing his office as President of the Republic of Zambia. The third overt act alleged that, on divers

dates between April 1 and October 14, 1980, A5, A7 and A8 had recruited from the Mwinilunga District, about sixty-five persons (thirty-eight of whom were named in the overt act) and had conveyed them to a farm referred to in this case as Chilanga Farm, Lusaka, with the intention of forming an illegal army for the purpose of overthrowing by unlawful means the Government of the Republic of Zambia as by law established. And the fourth overt act alleged that A6 was in command of the said illegal army at Chilanga Farm which was intended to be used for the overthrow by unlawful means of the Government of the Republic of Zambia as by law established.

As regards A4, the charge against him was reduced to misprision of treason contrary to section 44 (b) of the Penal Code (an offence with which he had initially been charged, in addition to the treason count).We shall later in our judgment revert to this matter.

A1, A2, A3, A5, A6, A7 and A8 were all convicted of treason and received the mandatory death penalty. A4 was convicted of misprision of treason and sentenced to imprisonment for ten years.

All the appellants appealed against their convictions and, in the case of A4, he appealed against sentence also.

This was a long and complex trial the record of which run into some 5500 pages. The case commenced in the High Court on November 2th, 1981 and lasted, on and of, until January 20th, 1983, when judgment was delivered and the appellants were convicted and sentenced. The complexity of the case was compounded by the fact that there were 122 prosecution witnesses (who will hereinafter be referred to as PW1, PW2 and so on), in the main trial; 158 exhibits, and an abundance of applications, objections and the trial court's rulings thereon. The period between January 20th, 1983, and August 8th, 1984, (when the hearing of the appeals started) was used for the preparation of the case record on appeal, the formulation of grounds and additional grounds of appeal by the appellants and also of heads of argument by the appellants and the State and replies thereto by the appellants. Altogether, eighty-five substantive grounds of Appeal (let alone the numerous subsidiary ones) were argued. The hearing of the appeals took twenty-eight days.

A1, A2, A3, and A4 are all Zambian nationals but A5, A6, A7 and A8 are Zairean nationals. Unlike the English jurisdiction and some other common law jurisdiction where treason is an offence committed against the duty of allegiance (see Archbold, 41st edition, paragraphs 21-14), in Zambia any person who is charged with treason, whether or not he owes his allegiance to Zambia or to another country, is amenable to the Zambian jurisdiction, save that, in terms of section 43 (3) of the Penal Code, a non - Zambian is not punishable for treason committed outside the country.

The principal witness for the prosecution was Major - General Christopher Kabwe, PW5, who was, at the material time, head of the Zambia Air Force (ZAF) in his capacity as Chief of Staff. PW5 had jointly been arraigned with the appellants but was later granted immunity against

prosecution: a nolle prosequi was entered in his favour and he became a state witness. He was rightly presented by the prosecution as an accomplice witness and so, support for his evidence became necessary.

The case for the prosecution was that, sometime between the months of April and May ,1980, PW5 had been approached at the Lusaka Flying Club by A3, a former school-mate of his, and been informed of plan - which had reached a very advanced stage - to carry out a coup d'detat in Zambia and that PW5 was to be one of the participants therein. The coup d'etat was to be financed by powerful people within and outside the country.

At a subsequent meeting held at A1's house in Kabulong, Lusaka, attended by A1, A2, A3, Pierce Annfield and PW5, the plan for the over-throw of the Zambian Government was cut-lined to PW5: he was told to find suitable ZAF pilots whose assignment was to be the diversion to a pre-selected place of an aircraft carrying the President of the Republic where he was to be forced, at gun-point, to renounce his office and to hand over power to someone else. Announcements to that effect were then to be made on Television Zambia, Radio Zambia and other forms of the news media. Following a successful execution of the plot, other national leaders, such as the Secretary - General of the ruling Party -the United National Independence Party (UNIP) - the Prime Minister, the

Secretary of State for Defence and Security, the Commander of the Zambia National Defence Forces, and all the service chiefs, including PW5, were to be arrested in order to forestall a possible counter-coup. However, PW5 was later to be released. It was stressed that there was to be no loss of blood unless this became an absolute necessity.

The co-operation of A6 and of his organisation called the National Liberation Front of the Congo (hereinafter referred to as F.L.N.C.) was then enlisted. F.L.N.C. was a political organisation of Zairean nationals in exile in Angola and Zambia whose object was to overthrow the Zairean Government. In Angola, F.L.N.C. was led by Mbumba and A6 was his Deputy. However, in March 1980, A6, who had since moved to Zambia, became the leader of the organisation which apparently had a small and incoherent membership in this country.

It was mutually arranged that A6 and his men were to join hands with the Zambian group for the purpose of overthrowing the Government of this country and that, thereafter, the Zambian group was, in turn to assist the Zairean group to overthrow the Zairean Government. In pursuance of this conspiracy, A3, A6 and A7 bought Land- Rover, registration No. AAD 5842, from Three Way Parking; and A6 bought a Combi and a Ford Transit registration Nos. ANA 1452 and AAD 9951, respectively, from Duly Motors. These motor vehicles were there used by A5, A7 and A8 at the instigation of A6 - for the recruitment from Mwinilunga, in the North - Western Province, of ex - Katangese soldiers who were, in the first place, driven to A6's Kishombe Farm at Kitwe and, from there they were taken to Chilanga Farm. Among the recruits were PWs 33-37. The men at Chilanga Farm were subsequently issued with.

p53

AK47 automatic rifles and rounds of ammunition and were under the leadership of A6 for the purpose hereinbefore stated.

The learned trial judge found support for the evidence of PW5 in A2's interrogation notes; confession statements attributed to A3, A4, A6 and A7; the evidence of PWs 1-6, 33-37, 63, 68, 69, 71, 85 and A7; in 5 documentary evidence. All this will be discussed later.

In regard to A4, the learned trial judge found him to have known that A1, A3, A7 and Pierce Annfield intended to commit treason but that he failed to report this to the appropriate authorities or to use reasonable endeavours to prevent the commission of the offence.

Several grounds of appeal have been put forward by the appellants individually, some of which being common to them all, for instance, an alleged misdirection on corroboration and other alleged misdirections by the trial court. In broad terms, these grounds related to (1) preliminary issues; (2) the alleged wrongful admission of evidence; (3) the alleged wrongful use of evidence; (4) the alleged wrongful assessment of evidence on credibility; (5) the alleged wrong specific findings; and (6) the alleged misdirections on corroboration. It is both logical and appropriate to consider these matters first before we can turn our attention to the alleged involvement of the individual appellants in this case.

1. *Preliminary Issues*

We will begins with those grounds of appear that raise preliminary issues. There are five such issues, namely, (a) duplicity; (b) uncertainty; (c) amendment of the second overt act, (d) reduction of the treason count to misprision of treason, in relation to A4; and (e) unfair trial. These issues will now be considered in the order in which they appear above.

(a) *Duplicity*

The issue of duplicity has been raised by A1 in one of his grounds of appeal. He contends that count 1 is bad for duplicity in two respects: firstly, that the first and second overt acts show that at least two conspiracies were charged; and secondly, that the wording of these overt acts discloses two offences (that is, once again, two conspiracies).

In arguing the first part of the ground, A1 affirms that the first and second overt acts each reveals a conspiracy and that, in addition thereto, the facts of the case, as shown by the evidence, also reveal at least two conspiracies, each one of them capable of being tried separately. To reinforce his argument, he points out that, in the first overt act, the conspiracy charged was allegedly committed between April 1, 1980, and July 31, 1980. He goes on to say that the conspiracy in the first overt act was supported by the evidence of PW5 and that it was to be implemented by an air-borne operation backed by a ground troop; whereas the second conspiracy was unveiled by PW68 and was to be given effect to by ground troop operation.

p54

For his argument, A1's principal authority is *R v Dawson* (1) which, he says, is similar to the present case.

In *Dawson* (1) the indictment on which the appellants - Dawson and Wenlock - were charged, included fifteen counts. Fourteen of those counts charged various fraudulent offences on dates in and between 1955 and 1957. Count 1 charged conspiracy to defraud between November 1, 1954 and December 31, 1957. The conspiracy count was charged against all four accused and as a conspiracy with others named. The transactions which were the subject of the other fourteen counts were within the purview of the conspiracy count. Both appellants were convicted on the conspiracy charge. Dawson was convicted also on the other counts. On appeal against convictions, the Court of Appeal said (per Finnmore, J., at page 563, letters E to G)

> "This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one Counsel referred to as mammoth conspiracy. Several reasons have been given. First of all if there are substantive charges which can be proved, it is in general undesirable to complicate matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence, which otherwise would be inadmissible on the substantive charges against certain people, becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable and impose quite intolerable strain both on the court and on the jury."

The court then came to the conclusion that the conspiracy count was unnecessary; that it had lengthened the trial enormously and had in fact worked an injustice (for the reason given above) on at least one of the appellants; and that, although the count charged one conspiracy, it was a count of

several conspiracies, and, therefore, duplicitous. Thus, the quashing of the convictions on the conspiracy count was inevitable.

It is apparent that here, unlike in *Dawson* (1), the duplicity complained of has direct bearing on overt acts, not on substantive count or offence as such . In *Dawson* (1), conspiracy was charged as count; in the present case, the substantive offence charged in count 1 is treason, not conspiracy. From this analysis, it becomes clear that, contrary to A1's argument, there is, in reality, no similarity between this case and *Dawson* (1).

As we see it, the real question raised by A1's entire argument on this ground is not just whether each of the first and second overt acts discloses a distinct conspiracy, but more importantly, whether, in a count for treason, two or more conspiracy overt acts may be charged in the same count, without making the count duplicitous.

Before consideration is given to the question posed in the preceding paragraph, we feel obliged to say something on the terms *duplicity* and *overt act*.

p55

In plain English, the word duplicity means doubleness, insincerity, or double dealing. In law, it means the charging of two or more separate offences in the same count. Thus, where two or more offences are charged in the same count of an indictment, the indictment is, to that extent, bad for duplicity. As we observed in *Mwandila v The People* (7), at page 176, the law relating to duplicity is intended to avoid subjecting on accused person to an unfair trial, so that he may know exactly what ease he has to answer.

It is well established that duplicity in a count is a matter of form not of evidence called in support of the count. This is illustrated by the English Court of Appeal in *R v Greenfeld and Others* (6), at page 1156; and paragraph 28-26 of Archbold 41st edition (unless otherwise sated, reference hereinafter to Archbold will be reference to the 41st edition). To ascertain whether a count is bad for duplicity, it is generally enough to examine the count itself, that is, the count's statement of offence as read with its particulars of offence, it being ordinarily unnecessary to look further than the count itself. If an examination of the count shows that two or more offences have been charged therein, then the count is bad for duplicity.

On the other hand, an overt act is an act that is open to the world, in the sense that it can be perceived by anyone placed to do so. It is an act which the law requires to be laid in a count for treason and by which alone treason is capable of being proved. When an overt act is charged in a count for treason, it is not charged as (nor does it constitute) a specific offence, but merely as a necessary adjunct to the substantive treason count. In law, any number of overt acts may be laid in the same count but, according to paragraph 21-11 of Archbold, proof of any one overt act will sustain the count, provided that the overt act so proved is a sufficient overt act of the species of treason charged in the count. However, whether the overt act proved is a sufficient act of the treason count laid in the information is a matter of law to be determined by the court.

We now return to the question earlier posed. It is trite law that conspiracy to commit treason is an

overt act of treason. That this is so is exemplified by a long line of authorities, including Archbold, paragraph 211; *Mulcahy v R.* (2); *R. v McCafferty* (3); *Mattaka v Republic* (4); *Lansana and Others* (5); and section 52 of our Penal Code. That section provides that

> "52. In the case of any of the offences defined in this Chapter (that is, the Penal Code), when the manifestation by an overt act of an intention to effect any purpose is an element of the offence, every act of conspiring with any person to effect that purpose by any of the persons conspiring, is deemed to be an overt act manifesting the intention."

(The words in parenthesis are ours). We are not aware of any legal rule or principle that precludes the charging of two or more different conspiracy overt acts in a treason count. In our judgment, it is proper and lawful to charge two or more different conspiracy overt acts in the same

p56

count for treason. *McCafferty* (3), where two conspiracy overt acts were validily laid in the same count, is a case in point.

As the learned authors of Archbold point out in paragraphs 28-5, subtitle "Conspiracy: Plot and sub-plots," it is feasible to have a broad general conspiracy, to which the learned Attorney-General has referred as the grand conspiracy, as well as sub-conspiracies. There can, for instance, be a grand plot to topple a lawful government and sub-plots as to the modus operandi in carrying out the grand plot.

It emerges from what we have said above that the charging of two or more conspiracy overt acts in the same count for treason does not ipso facto make the count duplicitous.

This then reduces to an academic interest the question raised by A1 on the entire ground, namely, whether each of the first and second overt aacts discloses a distinct conspiracy, because, as already demonstrated, neither a positive nor negative answer is capable of making the treason count duplicitous.

We think we should make some observations on this ground. These are that the conspiracy charged in the first overt act is, as earlier stated, not a specific offence, but simply as a necessary adjunct to count 1; and, on the authority of *Lansana* (5), it is charged as an act of preparation to overthrow the government by unlawful means. Similarly, the second overt act which alleges that A1, A2, A3 and Pierce Annfield endeavoured to persuade PW5 to arrange for the diversion of an aircraft carrying the President to land at an unauthorised place where he would fall into the hands of an armed band of men and be forced - at gun-point; - to renounce his presidency and to hand over power to someone else, is charged as an act of preparation for the same purpose as indicated in the first overt act. Although the word "endeavoured" appears in the second overt act, and, quite apart from what we have previously said concerning the status of an overt Acts it cannot conceivably have been used in a technical sense as envisage by section 43 (1) of the Penal Code. There is force in the learned Attorney- General submission that the word is there used to denote tried, attempted, strove or made efforts (for specific purpose) (see *Lansana* (5) at page 219). Indeed, the overt act speaks of endeavouring to persuade PW5; it does not speak of endeavouring to overthrow the government, as

does section 43 (1) of the Penal Code. Had the particulars of offence in count 1 alleged that the appellants had "prepared or endeavoured" to overthrow the government, as was the case in *Lansana* (5), the count would clearly have been duplicitous and, therefore, bad in law as the terms "prepared" and "endeavoured" would have related to two distinct specific offences of treason. This is, however not the case here.

Further, the fact that different dates are assigned to each one of the first and second overt acts, does not in itself serve to advance A1's argument as to the alleged duplicity, which, as we have seen, does not arise.

Similarly, the fact that the evidence of PW5 discloses an air-borne operation, supported by ground troop; and that of PW68 uncovers a

p57

ground troop operation, cannot sustain the allegation of duplicity because, besides being cognisant of the fact that we are here concerned with overt acts, not with a substantive offence, duplicity is a matter of form, not of evidence, and as such, it must be gathered from the count itself.

In conclusion, this ground of appeal is simply concerned with the issues of duplicity. An examination of count 1 of the indictment clearly shows that the only offence charged in the statement of offence is treason, not treason and conspiracy or conspiracies. And the particulars of offence alleged that the appellant together with Pierce Annfield prepared (not prepared or/and endeavoured) to overthrow the government. For this and other reasons herein before given, we are satisfied that count 1 is not bad for duplicity. In the result, this ground of appeal must be dismissed.

(b) *Uncertainty of the first overt act*

The next preliminary issue relates to uncertainty and has been raised by A1 and A6 in different contexts.

A1's ground on this issue is an attack on the first overt act. He claims that this overt act is bad for lack of particulars or, alternatively, for uncertainty. According to him, it is not enough for the prosecution to allege that the appellants conspired to overthrow the government by unlawful means; they must give particulars of the conspiracy by setting out the unlawful means alleged. He submits that particulars of the conspiracy are essential and that, as they were not supplied, what was alleged was a "roving conspiracy" or a "rolled-up conspiracy", and that, as such, the defence did not know what to defend themselves against. A1 relies, to a great extent, on *Lansana* (5); paragraph 28-25 of Archbold; and the provisions of section 134 of the Criminal Procedure Code (henceforth referred to as the C.P.C.).

Mr Balachandran, for the respondent, maintains that the prosecution gave sufficient particulars in the first overt act and that the provisions of section 134 as well as those of section 137 of the C.P.C., were complied with, in that the nature of the conspiracy and the names of the persons involved in the conspiracy, as well as the period of time and the place, were provided.

It is common cause that the framing of the information in relation to count l, in general, and to the first overt act in particular, was based on *Mattaka* (4), which in turn had followed *Mulcathy* (2). It is to be noted, however, that in *Mattaka* (4), the sufficiency or otherwise of the particulars of the conspiracy overt act was not in issue; what was in issue was whether it was proper and lawful to charge conspiracy as a specific overt act.

Similarly, *Lansana* (5) is not an authority for the proposition that particulars of a conspiracy overt act should be given. In argument, A1 has drawn attention to the following passage in *Lansana* (5), at page 254 lines 29 to 32:
p58

> "Further, in the absence of a special verdict it is virtually impossible for this court to determine on which act of conspiracy the appellants have been convicted. For this reason alone, I would set aside the convictions on the ground of uncertainty."

We do not think that this passage is of assistance to A1. The Court of Appeal was there concerned with the learned trial judge's erroneous summing-up which had tended to confuse the jury by leaving to them a number of distinct conspiracies as substantive charges under section 17 of the Treason and State Offences Act, 1963, with which the Accused had not been charged. Such is not the position here.

A1 relies also on paragraph 28-25 of Archbold. The paragraph is subtitled "Particulars of Offence" and appears under the heading "Indicting for Conspiracy". Obviously, the purpose of the paragraph is to focus attention on substantive conspiracy charges, not on conspiracy overt acts. The paragraph is clearly of no advantage to him. In any event, the last sub-paragraph under the sub-title: "Request for particulars", reads that -

> "On a general count (that is, of a substantive conspiracy) not alleging any overt act the court can order particulars if satisfied that without them the conduct of the defence will be embarrassed. However, this sort of difficulty will only genuinely arise on very rare occasions. The information sought on a request for further and better particulars can usually be found in the committal papers or in the Crown's opening or in both."

We now turn to consider the provisions of section 134 of the Criminal Procedure Code which are in these terms:

> "134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged; together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

The particulars referred to there are particulars of the specific, that is, substantive, offence or offences charged, not those of an overt act. The relevant provisions of section 137, ibidem, are to the same effect.

However, on the basis of paragraph 21-15 of Archbold, which discusses overt acts in relation to

high treason, and which stipulates, inter alia, that:

> "The evidence must be applied to the proof of the overt act, and not to the proof of the principal treason: for the overt act is the charge to which the defendant must apply his defence ...",

it is only fair and protein that, as general rule, reasonable information should be given as to the nature of the overt act charged, so and not to embarrass the defence.

p59

The question now is whether reasonable information was given in the first overt act by simply alleging that the appellants had conspired to overthrow the government by unlawful means. A1's answer is in the negative, because, as he puts it, it is essential for the prosecution to supply particulars of the conspiracy by giving details of the alleged unlawful means, arguing that, a conspiracy overt act cannot be established without proving the alleged unlawful means.

A1's approach must be looked at in the light of paragraph 1-57 (ii) of Archbold, titled "Duplicity", which runs counter to the subject matter of his proposition. The relevant passage comes at the end of sub-paragraph (ii) and is in these terms:

> " ...the practice of laying particulars of overt acts of conspiracy as opposed to particulars of the conspiracy itself has fallen into disuse."

From this passage, it is plain that failure to give particulars of conspiracy overt act cannot be criticised. It is sufficient to allege that accused persons conspired to overthrow the government by unlawful means, the particulars of the conspiracy, that is, of the alleged unlawful means, being a matter of evidence.

In any case, it is evident from paragraph 28-25 of Archbold that, even where a general count for substantive conspiracy is charged, without alleging any overt act, the court can order the furnishing of particulars but only if it is satisfied that, without them, the conduct of the defence will be embarrassed. Even then, this kind of difficulty will only genuinely arise on very rare occasions, as the information sought on request for further and better particulars can usually be found in the committal papers or in the prosecution's opening or in both.

In the present case, Mr Balachandran's submission is that, the statements of all prosecution witnesses were supplied to all accused persons before the case started, in compliance with section 258 of the CPC, and that, those statements disclosed the nature of evidence that was to be led in support of the overt acts charged. He states that, as the prosecution complied with the requirements of the law, it cannot be said that A1 found it impossible to defend himself. This submission is entirely valid, in the light of what has already been said above.

A1 has voiced criticism against the following ruling on the issue by the learned trial judge:

> "It is my considered view that where a conspiracy is charged as an offence itself, the

particulars ought to be provided so that the defence can prepare their case but the situation is different where the conspiracy is an overt act of some other offence; here particulars and details are a matter of evidence. The conspiracy in the present case is not an independent offence, it is an unlawful act proving the offence of treason and it is always a matter of evidence to prove particulars of the offence."
p60

Although A1 calls the ruling a serious misdirection, we are unable to see any misdirection in it.

In the final analysis on this issue, we are satisfied that the first overt act was properly and validly framed, for it is sufficient, in a conspiracy overt act, to allege that accused persons conspired to overthrow the government by unlawful means. It is unnecessary to give particulars of the conspiracy by specifying in the overt act the alleged unlawful means, as such details are a matter of evidence. The conspiracy alleged in the first overt act was, therefore, neither a "roving" nor a "rolled-up" one; and so, A1 (or anyone of his co-appellants) cannot be heard to say that he did not know what to defend himself against. What is certain is that the first overt act is devoid of uncertainty.

Before leaving this matter, we wish to point out that paragraph (a) of section 43 (1) of the Penal Code is the only paragraph there in which the expression "by unlawful means" appears; the other paragraphs, that is, paragraphs (b) to (f), do not use that expression. It goes without saying that the said expression is irrelevant in relation to paragraphs (b) to (1).

Incidentally, even in relation to substantive offences, such as manslaughter and unlawful wounding, it is adequate to allege in the particulars of offence that the accused person "unlawfully killed" (in the case of manslaughter) or, "unlawfully wounded" (in the case of unlawful wounding), a named person (see for example, specimen indictments in the second schedule to the (CPC, at page 144). In such cases, it is normally unnecessary to specify the nature of the unlawfulness or of the weapon, if any, allegedly used in the commission of the crime.

(c) *Uncertainty of the fourth overt act*

As regards A6, he contends that the fourth overt act (which concerns him alone) is bad for uncertainty and that, as such, he was unable to defend himself at the trial. He argues that the allegation that he "was in command of the said illegal army stationed at Chilanga Farm" is unclear because no other reference to the army appears in the overt act.

The criticism here is directed at the use of the expression "the said illegal army", emphasis being placed on the word "said" which means "before-mentioned". The argument is that, the fourth overt act is uncertain by virtue of the fact that there was no prior reference in the overt act, to an illegal army.

That the expression refers to the third overt act cannot be questioned. The third overt act is about the recruitment of men and their conveyance to Chilanga Farm for the purpose of forming an illegal army with which to overthrow the Zambia Government.

There can be no doubt that the linkage between the third and the fourth overt act was intended to show that there was one and the same illegal army common to both overt acts; the third overt act implicating A5, A7 and A8; and the fourth overt act implicating A6

p61

Although the term "said" was perhaps tautologous, it cannot by any stretch of imagination be argued that its use rendered the fourth overt act uncertain. Even without having any recourse to the third overt act, it is conspicuous enough that the illegal army referred to in the fourth overt act was the only one allegedly stationed at Chilanga Farm. There was thus nothing uncertain about the fourth overt act. The result is that, A6 knew or ought to have known what was alleged against him and that his ground, on this point, is without foundation.

(d) *Amendment of the second overt act*

The next ground of appeal attacks the trial court's amendment of the second overt act. Although this ground has been canvassed by A1, A2, A3, A5 and A8, the only appellants implicated in the second overt act are A1, A2 and A3.

In its original form, the second overt act alleged that an endeavour to persuade PW5 to arrange for the diversion of a Presidential aircrew had been made at a meeting held at Pierce Annfield's house in Kabulonga, Lusaka. At the trial, PW5 gave evidence of two meetings, the first of which having taken place at Pierce Annfield's house and the second one at A1's house, also in Kabulonga. The evidence was that, the first meeting, which was attended by Annfield, A3, PW5, and Sikatana - who left shortly after he was introduced to PW - yielded nothing conclusive as PW5 was told that he "would meet with some other people at a later date." The second meeting, which was held at A1's house, was attended by PW5, A1, A2, A3 and Annfield, and it was there that an attempt was alleged to have been made to persuade PW to cause the diversion of the Presidential 00aeroplane.

At the close of the case for the prosecution, and, after submissions of no case to answer, and counter submissions thereon, had been made by the defence and the prosecution, respectively, the trial court, in its ruling, amended the second overt act to read that, the endeavour to persuade PW5, in the terms already stated, had taken place at the meeting held at A1's house.

The argument, spearheaded by A1, is that the trial court was in error to amend the second overt act as it had no power to do so. The basis of this argument is that, firstly, the amendment involved & substitution of new overt act, not the correction of a misdescription; secondly, that the issue was not one of variance between the charge and the evidence but of insufficiency of evidence; thirdly, that the amendment was improperly made as it was made on the court's own motion; and fourthly that, as a result of the amendment, the appellants concerned suffered prejudice and injustice.

Since the argument as to the court's lack of power to amend the second overt act essentially rests on four propositions, the argument is best met by an examination of the propositions themselves.

p62

It is contended in regard to the first proposition, that PW5's reference to two distinct meetings was a reference to two independent overt acts, one of which (the new one) had not been charged; and that trial court was not entitled to substitute the then existing overt act for the new one.

A1 says that Annfield's house could not have been mistaken for this and that, the court's mendment by changing the venue of the alleged meeting from one house to the other was more than a correction of a misdescription as it involved a substitution of a different overt act.

In reply, the learned Attorney-General submits that the appellants have no cause to complain because the amendment of the second overt act was on a matter of description and also of a minute and inconsequential detail relating to the place of occurrence of the overt act. He goes on to say that, even before the amendment was made, the particulars of the treason count, and of the overt acts were in conformity with the provisions of section 137 of the C.P.C., as read with the second schedule thereof, which (that is, the schedule) sets out the format of specimen indictments. He states that, in accordance with the established practice, it is adequate for the indictment or information to indicate the town, district and province in which the offence charged was committed. He says that, in this case, however, the prosecution felt that a little more information should be provided and that, accordingly, not only was the city of Lusaka mentioned in the second overt act, but also the relevant township -Kabulonga - and the house. In his submission, the fact that this information was offered, does not alter the fact that it is a matter of description and also of a minute and inconsequential detail. The prosecution's stand is that, the naming of the house at which the second overt act took place, is not an essential ingredient.

The learned Attorney-General further submits that, the evidence as to the meeting at Annfield's house, was important in establishing a reasonable and logical sequence of events leading to the commission of the second overt act, that is , it was evidence leading to the direct proof of the second overt act.

In the first place, it is proposed to deal with the question whether the meeting at Annfield's house was in itself an overt act. On a charge of treason, and, regard being had to section 52 of the Penal Code, an overt act is manifestation of an intention to effect any purpose that constitutes an element of the offence, and includes every act of conspiring with any other person to effect that purpose. In this case, all that is alleged to have happened was that A3 drove PW5 to Annfield's house where they found Annfield and Sikatana, but Sikatana left immediately after PW5 had been introduced to him. At that meeting, A3 did not say anything relevant to this case; everything was said by Annfield, but we shall never know what it was that was said because, after objection had been taken by the defence, the trial court ruled that PW5 could not divulge what was said by Annfield, on the ground of hearsay. It is unnecessary here to discuss the merits and demerits of that ruling save to point out that the ruling appears to have been erroneous.

After PW5 had been told that, at a later date, he would meet with some people, the meeting was at an end and A3 drove him back to the Flying Club where he got into his car and returned home. Apart from the fact that PW5 was told that he would meet with some people at a later date, the meeting at Annfield's residence was of no consequence, in so far as this case is concerned, and

cannot be said to have amounted to an overt act, since there was no material to suggest that a manifestation of a treasonable intent was present.

The task before us now is to consider whether the amendment involved a substitution of a new overt act, or was simply a matter of correcting misdescription. In support of his argument on this point. A1 has cited *The People v Kunda* (8). This, being a decision of the High Court, can only be of persuasive value to this Court. That wa00s a case in which the accused was charged on an information containing two counts. The first count charged him with the murder of Davison Chisenga and the second count charged him with the murder of Elizabeth Kamutuka. During the course of the preliminary inquiry, the D.P.P. issued a summary trial certificate, pursuant to section 254 of the C.P.C., in respect of the second count only and the preliminary inquiry in relation to both counts was, therefore, discontinued. The accused was then committed by a magistrate to the High Court for summary trial under section 255 of the C.P.C., in respect of the second count. Subsequently, the D.P.P. filed an information for the accused's trial - not on the second count, in respect of which the accused had been commited but on the first count for which there had been no committal.

Since, in terms of section 255 of the C.P.C., the magistrate could commit, and had so committed the accused for trial before the High Court solely upon the charge designated in the certificate, namely, the charge contained in the second count, for which there had been no committal, the trial court held that the information was bad in law and could, therefore, not be amended by the deletion of the name Davison Chisenga and the substitution therefore of the name Elizabeth Kamutuka.

Kunda (8), can hardly be said to be analogous to the case now before us because, in that case, there was no valid information before the trial court, as the purported information was bad in law and, therefore, a nullity; whereas, in this case, the information was good in law, since both the statement of offence and the particulars of offence, let alone those of the first overt act, were properly and validly laid.

The learned Attorney-General has drawn our attention to a number of authorities, but we need only refer to *Wright v Nicholson* (9), at page 146, letter E, where the Queen's Bench Division (Per Lord Parker, C.J.) said that :

> "... a misdescription of premises might not even require an amendment, but where, as it seems to me here, unless amended, there might be grave injustice to the defendant, an amendment is called for."

p64

In *Wallwork v R* (10), one of the authorities referred to by the learned trial judge in his judgment, Lord Goddard, C.J., said at page 156:

> "The only other point in the Act (Indictments Act (1915)) to which I need call attention is that it is provided in rule 9 of Schedule I (which is a replica of our section 137 (f) of the C.P.C.): 'Subject to any provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any

> indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, matter, act, or omission referred to. So far as place is concerned, I think Mr Royle's point is a perfectly good one, that incest is an offence wherever it is committed, and it matters not whether it was committed in one place or another, provided the prisoner knows the substance of the charge against him. It makes no difference whether the incest in this case was committed in Sussex or Surrey or any other place. It is not intended by this single count to charge him with more than one offence of incest and the words 'County' or Sussex or elsewhere' in the opinion of the court are surplusage. It would have been a perfectly good indictment to charge him with the offence if the words 'in the County of Sussex or elsewhere' had been omitted, and there is no pretence for saying that he did not know the nature of the offence with which he was being charged."

In *R v Smith* (11) Humphreys, J., reading the judgment of the Court of Criminal Appeal, said this, page 681, letters E to G:

> "The argument for the appellants appears to involve the proposition that an indictment, in order to be defective must be one which in law does not charge any offence at all and, therefore, is bad on the face of it. We do not take that view. In our opinion, any alteration matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person .... It is to be observed that in this case the matter in respect of which the prosecution suggested that the indictment was defective was in the mere description of the thing obtained. In substance, the charge was the same, but in the view of the prosecution it was necessary to show that what was referred to in the court was not the actual sum of money obtained but the cheque, i.e., the valuable security with which in fact the society parted. We have no hesitation in this case in supporting the action of the judge in amending the indictment."

And, in *Mark Kaunda v The People* (12), Bruce Lyle, Acting C.J., delivering the judgment of the Court, said at page 29, lines 27 to 29:

> "...where the indictment is defective in mere description of the thing obtained the substance of the charge remained the same and an amendment could cure the defect."

p65

Authorities on this subject are legion. The golden thread that runs through all these cases is that, where an indictment is defective by virtue of a mere misdescription, but the substance of the charge remains intact, it is competent to amend the misdescription.

In this case, the substance of the overt act clearly lies in the attempt to persuade PW5 to arrange the diversion of the Presidential aeroplane. The evidence of PW5 unequivocally points to the residence, not of Annfield but of A1, as being the venue where the said attempt was allegedly made. We have no hesitation in coming to the conclusion that the naming in the second overt act, of Annfield's house, was a misdescription. Strictly speaking, no detail as to the specific venue of the meeting was necessary. To borrow Lord Goddard, C.J.'s term from *Wallwork* (10), such detail though not entirely

inadvisable, was "surplusage." For this reason, the trial court's amendment of the overt act, by altering the venue of the second meeting from the residence of Annfield to that of A1, was validly made and cannot, therefore, be faulted. The amendment in no way related to, or altered, the substance of the overt act, nor did it involve the substitution of a new overt act; it was in point of fact no more than the correction of a misdescription. Our decision on this matter is reinforced by *Harris v R* (13), where Stocker, J., delivering the judgment of the Court of Criminal Appeal, said at page 31, in the middle of the third paragraph:

> "But, in the view of this Court, this really is a case not of altering any substantive charge and substituting a new one, it really is a simple matter of correcting a misdescription."

R v Johal and Ram (14), at page 353 (first paragraph) is to the same effect.

The second part of the argument, which alleges that the issue was not one of variance between the charge and the evidence, but of insufficiency of evidence has, to a large extent, been dealt with during the discussion of the first part of the argument. The issue at the trial was plainly not one of insufficiency of evidence (since evidence on the point was in fact ample), but one of variance between the overt act and the evidence because there was evidence to show that the meeting at which an attempt was made to persuade PW5 had taken place at A1's house, not at Annfield's house. The amendment was, therefore, competent, subject only to the requirement that the amendment caused no injustice to the accused, in terms of section 273 of the C.P.C. It is unnecessary to consider now the subject of injustice stemming from the amendment, as we shall do so later. In our view, the following passage from Smith (11), at page 681, letters E. to F., is instructive:

> "In our opinion, any alteration in matters of description, and probably in many respects, may be made in order to meet the evidence in the case so long as the amendment caused no injustice to the accused person."

p66

We are firmly of the view that the amendment here was necessary to meet the circumstances of the case, in accordance with the provisions of section 273(2) of the C.P.C.

Next in line for consideration is the allegation that the amendment was improperly made because it was on the court's own motion. It is asserted that the amendment should have been made at the prosecution's instance. A1 maintains that it is the duty of the prosecution in every case to apply for an amendment. He argues that is it misdirection for the court to make an amendment at all on its own motion. Attention has been drawn to the case of *Hermes v R* (15), referred to in *Kapowezya v The People* (16), wherein Spenser - Wilkinson, C.J., said at page 45, line 45, and page 46, lines 1 to 3:

> "Moreover, it is not, it appears to me, the duty of a Magistrate to enter into the arena too much on his own initiative for the purpose of convicting an accused person upon some charge with which he has not been formally charged."

The learned Attorney-General's response is that, the contention that a judge cannot amend an

information, unless the prosecution have applied for the amendment, is incorrect. He concludes that, invariably, the prosecution will apply to the court for an amendment when they become aware that the amendment is necessary. But that, if the prosecution are unaware of the necessity for an amendment, it does not mean that the interests of justice would be served by dismissing the charge, even though the court is aware of the need to amend the charge. Section 273 of the C.P.C., the argument goes on, gives the power of amendment to the court and that an application made by the prosecution is made in order to assist the court in the exercise of its power.

In Zambia, section 273 of the C.P.C. (which is analogous to the provisions of section 5 of the Indictments Act, 1915 of England and Wales), confers upon the court wide powers of amendment. The main purpose of the section, like that of section 5 of the Indictments Act, is to do away with the technicalities and redundancies of pleading in criminal cases. Sub-section (2) (which is similar to sub-section (1) of section 5 of the Indictments Act) reads:

> "273 (2) Where, before a trial upon information or at any stage of such trial, it appears to the court that the information is defective, the court shall make such an order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be made upon such terms as to the court shall seem just."

Although the power of amending an information is vested in the court, it is settled practice that the prosecution, as the learned Attorney General rightly points out, invariably applies for amendment.

p67

It is submitted by A1 that, if the court wishes to amend an information on its own motion, it should in the first place invite the parties, and, in particular, the defence, to express their views on the matter. For this argument, paragraph 50 of Archbold, 39th edition (reproduced in paragraph 50 of the 40th edition and paragraph 1-63 of the 41st edition) has been called in aid. The relevant part of the paragraph reads as follows:

> "Where no application for leave to amend the indictment has been made by either side, the judge, in exercising his discretion whether to direct an amendment or not should invite the parties and in particular the defence to express their views on the matter before deciding to do so."

That this represents an established rule of practice in Zambia is beyond doubt. There is, however, an important exception to it, namely, that the rule of practice does not apply to an amendment made by the court in its ruling on a submission of " no case to answer" or in its final judgment, provided that, in the case of the ruling, aforesaid, after delivery thereof, the accused person must always be asked to plead to the amended information; be informed of his right to recall prosecution witnesses for further cross-examination; and be granted an adjournment, if so desired, to enable him or his advocate to consider the implications of the amendment.

It is inevitable to conclude that this part of the ground is of no avail.

The only issue that remains to be resolved in regard to this ground is the allegation of injustice flowing from the amendment. The criticism here is based on two propositions. The first proposition is that the appellants concerned were not accorded an opportunity to express their views on the propriety to amend, before the amendment was actually made. We have just discussed this aspect and dismissed it for the reasons given, namely, that an accused persons need not be heard before an amendment can be made in ruling at the "no case to answer" stage or in final judgment.

The second proposition is that prejudice and injustice resulted from the amendment because the appellants concerned did not defend themselves on the amended overt act.

In *Harris* (13), the Court of Appeal approved the course taken by the trial judge when he directed that the particulars of a count alleging an express false representation be amended to allege a false representation by conduct. The amendment was directed after the Crown had closed its case and after submission of no case to answer had been rejected. The Court of Appeal held that no injustice could have resulted from such a course. It made the following observations at page 32:

> "As to time at which the amendment was made, it may very well be that in very many circumstances an application to amend as late as the close of the case for the prosecution would be so

p68

> likely to involve injustice to an accused person that such an application in many instances might be refused. In this case, we can see no injustice which could have resulted, and we feel really that Mr Hordern has not pinpointed any specific injustice. He relied simply on the general proposition that an amendment at such a late stage must involve the question of injustice. We consider that it was an amendment which involved more accurate description of a representation by conduct and that could appropriately be made at the stay at which it was."

And in *Sebugenyi v R* (17), Bennet, Acting C.J., had this to say, at page 413, letters F. to I.:

> "The second point raised on behalf of the appellant was that the learned magistrate erred in amending the charge after the close of the prosecution and defence cases.
>
> The charge as originally drafted alleged "besetting" only ends the learned magistrate amended the charge so as to charge the appellant with "watching or besetting" thus following the words of the section. Learned Crown Counsel submitted that s. 76 A (1) creates only one offence and that watching or besetting as the case may be, are different modes of committing it. I agree with him . . .
> It is said that owing to the late stage at which the charge was amended injustice was caused to the appellant. In my opinion, section 213 of the Criminal Procedure Code permits court to amend the charge at any stage of the proceedings before judgment subject to conditions therein set out. This is to be implied from the words "at any stage of trial" which occur in sub-section (1).

> In the instant case the requirements of section 213 were strictly complied with. The appellant was called upon to plead to the amended charge. An adjournment was granted to enable his advocate to consider the implications of the amendment. After the adjournment the appellant's advocate stated that he did not wish any of the witnesses to be recalled and that he did not wish to call any additional witnesses. In these circumstances I fail to see how it could be said that any injustice was caused to the appellant."

In the case presently before us, when the second overt act woes amended by the High Court in its ruling at the no case to answer stage, fresh pleas were taken thereon; the appellants concerned were advised of their individual rights to recall any of the prosecution witnesses, if they so wished, for further cross-examination; and there was an adjournment of the case from August 25 to 30, 1982, during which period they had an opportunity to reflect on the implications of the amendment, which involved simple matter of correcting a misdescription. Clearly, therefore, the allegation that prejudice and injustice resulted from the amendment is without justification.

p69

(e) *Reduction of treason to misprision*

We now come to A4's grounds on preliminary issues. There are three such grounds, all of which stem from the amendment of the treason count at the no case to answer stage.

The first of the grounds alleges that the learned trial judge misdirected himself in law by holding that misprision of treason is a minor offence to treason and that, by so doing, there was a misapplication of *Phiri (C) v The People* (18), and of section 181 of the CPC.

We consider it pertinent to give a brief history of the misprision of treason count before delving into the grounds of appeal on preliminary issues. Originally, the information contained three counts, the first of which was a treason count, implicating all accused persons, including A4; and the other two were for misprision of treason, implicating A4 (second count) and another accused who has since been acquitted (third count). At a very early stage of the proceedings, and, before pleas could be taken, the defence raised objections concerning the second and third counts, on the grounds that the accused persons concerned would thereby be embarrassed and prejudiced. The objections were upheld and both those counts were struck out, leaving the treason count as the only one out standing.

At the no case to answer stage, A4 was acquitted on the treason count but put on his defence on second count of misprision of treason, and his rights were fully explained to him. When he declined to plead, a plea of not guilty was naturally entered. Later, in his judgment, the learned trial judge (hereinafter referred to as the trial judge) considered the question whether misprision of treason is a "minor offence" in terms of section 181 of the CPC and, on reviewing two leading authorities on the subject in this country, namely, *R v Secundo Mancinelli* (19), and *Phiri* (C) (18), arrived at the following conclusion:

> "Coming to the present case, bearing in mind that misprision of treason is cognate to treason

and bearing in mind the sentence of misprision of treason is lesser than that of treason, misprision of treason is minor offence and it is one of those invisible alternative charges to treason."

Section 181 of the C.P.C. provides:

"181 (1) When a person is charged with an offence consisting of several particulars, combination of some only of which constitute a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

p70

"(2) When person is charged with an offence and facts proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

Although the expression "minor offence" has been judicially considered, it is nowhere defined in our legislation. Until *Phiri* (C)(18) *Mancinelli* (19) was the leading authority in this country on the construction of section 181 supra and the judicial meaning accorded to the expression "minor offence". In *Mancinelli* (19), Bell, C.J., said, at page 23:

"No offence can be a 'minor offence' within the meaning of that subsection unless it carries a lesser penalty than the offence with which the accused person is originally charged and unless it is cognate to the offence originally charged, that is to say is of the same genus or species, *Robert Ndecho and Another v R.* (20), and comes within the ambit of section 168 (1) (corresponding to section 181 (1) of the current edition of the C.P.C.). "

This dictum was considered and approved by Blagden, J., as he then was, in *R v Justin* (21). However, in *Phiri* (C) (18), this court disapproved, in part, both *Mancinelli* (19) and Justine (21) in the following passage, appearing at page 171, lines 15 to 37;

"The dictum of Bell, C.J., would appear to hold that for an offence to be a minor offence for the purpose of section 181 (2) of the Criminal Procedure Code, three conditions must be satisfied: First, that the other offence carries a lesser penalty than the offence with which the accused was originally charged; second, that it is cognate to the offence originally charged; and third, that it comes within the ambit of section 181 (1). We deal first with the last of these requirements. With the greatest respect to Bell, C.J., we are unable to see how it can be a necessary requirement that a matter falling under subsection (2) must also fall within the ambit of subsection (1); if that had been the intention of the legislature the section would have been framed quite differently and in such a way as to make it clear that in every case not only must the facts constituting a minor offence be proved but also the particulars of the offence charged. It is difficult to see in such circumstances why subsection (2) would be necessary at all. The two subsections seem to us to contemplate two different cases. The first where the offence consists of several particulars and some of these particulars constituting another offence are proved; the second is where none of the particulars of the offence charged is proved but facts are proved which disclose another offence. We must therefore

with respect disapprove of that portion of the judgment *Mancinelli* (19), and disapprove also of the judgment in *Justin* (21) to the extent that it appears to adopt the earlier dictum."

p71

Phiri (C) (18) has since been confirmed by this court in *Haonga and Others v The People* (22).

For A4, Dr Mushota concedes that, misprision of treason is cognate to treason and that it carries a lesser penalty than treason, but argues that, even going by the authority of *Phiri* (a) (18), misprision of treason is statutorily not a minor offence, as it is not provided for under subsection (1) of section 183 of the C.P.C. He contends that, where a person is charged with treason, the only minor offence he may be convicted of is treason felony, in terms of subsection (1) of section 183.

On the authority of *Mancinelli* (19) and *Phiri* (C) (18), and, in the light of Dr Mushota's submission, the only question that remains is whether misprision of treason comes within the ambit of section 181. Dr Mustota's stand is that it does not because, it is not specifically provided for in sections 182 to 188 of the C.P.C. The learned Attorney-General's position is that, misprision of treason comes within the gambit of section 181 and that, the fact that it is not specifically provided for in sections 182 to 188 - which set out alternative verdicts that may be returned for various offences - does not preclude the application of section 181, regard being had to the provisions objection 189. That section reads:

"189. The provisions of sections one hundred and eighty-one to one hundred and eighty-eight shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections one hundred and eighty-two to one hundred and eighty-eight shall be construed as being without prejudice to the generality of the provisions of section one hundred and eighty-one."

On a proper reading of section 189, it is evident that none of the provisions contained in sections 182 to 188 can conceivably be construed as restricting the application and generality of section 181. The import of sections 182 to 188 is merely to specify some, not all, of the offences for which a conviction is permissible, although the particular offence was not charged. The application of any of these sections is, therefore, in addition to, but not in derogation of, the provisions of section 181 for, in the words of section 189, those sections "shall be construed as being without prejudice to the generality of the provisions of section one hundred and eighty-one". Thus, a minor offence need not be one specified any of the provisions contained in sections 182 to 188, but must nonetheless carry a lesser penalty than the offence with which the accused was originally charged, and come within the ambit of section 181 of the C.P.C. As we said, *Phiri* (C) (18), headnote (iv) at page 168:

"In all cases falling under s.181, the question of the cognateness or otherwise of the alternative offence is not an aspect of the definition of 'minor offence' but a factor to be taken into account

p72

by the court in exercising its discretion whether or not to convict of the minor offence."

In this case, misprision of treason is a minor offence, to treason, as it comes within the ambit of section 181 (2) of the C.P.C. it follows that the argument that a person charged with treason can only be convicted of treason felony, specified in section 183 (1) of the C.P.C. cannot be sustained.

Dr Mushota further argues that, the provisions of section 181 of the C.P.C., contemplate that the issue of minor offence can only arise at the final judgment stage, not at the no case to answer stage. The basis of this argument is that, subsections (1) and (2) of the section, respectively provide that proof of some of the particulars of the offence charged; or of the facts; which reduce the original offence to a minor offence, may result in the accused's conviction. Dr Mushota says that the catch word is "proof" and that this can only mean proof beyond a reasonable doubt which can only arise at the final judgment stage, adding that, the proposition is reinforced by the phrase: "he may be convicted of the minor offence," which is common to both subsections. We are unable to accept the proposition. In the view that we take, proof may be prima facie or beyond a reasonable doubt. In our opinion, the term "convicted" appearing in the expression: "he may be convicted of a minor offence" can only relate to the possibility of convicting if the court were to receive no further evidence. A Practice Note (22 (a)), given by the Queen's Bench Division (per Lord Parker, C.J.) lends support to our opinion. It reads (letters G and H):

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, submission is made that there is no case to answer, the decision sBhould depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

Further, in *R v Fulunete* (23), Somerhough, J., had this to say, at page 339, lines A to B:

p73

> "Accordingly, I find that the prisoner William Kasungo has no case to answer upon the information for murder, and I dismiss that charge. But I am satisfied that there is evidence upon which, if I were to hear no more, I could convict the prisoner of common assault, and of no other type of assault. I shall therefore call upon him for his defence to a charge of assault contrary to the provisions of section 219 of the Penal Code."

From what we have said, it is obvious that the application of section 181 of the C.P.C. may arise either (before or) at the no case to answer stage or at the judgment stage. Here, too, Dr Mushota's argument is unsustainable.

One other aspect raised on this ground is that, the trial judge misapplied section 181 of the C.P.C. by his failure to distinguish between subsections (1) and (2).

Although it is true that the trial judge did not expressly refer to any of the subsections of section 181, it is clearly implicit from his judgment that the subsection he was referring to is subsection (2).There is, therefore, no good reason for criticism.

A4's next ground of appeal, originally based on section 206 of the C.P.C. (rather erroneously as this section applies to proceedings before the subordinate court) but now centres on section 291 of the C.P.C., alleges that, when the trial judge found that A4 had no case to answer on the charge of treason, he should have acquitted him and set him free, rather than put him on his defence on the charge of misprision of treason, *Penias Tembo v The People* (24), and *Hahuti v The People* (25), are cited in support of the argument.

It will be observed that both *Tembo* (24) and *Hahuti* (25) are irrelevant here, not only because they were tried before the subordinate court, but more importantly, because they relate to a situation where an accused person is found to have no case to answer but is improperly put on his defence (on the original charge) and subsequent evidence incriminates him and so leads to his conviction. The *Tembo/Hahuti* situation does not arise where an accused person, though found to have no case to answer on the original charge, some of the particulars of the original charge, or, a combination of them (particulars), constitute a complete minor offence; or, as here, facts are proved which reduce the offence, in terms of section 181 of the C.P.C.

The final ground on the subject of amendment is that, the trial judge erred by reintroducing the count for misprision of treason against A4, in his ruling at the no case to answer stage, adding that A4 was thereby subjected to a mistrial. Dr Mushota contends that, the count for misprision of treason ceased to exist in the information from the time it was struck out, at the preliminary stage, on the grounds that,

if allowed to stand, it would embarrass and prejudice A4. He accuses the trial court of failure to indicate at what stage the embarrassment and prejudice has subsided or dissipated and of having erred by holding that the offence of misprision of treason did not prejudice A4. He submits that his client was prejudiced by, and suffered injustice as a result of, the amendment, contrary to the provisions of section 273 (2) of the C.P.C.

In our judgment, it is erroneous to suggest that, the putting of A4 on his defence on the offence of misprision of treason, amounted to a reintroduction, or reinstatement, of the original count which had been struck out at the preliminary stage in the trial. Our reason for this standpoint is simply that the misprision count at the no case to answer stage did not flow from the original count previously struck out: it flowed from the treason count itself, by virtue of the fact that it is a minor offence to treason in terms of section 181 (2) of the C.P.C.

The only critical issue raised by this ground is whether A4 suffered injustice on the ground that he

did not have a fair opportunity to meet the alternative charge. In *Muvela v The People* (26) headnote (ii), at page 21, we said:

> "The fundamental test to be applied in considering whether a court should exercise its discretion to substitute a conviction for a lesser offence is whether the accused can reasonably be said to have had a fair opportunity to meet the alternative charge; the fact that the alternative is or is not cognate to the offence originally charged will be one of the factors to be taken into account."

In view of the fact that misprision of treason is a cognate offence to treason; that A4 was asked to plead to the alternative charge (though he declined to do so); that his rights were fully explained to him especially the right to recall any of the prosecution witnesses for further cross examination; and there was an adjournment of the proceedings from August 25 to 30, 1982; we do not see why it should be argued that A4 did not have a fair opportunity to meet the alternative charge. In any case, as to cognateness, the commission of the offence of treason involves knowledge of the offence and participation in its commission. Once participation is removed, leaving the knowledge that treason is being planned or committed, but failing to report it to the authorities as soon as possible the offence of misprision of treason emerges. We are satisfied that A4 had a fair opportunity to meet the alternative charge of misprision of treason and, therefore, that no injustice was occasioned to him, either in terms of section 273 (2), or, of section 181(2) of the C.P.C (as to the latter section, see *Haonga* (22), at page 209, lines 36 to 46 and page 210 lines 1 to 20).

(f) *Unfair trial*

The last of the preliminary issues consists of allegations of unfair trial. The allegations are contained in two grounds of appeal, put forward by A1 and subdivided into four parts, namely, (i) the state's desire to

p75

convict, and hence, its lack of neutrality, including pre-trial publicity; (ii) bias by the trial court; (iii) unfair and improper conduct by the police; and finally, (iv) misdirection by the trial judge in allowing the learned Attorney-General to prosecute.

(i) *State's desire to convict*

As to the first of these allegations. A1 argues that, the state was anxious to secure convictions and so it delayed in bringing appellants to trial as it was searching for evidence to ensure that there was a "water tight" case against the appellants. He says that the prosecution has tried to make the court believe that this is a complicated case by calling 122 witnesses. In his submission, the case is a simple one and raises no new principles of law.

Covering different aspects of the allegation both the learned Attorney- General and the D.P.P. maintain that the delay in bringing the accused persons to court was neither deliberate nor did it amount to an unfair trial. It is submitted that the state tried to follow this court's guidelines given in *Chipango and others v The People* (27), where we said at page 312, lines 2 to 3: "It was in the

hands of the D.P.P. to reduce this case to manageable proportions", but that it met with limited success because the case involved a "large and complicated scheme." It is further submitted that the case was long and complicated, involving 40 persons who were apprehended and detained; 122 prosecution witnesses, 158 exhibits, including books of account pertaining to bank transactions; and the recovery of firearms; and that, in the circumstances, it was not possible to carry out, and complete, investigations within matter of weeks. It was, therefore, only fair that the prosecution should satisfy itself that it had evidence to put before the court. The state goes on to say that, the accused persons were brought before the subordinate court in May 1981, but that later, nolle prosequi was entered and the proceedings were discontinued. Subsequently, another information was preferred against the accused persons, this time, including Sikatana but excluding PW5; and that, in August, 1981, the accused persons were summarily committed to the High Court for trial.

It is common cause that, shortly after their apprehension, the appellants and their co-accused in the court below, were detained under the Preservation of Public Security Regulations, Cap. 106.

We have given a careful consideration to the arguments advanced for and against the allegation of delay in prosecuting the appellants, and are of the opinion that this has been a long and complicated case of an enormous magnitude; and that it is probably the longest criminal case in the history of this country.

In view of the magnitude and complexity of the case, and the conduct of the prosecution in the matter, we consider that the delay which was for a period of about seven months, was occasioned by the circumstances of the case it self; and that, it was neither deliberate nor did it constitute an unfair trial.

p76

Another aspect of A1's complaint as to the State's desire to secure convictions and hence rendering itself devoid of neutrality, is a criticism against the President. He complains, for instance, that the President though he is the fountain of justice, asked the Indian Prime Minister for experienced prosecutors and recalled the Chief Justice from abroad. These complaints may shortly be answered: it is a moot point whether there was an attempt to recruit special prosecutors from India or whether the Chief Justice was recalled (which he was), because, the prosecution of this case was conducted by a team of local personnel led by the learned Attorney-General and the D.P.P., and the case was tried, not by the Chief Justice, but by a puisne judge. It cannot seriously be argued that these or any of the other related complaints, with which it is unnecessary to deal here, had any influence on the conduct of the trial and, more importantly, on the trial judge and hence on the verdict, thereby making it unsafe or unsatisfactory.

There is, on this issue, another category of complaints, this time directed against the prosecution itself. There are four such complaints but, here again, it is unnecessary to deal with all of them for the reason already given in the preceding paragraph. It, therefore, suffices to refer only to one of them as an example. A1 alleges that the prosecution would at the trial, passionately support a legal point, but that when a contrary decision was made thereon, which was likely to bring a conviction, the prosecution would, in a similar fashion, support the decision as if it had been their original argument.

As we have previously pointed out, this, and other similar complaints, cannot be said to have had any bearing on the conduct of the trial or on the trial judge so as to render the trial unfair.

The final category of complaints on this issue is in connection with the said pre-trial publicity. A1's position is that, once in Lusaka and once in Maputo, Mozambique, the President held press conferences at which he said, inter alia, that the State had a "water-tight" case, and that this was reported in the mass media. Similarly reported, he says, was a press conference given by the Secretary of State for Defence and Security at which he allegedly said, inter alia, that Pierce Annfield, one of the persons named in the information, was hiding because he had committed a serious offence against the State.

It is common cause that, the publicity complained of - as against the President - took place well before criminal proceedings in this case were instituted. However, that attributed to the Secretary of State for Defence and Security occurred at the preliminary stage of the proceedings in the High Court, for which he was tried and convicted of contempt of court but was later successful on appeal to this Court.

It must be made abundantly clear that, the possibility of a conviction being set aside on an appeal, because of adverse re-trial publicity - where this is established - arises only if the appellants had not had a fair trial and there was an absence of overwhelming evidence. The test is whether the appellant had not had a fair trial.

p77

In *R v Malik* (28), the appellant complained that, because of adverse pre-trial publicity, he had not had a fair trial. Delivering the judgment of the Court of Appeal, the Lord Chief Justice said at page 145 (last paragraph):

> "This Court has considered this matter with some anxiety because, if the Court felt that there was any danger that this appellant had not had a fair trial, they would without hesitation set aside the conviction."

The question whether there was any danger that the appellant had not had a fair trial, due to adverse pre-trial publicity, was again recognised in *R v Savundra* (29), where, prior to the commencement of criminal proceedings against the appellant on charges of gross fraud, he was interviewed on television. With no experience of television, the appellant was faced with a skilled interviewer whose clear object was to establish his guilt before an audience of millions of people. On the facts of that case, Salmon, L.J., delivering the judgment of the Court of Appeal, said at page 643:

> "This Court is quite satisfied that, in the particular circumstances of this case, there was no real risk that the jury was influenced by the pre-trial publicity. Also, perhaps most importantly, the case for the Crown was so overwhelming that no jury could conceivably have returned any different verdict against Savundra."

It seems to us that the issue of pre-trial publicity is more relevant and significant where a judge sits

with a jury (the triers of questions of fact); as jurors, being lay people, are susceptible to being influenced by extraneous matters. This is not usually so when a judge sits alone as trier of questions of both law and fact since his legal training enables him to expunge extraneous matters.

In this case, we are satisfied that there was no risk that the pre-trial publicity complained of in any way influenced the trial judge in arriving at his verdict.

(ii) *Bias by the Court*

We now have to consider the alleged bias by the trial Court. It is enough here to deal with three of the points raised by A1. The first of these points is an allegation that the trial judge met the prosecution in chambers and there adjourned the case in the absence of A1 and other appellants who were representing themselves. His authority for this is paragraph 33-06 of Phipson on Evidence, 13th edition (henceforth referred to as Phipson) which reads:

> "33-06 (1) The accused has the right to be present during the whole of his trial upon indictment whether he be represented by counsel or not, subject to one qualification, that he does not abuse his right. If he abuses that right for the purpose of obstructing

p78

> the proceedings of the court by unseemly, indecent or outrageous behaviour, the judge may have him removed and proceed with the trial in his absence, or he may discharge the jury.
> (2) It would seem that a trial for treason cannot otherwise proceed in the absence of the accused, even though he consents or though his absence is voluntary, e.g., he has absconded from his bail."

In part, the provisions of Article 20 of the Constitution pertaining to an observance of a fair trial in criminal proceedings do reflect the contents of the paragraph quoted above, but make no reference to a trial for treason. This is what the relevant part of the Article says:

> "20. (2) Every person who is charged with a criminal offence (a) shall...;
> and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance **15** of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

Briefly, the factual situation in this case is that an adjournment had been sought and granted in open court to enable the defence, and there after the prosecution, to prepare a written submissions. The defence prepared theirs but, as the prosecution could not do so within the time allocated for the purpose, Mr Sheikh, a member of the prosecution team, approached one of the defence lawyers - Dr Mushota - and with him saw the trial judge in Chambers and his application for extension of time was heard and granted. In his judgment, the trial judge dealt with the matter in the following manner:

> "Before I consider the evidence in this case, I should comment briefly on the complaint of

> accused 1 that this court sat and granted an adjournment to the State on 28th September, 1982, in his absence as he was representing himself. The brief proceedings are on record. I was approached by Mr Sheikh for the State and Dr Mushota at about 12.55 hours. Mr Sheikh applied for an extension of time within which to make submissions and Dr Mushota fairly indicated to the court that although he had no opportunity to consult his colleagues and accused persons, looking at the stage of the proceedings, he had no objection. It should not look as if the court saw the prosecution only and nobody from the defence. I do not consider what transpired as proceedings which prejudiced the accused persons who were not represented on that day."

In the circumstances of this case, we cannot see any justification in criticising the trial judge's course of action concerning a simple and innocuous procedural matter. Neither A1 nor any of his co-appellants not represented during the brief proceedings can be said to have been prejudiced thereby. We feel that, the paragraph quoted from Phipson and the provisions of Clause (2) of Article 20 of the Constitution, relate

p79

to material parts of the proceedings, in order to safeguard the interests of the accused persons. There can be no merit in the argument that the brief proceedings complained of rendered the trial unfair in regard to the unrepresented appellants, including A1.

The case of *Bwalya v The People* (30), is to be distinguished from the present case because, there, the presiding resident magistrate allowed himself to be engaged "in private consultation" in his chambers with a state advocate and two of the main prosecution witnesses from whom he recorded answers to questions that had been written by the accused. We said in that case that it was "improper" for the resident magistrate to consult with the State advocate in the absence of the appellant and came to the following conclusion, at page 3, lines 24 to 25:

> "In view of the fact that justice was not seen to be done, this Court cannot say that no miscarriage of justice occurred."

R v Bodwin Justices (31), is also distinguishable in that, after an officer of the applicant - a soldier - had given evidence as to the applicant's character, which was not a bad character, "added that there was a lot more that he could say but he would not say it . . ." When the justices retired to consider the question of sentence and, during their retirement, they sent for the officer and interviewed him in their room in the absence of the accused or his advisers. Lord Goddard, C.J., said in his judgment that, that was a matter which could not "possibly be justified", adding that :

> "Justice must not only be done but must manifestly be seen to be done, and, if justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what was said."

Myburgh v R (32), where, in the course of the hearing, the prosecutor interviewed the magistrate alone during an adjournment, is to the same effect.

Bearing in mind what we have said, A1's submission on this point is unsuccessful.

The allegation by A1 that the triad judge showed bias and prejudice by excluding him and some of his co-appellants from cross-examination of witnesses in trial-within-the-trial, in respect of confession statements allegedly made by some of the appellants can shortly be dealt with.

Essentially, the point raised here hinges on the status of ex-curia statements. It is a fundamental rule of evidence that statements made by one defendant, either to the police or to others (other than statement's whether in the presence or absence of co-defendant, made in the course and in pursuance of a joint criminal enterprise to which the co-defendant was a party) are evidence only against the maker, not against a co-defendant, unless the co-defendant either expressly, or by implication, adopts the statements and thereby makes them his own: see paragraph 14-60 of Archbold. Nowhere in this case is it suggested that confession

p80

statements allegedly made by any of the appellants were adopted by the other co-appellants, and so, those statements were evidence only as against the makers. This being the position, it was unnecessary for the non-makers of the confession statements to be accorded the opportunity of cross-examining witnesses in trials-within-the-trial. As the exclusion of non-makers of confession statements during trials-within-the-trial was competent, neither A1 nor any of his co-appellants can be heard to complain about it.

Another of the criticism levelled against the trial judge concerns a reference by him to A1's submission as being "very childish". This is given to demonstrate the alleged bias by the trial court.

A brief historical background is here desirable. The defence had taken objection to the learned Attorney-General's role in the proceedings as public prosecutor. After submissions had been made by the defence and the prosecution, the trial judge made a ruling in which he overruled the objection. The expression complained of appears in the ruling, the relevant part of which reads as follows:

> "Coming to the present case now, I will consider whether the grounds filed are sufficient upon which I may advise the Attorney- General to withdraw. As I have just been talking about interest in the matter, I will deal with the last ground, namely that as Minister he is an interested party.It has been submitted that as a Minister in the Government against which the plot is alleged to have been aimed, he is an interested party. Perhaps this may be a good political science moot question but it is (probably this should have read "is it") relevant here: Who is the government? On an elementary level I would say that the government is the executive, the legislature and the judiciary. If there are any merits in this ground it would appear to me that this court has an interest in the matter and therefore should not preside over the matter. With the greatest respect, I feel this ground is very childish."

The dictionary meaning of the term "childish" is: puerile, silly, weak, feeble, foolish, petty, idle, trivial, trifling, futile, simple. Whether the trial judge intended to convey the meaning pertaining to any of the following words: puerile, weak, feeble, petty, idle, trifling, futile, or simple, on the one

hand, or puerile, silly, foolish, on the other, is moot question. Although it would have been more appropriate for him to use more temperate language, the critical point is whether, on the facts as recounted, and, regard being had to the trial judge's analysis of the issue before him and the definition he attached to the term "government", it can conceivably be said that he was biased against the defence and that the defence were thereby deprived of the fair trial? We do not think so, for we are unable to read any bias or partiality in his ruling. This and other similar aspersions cast on the trial judge are as unfortunate as they are uncalled for.

p81

In our opinion, the trial judge deserves considerable sympathy. The trial, as previously pointed out, lasted almost eleven months, on and off, judgment being delivered some five months later. This was a long and intricate trial during which there was a welter of an unprecedented number of objections and applications, some of them totally unnecessary. But through it all, he conducted himself as best as he could. Above all, he displayed a remarkable degree of patience and judicial poise, even under difficult and trying circumstances.

As against allegations of partiality, it is noteworthy that the trial judge tried the Secretary of State for Defence and Security (the fourth highest ranking person in the Republic) for, and convicted him of, contempt of court, ordered the severance from the information of one of the original thirteen accused persons, against strong opposition from the prosecution; reduced the number of overt acts from eleven to four; and acquitted four accused persons at the no case to answer stage.

We are not by any means trying to suggest that the trial judge was entirely free from misdirections, far from it; all we are saying is that, in all the circumstances of this case, it cannot justifiably be said that there was an unfair trial, engendered by the trial court's partiality. That the trial court was all in all an impartial arbiter in the matter is unquestionable.

(ii) *Unfair conduct by the police*

Next to be considered is the alleged unfair and improper conduct by the police. Quite frankly, we cannot see how this can become an ingredient of unfair trial. It is our view that any alleged police impropriety has no bearing on the issue of unfairness of the criminal trial, since individual allegations, for instance, as to the voluntariness of confessions, are dealt with in trials-within-a-trial. This ground is without merit.

(iv) *Attorney-General as Prosecutor*

The final allegation for consideration under the subject of unfair trial is that the trial judge misdirected himself by allowing the learned Attorney-General to prosecute in this case. A1 argues that the trial judge should have advised him to withdraw from the prosecution team after objections had been raised by the defence and that, failure to do so, was a misdirection, leading to the unfairness of the trial. A1 goes on to say that, his position as Minister of Legal Affairs and Attorney-General, is not the same as that of the Attorney-General in England: his position is the same as that of the Lord Chancellor and that, under the English practice, it is unthinkable that the Lord Chancellor can appear in a court to prosecute subject.

Although A1's analogy appears to be attractive, it is in Act falsely based because, the position of the Minister of Legal Affairs and Attorney-General in Zambia is not parallel to that of the Lord Chancellor in England. Whereas the Minister of Legal Affairs and Attorney-General in Zambia is

an important member of both the Executive and the Legislature the Lord Chancellor in England wears three separate and distinct caps by his membership of all the three traditionally renowned branches (or organs) of Government under the doctrine of separation of powers: the Executive, the Legislature, and the Judiciary. The Lord Chancellor is leading member of the Cabinet, Speaker of the House of Lords, the Upper House of Parliament; and head of the Judiciary, in which capacity he presides as a judge over the two highest courts in the realm: the House of Lords and the Judicial Committee of the Privy Council. The position of the Lord Chancellor is, therefore, unique and unprecedented in common law jurisdictions, including Zambia.

The Judiciary in Zambia is headed by the Chief Justice, not by the Minister of Legal Affairs and Attorney-General. And what's more is that, the Minister of Legal Affairs and Attorney-General, unlike the Lord Chancellor, enjoys no judicial powers.

Whilst conceding that section 2 of the C.P.C. includes the Attorney- General as public prosecutor, A1 contends that that section is ultra-vires the Constitution. We regard this ground to be without merit because, although in one breath he relies on constitutional provisions, he concedes in the other that the Constitution does not specifically say that the Attorney -General cannot prosecute. In actual fact, nowhere in the Constitution can it be implied that the Attorney-General is denied power to prosecute. Article 57 of the Constitution provides for the qualifications, appointment and termination of appointment of the Attorney-General and designates him as the "principal Legal adviser to the Government." And Article 58, ibidem, makes provision for the appointment and powers of the D.P.P.

When the Minister of Legal Affairs and Attorney-General appears in Court, he does so in his capacity, not as Minister, but as Attorney- General. By section 2 of the C.P.C. the interpretation section - the following provisions appear:

> "2. In this Code unless the content otherwise requires - 'public prosecutor' means any person appointed under the provisions of section eighty-six and includes the Attorney-General, the Solicitor - General , the Director of Public Prosecutions, the State Advocate and any other practitioner as defined in the Legal Practitioner's Act appearing on behalf of the people in any criminal proceedings."

The fact that sections 82, 86 and 88 of the C.P.C. which provide for the delegation of powers by the D.P.P., power to appoint public prosecutors and withdrawal from prosecution in trials before subordinate courts, respectively, are silent about the Attorney-General, does not detract from, nor in any way limit, the operation of the provisions of section 2 of the C.P.C. to which reference has already been made.

The position that emerges is that, whilst it is unthinkable that the Lord Chancellor in England can appear before a court to prosecute, due to his special status, it is not only thinkable but also permissible for the

p83

Attorney-General in Zambia to prosecute, in terms of section 2 of the C.P.C. Further, as the Attorney-General is a legal practitioner and head of the legal profession, he is entitled to appear on behalf of the people. Thus, the D.P.P may be represented in criminal proceedings by the Attorney-General, the Solicitor - General, a state advocate or legal practitioner.

The question its whether it was desirable for the learned Attorney- General to appear in this case, in the light of the fact that he was a potential witness for the defence. The issue of undesirability to prosecute depends on the circumstances of each individual case.

In *R v Tembo* (33), the accused was convicted of theft of a small item of property belonging to a police officer. The said police officer conducted the prosecution and was, therefore, the principal witness, not only in his capacity a police officer, but also in his personal capacity as the owner of the property alleged to have been stolen. On appeal to the High Court of the then Nyasaland (now Malawi), the appellate court said, at page 425, lines D to F:

> "It is always undesirable for the same person to be both a prosecuting officer and a witness in a criminal case. It is appreciated, however, that in outlying districts in this country it is often impossible to find a prosecuting officer other than the investigating officer, so that in some cases there is no alternative but for the prosecuting officer to give formal evidence in addition to conducting the prosecution.Where, however, the interests of the prosecuting officer are personally involved he cannot himself conduct the prosecution, and in such a case, some other prosecuting officer must be found or the case must be transferred to another Court."

In *Njekwa v R* (34), the Federal Supreme Court of the then Rhodesia and Nyasaland held that it is undesirable for the prosecutor, in a case, to be a witness for the prosecution in respect of anything, with the exception of purely formal matters. Delivering the Judgment of the Court, Clayden F.J., said, at page 775, lines D to G:

> "Authority in regard to the propriety of a prosecutor giving evidence in a case in which he prosecutes is, naturally, not to be found in closely settled countries. But the question has arisen in Africa. In Southern Rhodesia (now Zimbabwe) in *R v Van Rensburg* (35), that the prosecutor should give evidence, particularly evidence that is not merely of a formal character, but one has to take into consideration the circumstances of this country. We have a very sparse population, and in some of the smaller places the prosecutor is generally an officer of the police force has a good many duties of a different character imposed upon him, and very often he not only has to prosecute. Facts may have come to his notice in one or another of his public capacities, and if it is necessary for him to give them in evidence and in doing so there is no real prejudice to the accused, I do not think that the mere

> technical point that it is undesirable for the prosecutor to give evidence should be taken to be a ground upon which the proceedings are to be upset."

Sakafunya v The People (36), followed *Njekwa* (34).

Having examined the relevant authorities, we think that, where a prosecutor or defence counsel is given notice, verbal or written, that he would be called as a witness for one side or the other to give evidence, other than formal evidence, it is desirable for such prosecutor or counsel to withdraw, though failure to do so is not illegal. But where he has not played the dual role of prosecutor and witness, as in this case, there is no irregularity and absolutely no cause for complaint.

In the result, the complaint by A1 that the trial judge misdirected himself by overruling the defence objection and thereby allowing the learned Attorney-General to prosecute in this case, cannot be entertained.

Other issues have been raised but, in our view, none of them had any influence on the trial judge so as to make the verdict unsafe or unsatisfactory.

2. *The alleged wrongful admission of evidence*

The next major issue is as to the alleged wrongful admission of evidence. The various grounds of appeal on this issue centre around five topics, to wit, (a) the exclusion of PW5's entire evidence, on legal or ethical grounds; (b) hearsay evidence; (c) evidence of distinct and independent overt acts; (d) confessions; and (e) interrogation notes.

(a) *The exclusion of PW5's entire evidence*

In so far as the first topic is concerned, A1 strongly submits that the trial judge erred in not exercising his discretion to exclude the entire evidence of PW5 on legal or, alternatively, on ethical grounds, since this witness gave evidence after bargaining with the prosecution about his release and indemnity if he gave evidence for the prosecution. He goes on to say that PW5 was considered by the prosecution as being on contract. In this way, the argument continues, PW5 was not a free agent, as failure to give evidence would have relegated him to his former position, which would have meant his being redetained and prosecuted.

The learned D.P.P.'s reply is that the trial judge did not err in exercising his discretion to admit the evidence of PW5, in spite of the fact that he had bargained with the prosecution before he turned State witness. He concedes that, in his evidence, PW5 said that, before he agreed to turn State witness, he laid down certain conditions which the State had to meet, one of which was that he should be released from custody and, to that end, he was released and thereafter granted an indemnity from prosecution for his complicity in the coup plot. In his submission, there was nothing wrong with PW5 bargaining with the State before turning State witness, more so that in doing so, he sought legal advice from his legal representative. He contends that there is nothing illegal or unethical in the said bargaining, since the practice

p85

has been in existence for a very long time, adding that this case is on all fours with *R v Bryan James Turner* (37). We will revert to this case in a moment, when we discuss the legal implications generated by this ground of appeal.

In his ruling on the issue, the trial judge said:

> "The undisputed facts on Gen. Kabwe are that he was one of those people arrested and detained for the alleged complicity in the alleged coup plot of 1980 and he was detained on or about 9th October, 1980...
> The facts and background of Gen. Kabwe clearly make him an accomplice and it is law that an accomplice is a competent witness, this competency, among other things, is determined on relevancy of the evidence . . .
>
> On the available facts I find that Gen. Kabwe is an accomplice; he is a competent witness to give evidence relevant to the issue before the court."

And, after reviewing a number of authorities, including *Turner* (37) he said of PW5:

> "He was approached through his advocates... He had legal advice and he must have understood his rights... I find no basis, therefore, on which I can exercise my discretion to reject Gen. Kabwe's evidence. I will therefore accept Gen. Kabwe's evidence..."

The subject of accomplice evidence and, especially that of a person who turns State witness on an undertaking by the State to grant him immunity from prosecution has, over the years, evoked many comments by judges and jurists alike. The law on the subject is ably and explicitly stated by the learned authors of Archbold in paragraph 4-124, which reads, in part:

> "Where it is proposed to call an accomplice for the Crown, it is the practice: (i) to omit him from the indictment; or (ii) to take his plea of Guilty on arraignment: *Winsor v R* (38); or during the trial, if he withdraws his plea of Not Guilty: *R v Tomet* (39); or before calling him either (iii) to offer no evidence and permit his acquittal: *R v Owen* (40); or (iv) to enter nolle prosequi: *R v Feargus O'Connor* (41). This statement of the practice was approved by the Court of Appeal in *R v Pipe* (42). (Held: it was wholly irregular to call a receiver who had been charged and against whom proceedings were about to start, against the thief from whom he had received the goods.) The significance of the Court's observations in *Pipe* (42) was considered by the Court of Appeal in *R v Turner and others* (37), where it was contended for the defence that there had been for sometime past a practice for judges not to admit the evidence of accomplices who could still be influenced by continuing inducements, and that the Court in *Pipe* (42) had adjudged that this practice had become a rule of law. The Court in rejecting the submission reviewed the origin of the practice.

p86

"There can be no doubt that at common law an accomplice who gave evidence for the Crown in the expectation of getting a pardon for doing so was a competent witness (see *R v Rudd* (43); Black stone Commentaries (23rd ed.) (1854), Vol. 4, p.440) ... the 19th century brought about no change in the competence of accomplice to give evidence though the prospect of immunity from prosecution was before them . . . the contribution of the 19th century to this topic was the rule of practice that judges should warn juries of the dangers of convicting on the uncorroborated evidence of accomplices. In this century the practice became a rule of law. It is against that background that the case of *Pipe* (42) should be considered. There is nothing either in the argument or the judgment itself to indicate that the Court thought it was changing a rule of law as to the competence of accomplices to give evidence which had been followed ever since the 17th Century ... *Pipe* (42) is limited to the circumstances set out (above). Its ratio decidendi is confined to a case in which an accomplice, who has been charged, but not tried, is required to give evidence of his own offence in order to secure the conviction of another accused. *Pipe* (42) on its facts was clearly a correct decision. The same result could have been achieved by adjudging that the trial judge should have exercised his discretion to exclude (the accomplice's) evidence on the ground that there was an obvious and powerful inducement for him to ingratiate himself with the prosecution and the Court and that the existence of this inducement made it desirable in the interests of justice to exclude it, (pp.77-78.) Although Lord Parker, C.J., described what had occurred in *Pipe* (42) as being 'wholly irregular', 'it does not follow that in all cases calling a witness who can benefit from giving evidence is 'wholly irregular.' To hold so would be absurd. Examples are provided by the prosecution witness who hopes to get a reward which has been offered for information leading to a conviction' or even an order for compensation, or whose claim for damages may be helped by conviction ... If the inducement is very powerful, the judge may decide to exercise his discretion; but when doing so he must take into consideration all factors including those affecting the public. It is in the interest of the public that criminals should be brought to justice; and the more serious the crimes the greater is the need for justice to be done: *R v Turner* (37) (ante), pp. 78-79."

In *Pipe* (42), the prosecution called, at the trial of the appellant, an accomplice against whom proceedings had been brought, but had not been concluded. On appeal to the Course of Appeal, the conviction was quashed. Delivering the judgment of the Court, the Lord Chief Justice said at pages 20 to 21:

"In the judgment of this court, the course taken here was wholly irregular. It may well be, and indeed it is submitted, that in strict law Swan was a competent witness, but for years now it has been the recognised practice that an accomplice who has been charged, either jointly charged in the indictment with his co-accused or in

the indictment though not under a joint charge, or indeed has been charged though not brought to the state of an indictment being brought against him, shall not be called by the prosecution, except in limited circumstances. Those circumstances are set out correctly in Archbold (36th ed.), in paragraph 1297 of the current edition (now paragraph 4-124, supra), where it is said that where it is proposed to call an accomplice at the trial, it is the practice

(a) to omit him or (b) to take his plea of Guilty on arraignment or before calling him either (c) to offer no evidence and permit his acquittal or (d) to enter a nolle prosequi."

Pipe (42) is distinguishable from the present case because, here, unlike there, nolle prosequi was entered and, moreover, PW5 was indemnified.

However, *Turner* (37) bears great similarities to the case now before us. In that case, a man called Derik Smalls was arrested on suspicion of having been involved in at bank robbery. He was later charged with that robbery and others. On his arrest, he said to Detective Sergeant Marshall: "You give me outers and bail now and I'll give you everything on those jobs you told me about." Shortly thereafter, he told the same officer that in return for what he called a guarantee, he would tell "the inside story." He persisted in this at later interviews with the police. What had happened was reported to the D.P.P. Then Smalls' solicitors went to the D.P.P.'s office and had conversations with one of his staff as a result of which the Assistant Director wrote to Smalls' solicitors and set out certain terms. Subsequently, Smalls made a number of written statements in which he admitted his own part in twenty armed robberies and gave names and particulars of other participants in the robberies. As a result of this, twenty-six people were arrested. The prosecution offered no evidence against Smalls and he was acquitted. At the trial of Smalls partners in crimes, Smalls gave evidence in considerable detail as to the planning and execution of the robbery and as to the movements of the robbers after the offence. Most of the accused persons were convicted as charged. On appeal to the Court of Appeal, Lawton, L.J., said, at page 77:

> "The foundation of the prosecutions case against all the appellants was Smalls' evidence. Without it the Crown would have had no case except as against Holt. In this Court, but not at the trial, it was submitted that Smalls should not have been allowed to give evidence at all. The submission was made by Mr Hutchinson on behalf of Wilkinson, but these arguments ware adopted on behalf of all the other appellants in this appeal. ... Smalls, he said, was an accomplice in the crimes about which he was to give evidence, The trial judge should have appreciated that, if he gave evidence, there would still be operating in his mind some of the inducements held out to him by the agreement made between the Director of Public Prosecutions and his solicitors ..."

He continued in the last paragraph of the same page and at the top on page 78:

> "There can be no doubt that at common law an accomplice who gave evidence for the Crown in the expectation of getting pardon for doing so was a competent witness. The most persuasive authorities in English law say just that. In *RUDD* (43), the Court of King's Bench had to consider an application for bail made by a woman who had given King's evidence and who claimed that in consequence she was entitled to be released on bail pending the grant of the pardon which she submitted she was entitled to as of right. Lord Mansfield ,C.J., adjudged (at p. 334) that hers was one of the three types of cases in which pardons could be claimed as of right (that is, pardons promised by proclamation or given under statute or earned by the ancient procedure of approvement). He continued as follows (at p.344): 'There is besides a practice, which indeed does not give a legal right; and that is

> where accomplices having made a full and fair confession of the truth, are in consequence thereof admitted evidence for the Crown and that evidence is afterwards made use of to convict the other offenders. If in that case, they act fairly and openly, and discover the whole truth, though they are not entitled as of right to a pardon, yet the usage, lenity and the practice of the Courts is to stop the prosecution against them and have an equitable title to a recommendation for the King's mercy."

And further on, at page 79, he said:

> "If the inducement is very powerful, the judge may decide to exercise his discretion; but when doing so he must take into consideration all factors including those affecting the public. It is in the interest of the public that criminals should be brought to justice; and the more serious the crimes the greater is the need for justice to be done. Employing Queen's evidence to accomplish this end is distasteful and has been distasteful for at least 300 years to judges, lawyers and members of the public. Hale CJ, writing about 1650, used strong language of condemnation of the plea of approvement which was the precursor of the modern practice of granting immunity from prosecution, or further prosecution, to accomplices willing to give evidence for the Crown. See Hall, Pleas of the Crown, Vol. 2, p.226. His comments should be remembered by the Director of Public Prosecutions. 'The truth is,' he wrote 'that more mischief hath come to good men, by these kinds of approvements by false accusations, of desperate villains than benefit to the public by the discovery and convicting of real offenders. The practice has been condemned on ethical grounds. See Professor Sir Leon Radzinowiz, History of the English Criminal Law (1956),Vol. 2, p.53. It is, however, no part of our function to add to the weight of ethical condemnation or to dissipate it. We are concerned to decide what the law is and whether the judge should, as a matter of discretion, have excluded Smalls' evidence, and whether, having admitted it, he gave the jury an adequate, warning about acting on it."

p89

The clear picture that emerges from all this is that, although an accomplice is a competent witness, an accomplice who has been charged, either jointly charged in the indictment with his co-accused, or in the indictment though not under a joint charge, or indeed has been charged though not brought to the stage of an indictment being brought against him, shall not be called by the prosecution, except in certain limited circumstances. Those limited circumstances are that, where the prosecution are minded to call such accomplice as a witness, it is settled practice (a) to omit him from the indictment; or (b) to take his plea of Guilty on arraignment, or during the trial, if he withdraws his pleas of Not Guilty, or before calling him either (c) to over no evidence and permit his acquittal; or (d) to enter a nolle prosequi. As the Court of Appeal aptly observed in *Pipe* (42), at page 21:

> "In the judgment of this court, it is one thing to call for the prosecution an accomplice, a witness whose evidence is suspect and about whom the jury must be warned in the recognised way. It is quite another to call a man who is not only an accomplice, but is an accomplice against whom proceedings have been brought which have not been concluded."

Further, an accomplice who is granted immunity from prosecution, or further prosecution, by way

of a pardon or an indemnity, remains a competent witness for the prosecution. All that can be said about the well recognised practice of granting immunity from prosecution or further prosecution is that it has received condemnation on ethical grounds. It is, however, unnecessary for the court to add to such condemnation or to dissipate it. The critical issue is whether a trial judge should, as a matter of discretion, exclude the evidence of such witness. If, and only if, the inducement is very powerful, the Judge may decide to exercise his discretion in favour of exclusion; but when doing so, he must take into account all the factors, including those effecting the public. It is in the interests of the public that criminals should be brought to justice; and the more serious the crimes, the greater the need for justice to be done. In view of the potent factor as to public interest, it will but rarely happen that a trial judge will decide to exercise his discretion against admission of such evidence.

In the light of the foregoing synopsis, the only issue here that calls for our decision is whether, in all the circumstances of the case, the trial judge properly exercised his discretion by admitting the evidence of PW5. In deciding this issue, regard must be had to the question whether it can be said that, when PW5 gave evidence, he was under the influence of continuing inducements. To this end, A1 has argued that PW5 was not free agent when he gave evidence in this case as failure to give evidence would have relegated him to his former position, which would have meant his being redetained and prosecuted. This argument is misconceived because PW5 had been granted an indemnity, that is, an immunity from prosecution. An indemnity has the same effrect as, and is to all intents and purposes, a pardon.

p90

Although, in accepting to turn State witness, PW5's receipt of immunity from prosecution was a most powerful inducement, we do not think that, in all the circumstances of this case, including the cogent factor that it is in the interests of the public that criminals should be brought to justice, the trial judge can be criticised for deciding to exercise his discretion in favour of admitting PW5's evidence. In our judgment, the exercise of his discretion was not only fair and proper, but also impeccable.

(b) *Hearsay evidence*

The next topic to be considered is hearsay evidence. This falls into two parts: oral evidence; and documentary evidence.

Firstly, it is contended by the appellants that the trial judge misdirected himself by admitting the hearsay evidence of PWs 69,70 and 110. It is urged that a human brain, even that of a judge, is like blotting paper. Once an impression is made, it is almost impossible to erase it. The objection is that this evidence was ever allowed to be given, and that, the extent to which it influenced the trial judge will never be known, even though he declared that it did not advance the State's case any farther.

It is a fundamental rule of evidence that hearsay evidence, whether oral or written, common law and statutory exceptions apart, is inadmissible in criminal proceedings. Although the rule lacks a comprehensive judicial formulation, the formulation of the Privy Council in the celebrated case of *Subramanian v Republic Prosecutor* (44), has gained wide acceptance. The formulation, which appears at page 970, is in these terms:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

The essence of hearsay evidence is that the statement complained of was made in the absence of the accused person. In our view, what one witness says to another, in the absence of the accused, is equally hearsay evidence if it is given in court to prove, not the fact that the statement was made, but the truth of what the witness said.

The defence argument is made to the extent that the hearsay evidence of PWs 69, 70 and 110 - based on what PW68 had said - was wrongly admitted by the trial judge in that it went beyond the principles laid down in *Subramaniam* (44). It is, however, inaccurate to liken the brain of a human being to a piece of blotting paper because, unlike the blotting paper, the human brain is capable of being discriminatory and can, therefore, discard, expunge or ignore whatever it considers irrelevant

p91

or unnecessary. In this case, it is obvious that the trial judge disregarded the hearsay evidence of PWs 69, 70 and 110. The following extract from his ruling at the no case to answer stage, speaks for itself:

> "The evidence of PW69, Mr Butter, PW70, Mr Munyati and PW110, Mr Kaulung'ombe is based on what they were told by PW68 and it does not advance the state case any further."

We are satisfied that the trial judge did not make use of the hearsay evidence of any of those witnesses. Indeed, there is nothing on record to show that he was in any way influenced by it.

Secondly, the court has been urged to find that the trial judge misdirected himself in law by receiving documentary evidence contained in exhibits P112 and P139 to P142, on the ground that it was hearsay evidence since the documents' authors were not called to prove their authenticity.

For the purpose of this case, exhibits P139 to P142 are to be referred to as the Chilanga documents.

Exhibit P112 is a detailed street map of the City of Lusaka, complete with "Street names index" as well as an "amenities index". PW57, George Chikalamo, a Drawing Assistant in the Survey Department, testified at the trial that maps such as exhibit p 112 were produced by his Department and can be soled to members of the public. He further testified that exhibit p 143 - a replica of exhibit p 112 - which, unlike the latter, is in colour, is similar to what was produced by his Department. It in fact carries the following caption: "Published by Surveyor - General December, 1972." Both these maps bear the Court of Arms of the City of Lusaka.

Paragraph 26-03 of Phipson on Evidence, 13th ed. under the subheading: "Maps" reads (omitting portions of no immediate relevance):

> "Published maps generally offered for public sale are, ... admissible to show the relative positions of towns, countries, and other matters of geographical notoriety. Judicial notice will, as we have seen, also be taken of the geographical position and general names applied to the districts...
> Maps and surveys may be admissible (1) as public documents ... (2) as quasi public documents under the present heading to prove general geographical facts."

The foregoing paragraph from Phipson makes it abundantly clear that both maps - exhibits P112 and P143 - were properly admitted, and that the question of hearsay evidence does not arise. It appears to us that paragraph 10-18 of Archbold is complementary to paragraph 26-03 of Phipson.

Exhibits P112 bears writings and markings, including arrows, all of which were superimposed by PW85, Hilalio Kapenda Mwansa. Exhibit P143 - though it does not feature in the submissions before us - is similarly marked. The arrows are marked in ink leading from the Chilanga -direction to various strategic points marked in red ink namely the central

p92

(Main) Post Office, the Boma, Lusaka Central Police Station, the Police Force Headquarters, the Zambia Broadcasting Services Headquarters, State House, the adjoining barracks and the Lusaka International Airport.

With regard to exhibits P139 to P142, it is convenient to discuss Exhibit P139 separately as it falls into a different category from the rest.

Exhibit P139 consists of small groups and names of persons there under. It has a chart also, depicting a hierarchical order of persons. PW 85's testimony on the point is that, with the exception of the chart, the rest of the exhibit was drawn up by a person called Modest Kankunku, whose handwriting he had witnessed and later recognised because he was familiar with it. The chart was equally prepared by Modest Kankunku but the witness traced pencil lines (previously made by Modest) in ink at Modest's request. As there was evidence of authorship of the exhibit as **15** spell as of the witness' familiarity with the author's handwriting which he had witnesses, the requirements of proving a private document were met.

The appellants have alleged that Modest Kankunku should have been called as a prosecution witness and that failure to do so meant failure to prove the authenticity of the exhibit. The prosecution's reply to the criticism is that there is no evidence to show that Modest was in custody at the time of the trial but that the evidence on record revealed that when the security forces clashed with the men at Chilanga Farm, some of the men ran away, thereby implying that Modest was among those who succeeded in running away.

In any event, as we have already pointed out, there was evidence to warrant the admission of exhibit P139.

As to exhibits P140 to P142, they contain lists of persons with military ranks and of senior officers. They contain also numbers and types of firearms listed against names of individuals, including that of PW85. There is, however, ample evidence regarding the authorship of these exhibits from PW85 who said that they were written by Kankunku Modest.

In their evidence, PWs 86 and 87, Constable Mutafela Silenga and Constable Peter Mike Mwila, respectively, described the manner in which they discovered exhibits P139 to P142: These were found buried in a military pouch in a shallow hole about 50 metres from Chilanga Farm. There was a booby trap set above those documents. An AK47 rifle with a string attached to the trigger was carefully concealed there and when one of the Constables referred to above tripped over it, the firearms went of.

The question is whether, in the circumstances as recounted, exhibits P139 to P142 ought to have been excluded on the ground that they were hearsay evidence. As we have earlier seen, the rule against hearsay applies equally to documents and it is relevant both to the authenticity

p93

of the documents and to its contents. The cases of *R v Gillespie* (45), and *R v Van Vreden*, (46), are among the many authorities that lend support to this view.

It seems to us that the documentary evidence we are here discussing falls into a different and distinct category from the usual one relating to the conventional admissibility of public or private documents. It may be classified as real evidence, or original circumstantial evidence.

As to real evidence, we need only draw attention to paragraph l-05 of Phipson which, though it begins by appearing to exclude documents from what is commonly called "real evidence", that is, material objects produced for the inspection of the court, the subsequent brief discussion of the subject does in fact include documents, in certain circumstances, depending upon which classification it falls into. The paragraph states:

> "Real evidence" Material objects other than documents, produced for inspection of the court, are commonly called real evidence. This, when available is probably the most satisfactory kind of all, since save for identification or explanation, neither testimony nor inference is relied upon. Unless its genuineness is in dispute, the thing speaks for itself.Unfortunately, however, the term 'real evidence' is itself both indefinite and ambiguous, having been used in three divergent senses: (1) EVIDENCE FROM THINGS AS DISTINCT FROM PERSONS (2) MATERIAL OBJECTS PRODUCED FOR THE INSPECTION OF THE COURT. This is the second and most widely accepted meaning of 'real evidence'. It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as conveyance, and a document is a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing."

In this case, it is not in dispute that a sizeable number of men was grouped at Chilanga Farm some

of whom could speak French. It is further not in dispute that the Chilanga documents - all of which written in French - were found concealed in a shallow hole in the immediate vicinity of- that is, some 60 metres from - Chilanga Farm, in the circumstances as recounted by PWs 86 and 87. The point of divergence between the respondent's and the appellant's respective positions is that, the appellant's argue that the men at Chilanga Farm had nothing to do with those documents. However, the only inference reasonably possible on the facts of this case, is that the Chilanga documents belonged to, and had been in the possession and for the use of, the men grouped at Chilanga Farm. In the circumstances, those documents fall under the classification of "real evidence."

The second classification of the Chilanga documents is that they constituted original circumstantial evidence in terms of paragraph 21-09 of Phipson, ibidem, which reads, in part:

> "Documents which are, or have been in the possession of a party will, as we have seen, generally be admissible against him as original

p94

> (circumstantial) evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto."

Paragraph 21-09 of Phipson is supported by the case of *R v Lambert* (47), where the appellant was convicted of indecently assaulting two girls. The girls were not available to give evidence as they had left England permanently. The prosecution case was based on four rolls of developed film and one roll of undeveloped film belonging to the appellant and prints therefrom which depicted him acting indecently with the girls. He appealed on the ground that the film was in admissible since the photographer was not called to prove it and there was a risk of faking, and there was no evidence as to when and where the film was taken. Dismissing the appeal, the Court of Appeal held that, on the facts, there was no need to call the photographer; that the appellant's possession of the film was evidence that he was a partner to taking it, that there was no real risk of faking, particularly in regard to the undeveloped film; and that there was evidence of the period when the film must have been taken and the issue of whether it was taken within the jurisdiction was properly led to the jury to decide.

On these authorities, the Chilanga documents, in our view, were admissible as original circumstantial evidence to show the connection of the men at Chilanga Farm with the coup plot. In the circumstances of this case, there was, in the words of *Lambert* (47), "no real risk of faking." Those documents were, therefore, properly admitted.

(a) *Evidence of distinct and independent overt acts*

Next is a ground of appeal advanced by A1 and adopted by A3, A6 and A7. The ground alleges that the trial judge misdirected himself in law when he admitted evidence of independent and distinct overt acts not charged in the information, to wit:(a) an alleged meeting between A1 and A6 on October 23, 1980; (b) delivery to, and distribution of, guns at Chilanga Farm by A3, A6, and A7; (c) an alleged meeting at a house in Roma Township attended by A1, A3, A6, A7 and three others (d)

an alleged meeting at A3's office attended by A3, A4, A7, Annfield and PW5; (e) an alleged meeting at the house of A1, in his absence, attended by A3, A4, A6 and two others; and (f) alleged meetings in Kitwe and Kalulushi attended by A3, A6, A7 and Fred Bwalya. In addition, A3 refers to an alleged meeting between him and PW5 at the Lusaka Flying Club.

The stand taken by the learned Attorney-General is that the trial judge acted correctly in receiving the evidence in this case because the evidence adduced by the State was aimed at proving the charge of treason through overt acts which were specifically laid in the information. He says that, evidence in a case of this nature, is not adduced in compartments and that evidence of one overt act may support other overt acts and, therefore, finally support the charge. He submits that evidence in support of a conspiracy overt act may vary and consist of many acts done, declarations made or steps taken, in pursuance of a grand scheme.

p95

Conspiracy, he says, is a crime of the mind which even a surgical operation cannot reveal and that there are, in a conspiracy overt act, many acts and declarations; that even the fact of travelling from point A to point B may constitute an overt act. He argues that if each and every act of consultation were to be laid as an independent overt act, the charge would be overwhelming, running into many pages and that, even the principle of reasonableness in drafting indictments would be totally defeated. He concludes by submitting that proof of a conspiracy overt act necessitates proof of acts and declarations of conspirators and that the various allegations of independent overt acts relate to the proof of the conspiracy overt act.

In resolving the issues raised, we need only to have recourse to paragraph 820 of Halsbury's laws of England, 4th ed.,Vol. II, which reads:

> "820.Treason proof by overt acts. The treason alleged must be proved by overt acts. It seems that the overt acts upon which it is intended to rely must be expressly alleged in the indictment and that no evidence is admissible of any overt act that is not so alleged unless it affords direct proof of the overt acts that are laid. Where the overt acts alleged in the indictment include acts of conspiracy, evidence may be given of acts committed by conspirators in execution of the common design even if committed after the date of the overt acts alleged and after the defendant's arrest."

Paragraph 21-15 of Archbold is couched in similar terms: it states:

> "No evidence may be admitted of any overt act not laid in the indictment: that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charged, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid amounts to a direct proof of any overt act which is laid, it may be given in evidence to prove such overt act."

The foregoing quotations are sufficiently explicit and authoritative. Simply put, both amount to this: although no evidence is admissible of any distinct overt act not expressly laid in an indictment, evidence of an overt act not laid but which amounts to a direct proof of the overt act laid, may be

given in evidence to prove such overt act. In this case, all the evidence complained of afforded direct proof of the first (that is, the conspiracy) overt act and, therefore, it was properly admitted.

(d) *Confessions*

This brings us to a consideration of those grounds of appeal that are directed against the admission of confession statements. In this regard, the aggrieved appellants are A3, A4, A6, A7 and A8. Although A2's position is not entirely akin to the respective positions of the others and, for that reason, deserves to be discussed separately, submissions on his behalf which relate to confessions, will also be covered in our discussion now.

p96

The common grounds canvassed by the appellants concerned are that the trial judge erred in law in admitting in evidence the alleged confession statements in that the same had been obtained by threats or inducements, or in breach of the Judges' Rules. With the exception of **5** A8 (for reasons to be given later when his individual position is dealt with) trials-within-the-trial were conducted in respect of A3, A4, A6 and A7, at the end of which the trial court ruled that the confession statements had been made freely and voluntarily and that, although the Judges' Rules had been contravened, especially in regard to the absence of the usual warn and caution at the commencement of the majority of the statements, the administration of the warn and caution was done as soon as the appellants concerned started to incriminate themselves. Rule 3 of the Judges' Rules says that :

> "3. Persons in custody should not be questioned without the usual caution being administered."

At the time that the statements were recorded from the appellants, they were detained under the Preservation of Public Security Regulations. As the trial court correctly found, the appellants had been in custody for the purposes of rule 3. In the course of exercising his discretion in the matter, the trial judge expressed himself in these terms:

> "As said earlier on the Judges' Rules are there for the guidance of the police in safeguarding the interest of the accused persons. In the present case although the police did not strictly follow all the Judges' Rules to the letter, they protected the accused interests as soon as the accused started to incriminate themselves. The accused freely went ahead with their statements. I see no unfairness or prejudice against the accused produced by the breach of r.3."

We begin with an examination of the principles applicable to the admissibility of confessions and the exercise of the trial court's discretion. The classic formulation of the principle applicable to the admissibility of confessions appears in Lord Summer's speech in *Ibrahim v R* (48), where he stated, at page 609:

> "It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been voluntary statement in the sense that it has not been obtained from him either by

fear of prejudice or hope of advantage exercised or held out by person in authority."

This formulation was expressly approved by the House of Lords in *Commissioner of Customs and Excise v Hare and Power* (49), and also by the forerunner of this Court - the Court of Appeal - in *Zondo and Others v The Queen* (50). In *Muwowo v The People* (51), the Court of Appeal said (per Charles, J.) at page 95:

p97

"An incriminating statement made by an accused to person in authority is not admissible in evidence unless it is proved beyond reasonable doubt to have been made by him voluntarily. In that context the words 'made voluntarily' do not mean 'volunteered' but made in the exercise of free choice to speak or to be silent."

In *Zeka Chinyama and Others v The People* (52), we said, at page 430, lines 11 to 18:

"In practice, when dealing with an objection to the admission of an alleged confession the trial court will first satisfy itself that it was freely and voluntarily made; if so satisfied, the court in a proper case must then consider whether the confession should in the exercise of its discretion be excluded, notwithstanding that it was voluntary and therefore strictly speaking admissible, because in all the circumstances the strict application of the rules as to admissibility would operate unfairly against the accused."

We continued at page 431, lines 37 to 46 and page 432, lines l to 11:

"The precise position of the Judges' Rules is important. Their breach does not render evidence, and in particular a confession, automatically inadmissible; they are rules of practice indicating what conduct on the part of police officers the court will regard as unfair or improper. Since in practice most cases in which the issue of the court's discretion arises involve alleged improprieties by police officers, the issue has come to be associated with breaches of the Judges' Rules, and no other impropriety is alleged here; but for completeness it should be said that the principle of fair conduct underlying the Judges' Rules are principles in their own right independently of those rules, and that unfair or improper conduct on the part of people other than the police officers can equally lead to the exclusion of evidence in the exercise of the discretion of the court.The circumstances, then, in which the discretion to exclude confession made to a police officer falls to be considered are when such confession has been held to have been voluntarily made but there has been a breach of the Judges' Rules or other unfair conduct surrounding the making of the confession, either on the part of the police officer or some other person, which might indicate to a judge that there is danger of unfairness. The test as to whether the discretion should be exercised is whether the application of the strict rules of admissibility would operate unfairly against the accused."

And at page 431, lines 41 to 47, and page 432, line 1 we said:

"The circumstances in which the reception of evidence would operate unfairly against an accused will depend on the facts of the particular case and do not lend themselves to precise

definition. But the dicta in *Callis v Gunn* (53) and *R v Payen* (54), would

p98

> seem to suggest the following as a general principle: that the discretion ought to be exercised in favour of the accused where, but for the unfair or improper conduct complained of, the accused might not voluntarily have provided the evidence in question or the opportunity to obtain it. "

The case of *Chilufya v The People* (55), has been referred to in support of the proposition that confessionary evidence should be excluded in the absence of a warn and caution. We would like to stress that, that case was not intended to be a departure from the already well established practice. That this was so is plain from what we said, at page 139, lines 26 to 32:

> "Judges' Rules are not rules of law; they are rules of practice drawn up for the guidance of police officers and a statement made in breach of such rules is not *ipso facto* inadmissible if it is a voluntary statement although the court has a discretion to disallow it."

In that case, unlike in the present one, no warn and caution was ever administered at all. Our courts do not usually take kindly to any deliberate non-compliance with the Judges' Rules and, in the absence of good reasons or what are called "exceptional circumstances", they tend to exercise their discretion in favour of exclusion. It was for that reason that we said in lines 35 to 38 of the same page:

> "As a general rule in this country, however, a confession made to a person in authority, such as a police officer, in the absence of any warning, is prima facie inadmissible. It is only in very exceptional circumstances that such a conference will be admissible."

In *Chulu v The People* (56), the High Court held to the effect that, although the breach of the Judges' Rules does not automatically invalidate anything done in pursuance thereof, it does raise a rebuttable presumption of involuntariness and unfairness. Thus, both *Chilufya* (55) and *Chulu* (56), were designed to serve as a strong reminder to the police to ensure the observance of the Judges' Rules, particularly those that require the giving of the usual warn and caution to a defendant or a suspect so as to inform or remind him of his right to exercise a free choice to speak or to be silent (see *Muwowo* (51) ante). By "special circumstances" (or good reasons) was meant such circumstances or reasons as would persuade the trial court to exercise its discretion in favour of admission of confessionary evidence, such as where the defendant or suspect made a spontaneous confession before the police could administer the usual warn and caution; or where the breach had not induced the accused to make a confession which he would not otherwise have made. The exercise of a trial court's discretion whether to exclude or admit confessionary evidence will always depend on the facts of each particular ease. Where a breach of the Judges' Rules has been admitted or established, it is for the prosecution to advance an explanation acceptable to the court for such breach.

p99

In any event, recent trends in England indicate that certain inroads have been made into the extent of the judge's exercise of his residual discretion to exclude evidence admissible in law, including confessions obtained breach of the Judges' Rules simpliciter. Many English authorities on the subject have emerged in recent times, notable among them are *R v Sang* (57), and *R v Rennie* (58).

In paragraph 22-39 of Phipson, headed "Breach of the Judges' Rules" is to be found the following:

> "Prior to *R v Sang* (57) it was commonly thought that the court had a discretion to exclude confessions when there had been breach of the Judges' Rules simpliciter. Indeed in *R v Henry* (57) Lord Diplock referred to 'the discretion that had long been exercised in England under the Judges' Rules to refuse to admit confessions by the accused even though strictly they may be admissible.' However, *R v Prager* (59), shows that there has been in recent years a tendency in the Court of Appeal to treat a breach of the Judges. Rules as only a guide to whether the confession was in fact voluntary. In *R v Houghton* (60), for instance, the Court of Appeal found that there had been a flagrant disregard of paragraph (d) of the principles at the beginning of the Judges' Rules, but upheld the judge's exercise of his discretion to admit the evidence of a confession by the accused. The judge had said that he was satisfied that the confession had been made voluntarily. The Court of Appeal found no ground for holding that the discretion had been exercised wrongly. The Court also said that the irregularities on the part of the police had no bearing upon the confession by the accused."

In the recent case of *R v Cockley* (61), the Court of Appeal , discussing the exercise of the trial court's discretion, said in the last paragraph at page 664:

> "The trial judge has of course a discretion to exclude admissible evidence if in his judgment its prejudicial effect would be disproportionate to its probative value. But such a discretion is to be exercised to promote, not to defeat, the course of justice."

All this is reinforced by paragraph 15-25 of Archbold which says that:

> "Even when the voluntary nature of a defendant's incriminating assertions has been established or (admitted) judges are still invited to exercise their discretion and exclude them on the ground of some breach of the Judges' Rules ... Judges rarely accede to these invitations and this approach is fortified if not actually confirmed by the obita dicta of the House of Lords in *R v Sang* (57)."

Further, the following appears in paragraph 22-31 (3) of Phipson:

> "(3)... There may be circumstances where a confession, induced by a breach of the Rules, is obtained by improper or unfair means though it is 'voluntary' and therefore admissible in law. See

p100

> however, the judgment of the Court of Appeal in *R v Rennie* (58) which would seem to

indicate that a confession which is admissible in law should not lightly be rejected."

The effect of the obita dicta in *R v Sang* (57) on the Judges' Rules may be summarised in the following propositions: (1) breach of the Judges' Rules does not by itself confer upon a judge a discretion to reject a subsequent confession admissible in law; (2) the discretion does, however, arise if the breach has induced the accused to make a confession which he would not otherwise have made, because the breach will be improper if not unfair; and (3) if the breach is such that the confession which it induces is not voluntary, the judge has no discretion, and must exclude the confession as inadmissible in law. (See paragraph 22-40 of Phipson).

A point has arisen as to when the trial court should consider and exercise its discretion either in favour or against exclusion of evidence of a confession obtained in breach of the Judges' Rules or by means of some other impropriety emanating from an unfair or improper conduct on the part of the police or someone else. It has been submitted by the appellants that it is universal practice to deal with both voluntariness (in the case of an alleged confession) and the exercise of the court's discretion, together and that, where breach of the Judges' Rules is in issue, a trial-within-a trial should be held.

The answer to the first part of the question is to be found in the case of *Chinyama and Others* (52) and is reflected also in *Njobvu and Another v The People* (62). The position is that, where any challenge is made as to the admissibility of evidence of a confession, it is the duty of the judge to hold a trial-within-a-trial on the voire dire in order to determine whether the accused's confession was made freely and voluntarily, if he so determines, he must then consider, in a proper case, whether the confession, notwithstanding that it was voluntary and, therefore, admissible as a matter of law, should in the exercise of his discretion, be excluded on the ground that the strict application of the rules as to admissibility would operate unfairly against the accused; for instance, where, but for the unfair or improper conduct complained of, either on the part of a police officer or of some other person, the accused would not otherwise have made the confession .

Where the impropriety alleged is a breach of the Judges' Rules, and the breach is not in dispute, then the breach becomes part of the general issues and the trial judge need not decide, at that stage, the question of exercising his discretion in the matter unless the circumstances of the case so warrant or there is a request to that effect, in which case, he may invoke his discretion without the necessity of holding a trial-within-a- trial.

The critical question, however, is as to what should happen where the impropriety alleged is a breach of the Judges' Rules and there is dispute about it: should a trial-within-a-trial be held in those circumstances?

p101

In *Chinyama and Others* (52), we said at page 436, lines 1 to 2:

> "As this court made clear in *Tapisha v The People* (63), trial-within-a-trial is only held to determine the issue of voluntariness."

Headnote (i) in *Tapisha* (63) at page 223, lines 1 to 5, says this:

> "(i) Where any question arises as to the voluntariness of statement or any part of it, including the signature, then because voluntariness is, as matter of law, a condition precedent to the admissibility of the statement, this issue must be decided as preliminary one by means of a trial-within-a-trial."

(See also page 225, lines 9 to 17 and page 226, lines 37 to 46). This clearly indicates that the holding of trial-within-a-trial can only take place when it becomes necessary to determine the issue of the voluntariness of a confession or any part of it, on the ground that voluntariness is, as a mater of law, a condition precedent to the admissibility of confession.

As the exercise of the court's discretion in favour of an accused necessarily leads to the exclusion of a confession, it is arguable that, where the production of an alleged confession is challenged on the ground of breach of the Judges' Rules, the procedure adopted when the question is whether the confession is admissible in law should apply. Paragraph 22-09 of Phipson says that:

> "Although the authorities considered below related to the procedure when the question is whether the confession is admissible in law, the same procedure clearly applies when the Judges' discretion is invoked. Frequently, both questions are raised on the same issue. "

The learned authors of Archbold provide more substance in paragraph 15-77 (6) (iii):

> "(6)(iii). It is still common for defending counsel to obtain 'a trial-within-a-trial' in the absence of the jury in order that the judge should determine whether there had been a breach of the Judges' Rules, ... and to submit that if there had been (or may have been) a breach the judge had a discretion to exclude evidence of any confession or admission which followed the breach, whether or not the breach was instrumental in inducing the accused to confess. So for at any rate as the Judges' Rules are concerned, it had certainly been assumed by the Court of Appeal prior to *R v Sang* (57) that the judges had such discretion, though in *R v Prayer* (59), the Court of Appeal appeared to be leaning to the view that the question whether there had been a breach of the rules was only relevant to the question whether the subsequent confession was voluntary as a matter of law."

This then puts it beyond doubt that it is competent for a trial court to hold a trial-within-a-trial when there is challenge based on a disputed breach of the Judges' Rules in order to determine the issue.

p102

It is important to note that, when a judge has ruled at a trial-within-a-trial to the effect that a statement made by the accused, whether oral or written, was made voluntarily and is, therefore, admissible in evidence as a matter of law, if further evidence relevant to the issue of admissibility of the exercise of the court's discretion emerges later in the trial, the judge is entitled to reconsider his earlier ruling. If however, no such further evidence emerges, the need to reconsider his ruling already made does not arise. In *R v Watson* (64), the court held that nothing had emerged after the trial-within-the-trial which should have caused the trial judge to have reconsidered his ruling.

We will now consider the position of the individual appellants concerned. In doing so, it is convenient, for reasons that will soon be apparent, to classify the confessions into two categories, to wit, (what we term) the Lilayi confessions and the other type of confessions. The confessions of A3 and A4 both fall into the first category- the Lilayi confessions. Those of A6, A7 and A8 fall into the second category.

The line of attack pursued by both A3 and A4 is that the trial judge misdirected himself by admitting in evidence confessions individually made by them under threats and inducements and in breach of Judges' Rules. Each one of them alleges that he was a victim of prolonged and brutal interrogations at Lilayi (which houses a Police Training School and a prison.) It is unnecessary to discuss in any detail the question of voluntariness of the confessions made by A3 and A4 because, in the view that we take, the trail judge, after an evaluation of the evidence as adduced in the trials-within-the-trial and review of the relevant authorities, was entitled to come to the conclusion that the confessions had been made voluntarily because, even if there had been any threats or inducements as alleged, the same had dissipated by the time the confession were made. As a matter of law, therefore, and inspite of any other alleged misdirections on the part of the trial judge, we would say that those confessions were admissible in evidence.

It is not in dispute that there was, in both cases, a breach of the Judges' Rules. The only crucial issue in whether the trial judge misdirected himself in refusing to exercise his discretion in favour of excluding the said confessions. In resolving this issue, regard will be had, firstly, to the circumstances that preceded the making of the confessions, and secondly, the breach of the Judges' Rules.

When the coup plot was foiled by the national security forces, about forty suspects, including A3 and A4, were picked up and detained at Kamwala Remand Prison. Shortly thereafter, Lilayi was chosen as an interrogation centre and was used as such. Three teams of interrogators were then established, consisting of personnel drawn from the Zambia Army, the Zambia Police Force and the Special Branch. PW 110, Superintendent Kaulung'ombe, though not a participant in the administration of interrogations, was in charge of all the teams, but the overall supervision was in the hands of PW119 - Sinyinda-then Deputy Commissioner of Police who, took no part in the administration of the interrogations

at Lilayi. Throughout the period of interrogations, the interrogation centre was surrounded by armed guards. It would appear that the number of interrogation sessions each suspect was to undergo depended on when the requisite information would be forthcoming. In all the circumstances it is not surprising that one of the suspects - now A4 - found the ordeal so unbearable that he broke down and wept. On the facts of this case, there can be no doubt that the entire atmosphere prevailing at Lilayi, at the material time, was oppressive in relation to the suspects concerned.

Three days after the interrogations, in the case of A3, and a day in the case of A4, each one of them was taken to Zambia Police Headquarters where PW119 recorded confession statements from them

in the presence of police witnesses, the warn and caution being administered in both cases after each appellant had started to incriminate himself. As we have previously said, on the prosecution evidence before him (A3 and A4 had elected to remain silent and had called no witnesses on their own behalf), the trial judge was able to hold that the confession statements had been made voluntarily.

On the facts of this case, it is plain that, whenever an advocate was present, the warn and caution was administered at the right time, that is, at the very beginning of the statement; but whenever no such advocate was present, the warn and caution was administered after the suspect had began to incriminate himself; This was obviously a flagrant breach of rule 3 of the Judges' Rules for which there was no credible explanation. The majority of the statements were recorded from suspects by PW 119. He cannot be heard to say that it was not known, or that it was unclear, as to what offence was being investigated, since news of the impending coup d'etat had reached him three months previously. Besides, it cannot be said that he misunderstood the Judges' Rules, not only because he was, and still is, a senior and experienced police officer (he is now Commissioner of Police) but, more importantly, because whenever he recorded a statement in the presence of an advocate, the warn and caution was administered at the very beginning of such statement. For instance, when he recorded statements from A1, A6, MacPherson Mbulo, Patrick Mkandawire (both of whom have since been acquitted) and PW5, in the presence of their respective advocates, the warn and caution was administered at the proper time. Likewise, when he interrogated A2, in the presence of his advocate the warn and caution was administered at the right stage. And yet, when he recorded statements from A6 and PW5, in the absence of their advocates, no warn and caution was administered at the right time. It is serious contradiction that after he had himself issued orders to his subordinates to ensure the observance of the Judges' Rules, he should be the first to break them. This catalogue of events speaks for itself: PW119 was aware of the fullest import of the Judges' Rules but chose to partially ignore them. As Hankambe, one of the police witnesses in trials-within-the-trial explained, the reason for this improper approach was that, in the warn and caution were to be administered at the right time, the suspect concerned "would not reveal what was wanted." We

p104

cannot over emphasise our condemnation of this kind of impropriety which can hardly be in aid of fair administration of justice.

We are firmly of the view that the cumulative effect of the oppressive atmosphere at Lilayi, coupled with the breach of the Judges' Rules - emphasis being placed on the oppressive atmosphere at Lilayi - had or must have had an effect on the minds of A3 and A4 to induce them to make the confessions which they would not otherwise have made. Accordingly, failure on the part of the trial judge to exercise this discretion to exclude the confession statements of A3 and A4 was a misdirection. Their grounds of appeal on this subject-matter are upheld and so their confession statements stand expunged from the body of evidence.

At this stage, we will turn to the second category of ex curia statements which embraces A6, A7 and A8, none of whom was exposed to the Lilayi experience. These will be discussed in the order in which they appear above.

In the course of apprehending A6, he was shot and badly wounded, on October, 23 1980, by PW1, Hebert Mapili, then Commissioner of Police in charge of special duties at State House (Now Inspector - General of Police). A6 was then rushed to a military Annex Hospital where he later recovered from the shot wound. It was during his period of hospitalisation that a statement was taken from him by PW119.

In his ground of appeal, A6 says that the trial judge erred in admitting his statement which had allegedly been obtained by threats and menaces in that he was chained to a hospital bed throughout the taking of the statement which was obtained in breach of the Judges' Rules; and that he was guarded by armed security personnel. Besides, it is alleged that the statement was recorded in the English language which he did not understand.

The language issue can quickly be disposed of. By decision of this Court in *Kafuti Vilongo v The People* (65), we said at page 425, lines 7 to 12, that an objection to the production of a confession statement on the ground that the appellant did not understand or use the language in which the statement had been recorded, did not raise a triable issue to be dealt with under the procedure of trial-within-the-trial, as the issue was part of the general issues. In any event, there was ample evidence to support the view that, at the material time, A6 understood and spoke English sufficiently well. For instance, Dr Manuele who treated A6 at the Annex hospital testified that his patient (A6) spoke good English and that he was able to understand well what was said to him in the English language and was also able to communicate in that language sufficiently well. Moreover, a letter addressed to A1 and Sikatana by A6, from a remand prison, on August 12th,1980, and in which he sought legal representation from either of the addresses, in connection with another matter, was couched in perfectly good English.

In relation to the allegation that A6's statement was obtained by threats and menaces, particularly with reference to his having been put in

fetters and under the surveillance of armed guards at the Annex Hospital, this must be looked at against the background of his own circumstances.

It is on record that A6 was leader of FNLC, a political and military organisation with ambitions to overthrow the Zairean Government; that as a result of the events at Chilanga Farm on the night of October 16th,1980, he and some of his men escaped the security forces' dragnet; that from the date of his apprehension on October 23rd, 1980, through to November 14th when the recording of the statement from him was concluded, and beyond, until his discharge from the Annex Hospital, the precautionary security measures taken against him remained unchanged; and that the statement complained of was recorded, with many breaks, between November 6th and 14th, both dates inclusive. Prior to the recording of the statement, permission was sought from, and granted by Dr Manuele, and the recording was done in the presence of witnesses. Although A6 made several complaints and requests to PW119 and Dr Manuele, during the period in questions, there were none touching on the alleged involuntary nature of the statement. The mere fact that security measures were taken against him from the time of his apprehension, right through the recording of the statement and beyond, until he was discharged from the Annex Hospital, does not ipso facto lead to

the conclusion that the statement was involuntary, for it is not a condition precedent to the voluntariness of a statement that it must be made in an atmosphere of utter freedom; if this were so, a person in custody would never give a voluntary statement. Whether or not a statement is voluntary depends upon the circumstances of each particular case. In this particular case, and on the evidence before the trial judge, he was entitled to come to the conclusion that A6 was neither threatened nor induced to make the statement. A6's allegations that his request for the presence of a lawyer and that, being a non-citizen, he was assured he would not be prosecuted, were denied by prosecution witnesses. The issue became one of credibility. The trial judge can not be faulted for having accepted the prosecution evidence. In the circumstances of this case, the trial judge's decision that A6's statement was admissible in evidence, as a matter of law, cannot be disturbed.

As in the case of A3 and A4, A6's confession statement was obtained in breach of the Judges' Rules since he was not warned and cautioned until he started to incriminate himself. However, the breach was preceded by circumstances different from those of A3, A4 and other victims of the Lilayi experience. Having considered the question of unfair or improper conduct on the part of the police, in regard to the breach of the Judges' Rules, seems to us that the trial court's discretion to admit in evidence A6's confession statement was properly exercised. From such circumstances and from the evidence, particularly that of Dr Manuele who would not permit his patients to be ill-treated, any presumption of involuntariness or unfairness occasioned by the breach of the Judges' Rules (in terms of Chilufya and Chulu) was in our considered opinion rebutted.

p106

It is now A7's turn to have his position considered. The only criticism levelled against the trial court is an allegation of concoction of certain parts of the confession but, on the authority of *Tapisha* (63), at page 226, lines 37 to 46, this was part of the general issues which, in any case, was without substance. The confession statement was, therefore, a voluntary one and was properly admitted in evidence and was indeed reinforced by his own evidence which he gave in his defence.

Finally, on this issue of confession statements, we come to A8. In his case, the trial within-a-trial procedure was not asked for, nor did it arise on the facts. The allegation now that his statement was obtained by inducements stands unsupported and is entirely expletive.

The next issue that arises is as to the language problem, namely, that the ex curia statement was taken down in language that A8 did not fully understand. It is said that the Lunda of Mwatiyavo of Zaire, which he speaks, is not the same as the Lunda spoken on the North - Western Province, although there are some similarities between the two languages. The evidence which the trial judge accepted was that the language spoken in the two countries was the same since PW121, Detective Sub - Inspector Pearson Kumasa, who recorded the statement, had spoken the language in both countries. The allegation is, therefore without Justification. In any event, the language issue is, on the basis of *Vilongo* (65), ante, a general issue which does not evoke the procedure of a trial-within-a-trial.

The final issue here is that the prosecution having conceded that A8's statement had been taken in breach of the Judges' Rules, in that A8 had not been warned and cautioned until he started to incriminate himself, the trial judge should have exercised his discretion to exclude the statement.

Here again, A8's background - unrelated to the Lilayi experience - was such that the trial court's exercise of its discretion in favour of A8's ex curia statement cannot be criticised.

Interrogation notes

This brings us to A2's situation which is radically different from the others in that here, we are faced, not with a confession statement but with interrogation notes, exhibit P100. Mr Gatehouse's submission is that there was, in this case, a wrongful admission of A2's interrogation notes which should never have been before the trial court.

It is not in dispute that, on November 2-3, 1980, PW 110 - Superintendent Kaulung'ombe - interrogated A2 at Lilayi whilst Police personnel secretly endeavoured to maintain a hand-written record of the interrogation. There was no warn and caution administered to A2. The notes were not read to, or signed by, him, nor were they shown to him. The notes were recorded, not for production in court, but in order to gather as much information as possible on the coup attempt and for use by PW110 as an aide-memoire

p107

The notes contained insertions as well as alterations. The following appears in the state's written submission:

> "The notes taken of the information given was not a warn and caution statement. The notes were at that time for the assistance of PW 110.... In those circumstances the lack of a caution was not an impropriety ..."

Mr Balachandran argues on behalf of the State that the interrogation notes were admissible in evidence as they were a contemporaneous record of the information given by A2 to PW 110 .

Clearly, the interrogation notes were, to all intents and purposes, admitted in evidence and used by the trial court as if they were a substitute for a properly admitted confession. This was a misdirection. Interrogation notes may at best be used only as an aide-memoire, but should not, as a matter of principle, be used as a substitute for a confession. If this were not so, the Judges' Rules would fall away on their own inanition. The significance and purpose of interrogations is to aid police investigations, not to be later transformed into evidence. It would be undesirable to promote the status of interrogation notes to the status or quasi status of a confession since, for obvious reasons, the police would usually be tempted to prefer the former. In this case, A2 made a statement to the police subsequent to the interrogations, but because it was apparently of no interest to them, they preferred to fall back on the interrogation notes which, according to PW110's evidence, had been made as an aid-memoire, and not for the purpose of production in court.

As to the State's submission that the interrogation notes were admissible in evidence as a contemporaneous record of information supplied by A2 to PW110, the learned authors of Archbold, discussing about "contemporaneous notes made by the police and not signed by the accused point out; in paragraph 15-56 (ix) that, ordinarily, such documents are no more than memory refreshing documents used by the officers concerned. In our judgment, the admission (including the

exhibiting) of the interrogation notes was, in the circumstances of this case, as in *R v Fenlon and Others* (66), "technically incorrect."

In any extent, even if the interrogation notes were produced as a confession, they would, on the facts of this case, have been inadmissible in evidence for other reasons, including the trial court's refusal to hold a trial-within-a-trial, although in so doing as in *Belemu v The People* (67) it was misled by learned counsel for the defence who was not explicit in making his objections. And in *Ambrous Mulenda v The People* (68) we said that the non-holding of a trial-within-a-trial was prejudicial to the appellant and made the proceedings a mistrial unless the prosecution case was dependent on other evidence, rather than on the confession.

Further, not only was there a total breach of the Judges' Rules, but more importantly, there was the Lilayi oppressive atmosphere from which A2 was not spared.

p108

For the reasons given above, A2's, ground for the exclusion of the interrogation notes is upheld.

3. *The alleged wrongful use of evidence*

The next set of grounds of appeal relates to the alleged wrongful use of the evidence. The first of these, which is common to the appellants, is in connection with PW5.

(a) *Re: PW5*

The appellant, with A1 in the forefront, allege that the trial judge was strong to take into consideration extraneous matters not given in evidence, namely, (i) that PW5 said there was no evidence against him when the evidence was that the police had such evidence against him; (ii) that PW5 would have preferred an acquittal, when PW5 did not give any such evidence; and (iii) that PW5 had been acquitted on a charge involving dishonesty and was, therefore, an honest man, when there was no such evidence of acquittal. In regard to (iii), the objection is that the trial judge took judicial notice of PW5's acquittal in the absence of evidence to that effect:

The first part of the allegation arises out of PW5's cross-examination by Mr Willombe, who was representing A2, concerning PW5's indemnity which had been offered to him by PW119, on behalf of the State. It arises also out of the trial court's judgment. The two brief portions of evidence complained of are these:

> "A week after, and I think there was a break of about an hour after my advocate had left that this police officer came and he said to me that he had a proposal and the proposal was that the State was thinking of turning or offering me to be a State witness and he said this was not an offer, the offer was not because they did not have evidence but they thought my part in the whole thing was negligible and therefore, the only thing they could get me out was to turn me into a State witness."

And when Mr Willombe asked him to elaborate on this, he said that the police officer had told him

that:

> "That offer was not because they did not have sufficient evidence in the case but because he thought according to the evidence they had, my part in the whole thing was negligible and therefore to get me out of it, they decided to offer me to be a State witness."

The principal objection is that, what PW5 was told in the absence of any of the appellants was hearsay, and, hence, inadmissible. Apart from the fact that the portion of evidence complained of was elicited during the cross-examination of PW5, by a member of the defence team, no objection was ever raised on the ground of hearsay. As we have already noticed (see *Subramanian* (44)), evidence of an out-of-court statement made in the

p109

absence of the accused to a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is, however, not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. And so, it is the purpose for which the evidence tendered that is the key to its admissibility. On the facts of this case, it is clear that what PW119 said to PW5 was relevant in relation, not to the truth of the statement, but to PW5's mental state and his subsequent conduct to turn State witness. To this extent, therefore, what PW5 narrated in court was not hearsay evidence and was admissible.

What appears to be of great interest to the appellants is the trail judge's obvious misunderstanding as to what had been said to PW5 by PW119. In his judgment, the judge mistakenly said that PW5:

> "...was told when the offer to turn State witness was made to him that evidence against him was negligible ..."

This was a clear misdirection because the evidence was that the role played by PW5 in the coup plot had been considered by the police to be negligible. Accordingly, this aspect of the appellants' argument is upheld.

The second part of the allegation is that the trial judge erred when he said in his judgment that PW5 had been told that there was no sufficient evidence against him and that "he would have preferred an acquittal by a court of law." This argument is well founded. We agree that the trial judge erred as there was no evidence to the effect that PW5 would have preferred an acquittal.

The third and final part of the allegation is a criticism on the fact that the trial judge took judicial notice of PW5's acquittal by the High Court (in another case), in the absence of evidence to that effect.

The background to the allegation is that, when PW5 gave evidence at the trial of the appellants, and in an effort to impugn his honesty, he was cross-examined by the defence about his conviction in a subordinate court, of receiving goods believed to have been stolen or unlawfully obtained. PW5 admitted having been convicted and sentenced to a fine but said that he had appealed to the High

Court against both conviction and sentence. At the close of the case for the prosecution, it was submitted by the appellants that PW5's total evidence should be rejected on the premises that it had come from a witness who was not credible since he had been convicted of an offence involving dishonesty. Before a ruling could be made on submissions of no case to answer, the judge learnt, through the daily press, that on July 29th, 1982, PW5 had been acquitted by the High Court. The trial judge confirmed this by calling for PW5's case record No.HPA/70/1982. In his ruling, the judge took judicial notice of PW5's acquittal and so held that the witness had a clean record. This course of action was heavily criticised by the appellants at the close of their own cases. In his judgment, the trial judge said:

p110

> "Coming to the main issue, I was not receiving evidence I merely took judicial notice of a fact that had happened. It is on record that Gen. Kabwe did agree in evidence that he was convicted of receiving goods believed to have been stolen or unlawfully obtained. It is further on record that he said, 'In the meantime I have appealed to the High Court.' It is common knowledge that his acquittal was reported in the press. In order to equip myself to take judicial notice of the fact that Gen. Kabwe was acquitted, I did consult appropriate sources, namely, case record HPA/70/1982. I am entitled to refer to appropriate source as Lord Summer stated in his definition of judicial notice in the case of *Commonwealth Shipping v Peninsular Branch services* (69): Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

The trial judge continued:

> "It would be folly for the court, in appropriate cases, to keep aloof on facts of common knowledge. Again as Lord Summer said in the same Commonwealth Shipping (69), at p.211: 'My Lords, to require that a judge should affect a cloistered aloofness from acts that every other man in court is fully aware of, and should insist on having proof on oath of what as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile."

The question whether a court is at liberty to look at its own records and to take judicial notice of them has previously been judicially considered and decided in the positive. In *R v Chona* (70), for example Conroy, C.J., said at page 350, letters G to H:

> "I myself heard Zongani Banda's appeal three months ago, and the course which the case followed is clearly in my mind. A court has power to look at its records and take judicial notice of their contents, even though not formerly brought before the court. See *Craven v Smith* (71). I have referred to the record which confirms my recollection that the District Commissioner heard the appeal five weeks after the conviction, and allowed the appeal in part. He reduced the sentence to a fine of 15 pounds or four months' imprisonment. To this extent the accused's recollection is, therefore, inaccurate."

In *Fatyela v The People* (72), where a magistrate's court took judicial notice of a record of another magistrate's court, Ramsay, J., said at page 136 that :

> "It is improper for a magistrate to look at the record of another court in order to determine what was said during the hearing of the case and that the correct procedure is to have the clerk of the other court produce the record."

p111

Both *Chona* (70) and *Fatyela* (72) are decisions of the High Court. The issue raised by the present case is whether a judge is at liberty to look, not only at his own records, but also at those of another judge, and to take judicial notice of their contents.

Cross On Evidence, 4th edition, sets out a useful guide: it illustrates, at pages 136 to 139, the application of the doctrine of judicial notice by reference to three main categories of facts, namely (i) facts which are judicially noticed without inquiry; (ii) facts which are judicially noticed after inquiry; and (iii) facts which are judicially noticed under various statutory provisions.

The issue before us would appear to fall under category, (ii) above. This category is vividly exemplified, by Lord Summer's observations in *Commonwealth Shipping Representative v P &O Branch Services* (69), supra, which we think are an accurate and explicit exposition of the law on the subject. A judge may thus receive and act upon facts either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. As Lord Denning (as he then was) pointed out in *Baldwin and Francis Ltd. v Patent Tribunal Ltd* (73), at page 691:

> "All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly."

In an appropriate case, therefore, particularly where, as in this case, facts may be judicially noticed after an enquiry has been made, a judge has power, not only to look at his own records, but also at those of another judge, and to take judicial notice of their contents. This applies to all courts the Republic. To this extent, *Fatyela* (72) stands overruled. This court, for instance, does sometimes call for case records of lower courts to examine them and to take judicial notice of their contents, especially in connection with issues affecting sentence(s), such as where further offences were committed by the appellant while on bail pending trial for earlier offences, in order to decide whether all offences should be regarded as constituting one course of conduct. *Alfred Mulenga v The People* (74), is a case in point. Whether a court is at liberty to take judicial notice of another court's records, will depend upon the circumstances of the particular case before it.

In this particular case, the acquittal of PW5 was public knowledge but to put the matter beyond any shadow of doubt, the trial judge was entitled to make an inquiry by reference to the appropriate source of formation, which was the case record on appeal, in order to equip himself before he could take judicial notice of PW5's acquittal. For the reasons given, judicial notice of PW5's acquittal was properly taken and the fact of acquittal was properly used.

(b) *A5's excluded confession*

The second set of the grounds is a criticism of the trial judge's alleged use of A5's excluded confession. The offending sentence appears at the end of the following passage in the judgment:

p112

> "From the evidence I am satisfied that the accused Mulewa joined the conspirators who planned to overthrow the Zambian Government. His warn and caution statement was a saving statement, not containing the truth."

Whilst it is obviously true that the trial judge misdirected himself by his reference to A5's excluded statement, it is quite clear that the reference thereto was a mere surplusage as reliance was placed on the evidence he had just recited. It cannot thus, strictly speaking, be said that the excluded statement was made use of.

(c) *Evidence of overt acts not made out*

The third set of the grounds is common to A1 and A6. We begin with A1 whose allegation is that, having been acquitted on the sixth overt act, which had charged receipt and distribution of money to, inter alia, five co-accused (for the alleged purpose of overthrowing the Government of this Republic), the court could not use this same evidence to corroborate either the first or second overt act. In A1's submission, the defence of autrefois acquit applies.

In our view, it is a misconception to suppose that, when several overt acts or counts, as the case may be, are laid in an information, but the court finds, at the no case to answer stage, that some of the overt acts or counts have not been made out, all the evidence adduced by the prosecution in respect of the overt acts not made out automatically falls away, as being of no application to the remainder of the overt acts, for one piece of evidence may be relied upon to establish different situations, provided it is relevant in respect of such situations. The general rule is that, all evidence which is sufficiently relevant to an issue before the court is admissible. As Lord Goddard, C.J., stated in Kuruma, Son of *Kaniu v The Queen* (75) ... at page 203:

> "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue."

According to Stephen's classic definition (see Stephen's Digest on the Law of Evidence, 12th edition, art. I), the term "relevant" means that:

> "Any two facts to which it is applied are so related to each other the according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other."

In the law of evidence, therefore, the test of admissibility is relevance. And so, once relevant evidence is let in, its relevancy is not confined to one overt act but may extend to others also; and, therefore, a judge cannot turn blind eye to it, just because one overt act has not been made out

against the accused, even if such evidence was ostensibly given in respect of that overt act. The position would be the same where, on a joint charge, one accused is acquitted but the evidence against him in relevant in relation to the remaining accused.

p113

In his ruling at the no case to answer stage, the trial judge found that it had been established by evidence that, in exhibit P106-A1's personal cheque book-counterfoils of cheque No. 674276 and cheque No. 674277, both of which have been endorsed "cash", bore A6's name but that since there was no evidence to lead to the conclusion that the money had been given to A6 for the alleged purpose specified in the sixth overt act, the said overt act had been made out. In his judgment, the trial judge pointed out that his reference to exhibit P106 was for the purpose of showing a special relationship between A1 and A6. As we see it, and in the light of what we have said above, the trial judge was fully entitled to do so. The defence of autrefois acquit does not arise in circumstances such as these. Autrefois acquit (like autrefois convict), is merely pela in bar to a second indictment for the same offence or for any other of which the accused might have been convicted under the first. This is illustrated, though in a different context, lay the case of *Shamabanse v The People* (76), where the first and second accused were originally charged before a senior resident magistrate with theft of money. At the no case to answer stage, they were put on their defence on the alternative charge of obtaining money by false pretences but acquitted on the original charge. They unsuccessfully pleaded autrefois acquit and were subsequently convicted of the alternative offence. On appeal to the High Court on the ground that the pleas of autrefois acquit should have been upheld, Scott, J., had this to say at page 153, lines 19 to 30:

> "I shall say at once that the plea of autrefois acquit is not of valid application to the circumstances of this case, because both on the authorities and under our law it is envisaged that there have been previous and earlier proceedings followed by later proceedings at which the plea has been or can be raised. Section 20 (5) now Article 20(5) of the Constitution refers to a person again being tried for an offence and s.128 of the Criminal Procedure Code also speaks of a person not being liable to be tried again on the same facts for the same offence. In the instant case there was only one set of proceedings, one trial: the accused were not being tried again, but were purportedly being called upon for their defence ... to an offence of which they could be convicted though not charged therewith."

As we have indicated, the ground advanced by A1 on this issue cannot succeed.

What we have said above applies with equal force to A6's ground on the same issue, and so, it is unnecessary to enter upon any further discussion thereon.

In both cases, therefore, there was no misdirection on the part of the trial judge.

(d) *Use of A7's Unsupported evidence*

The fourth set of grounds is about the trial judges' alleged use of A7 s unsupported evidence against other co-appellants and his alleged

p114

failure to warn himself before he could act on his evidence. Of all the appellants, A7 was the only one who elected to give evidence on oath at his trial.

R v Rudd (77), is an authority for the proposition that, although a out-of-court statement made in the absence of the defendant by one of his co-defendants cannot be evidence against the former, unless he expressly or by implication adopts the statement as his own, if a co-defendant goes into the witness box and gives evidence in the course of a joint trail, then, what he says becomes evidence for all the purposes of the case, including the purpose of being evidence against his co-defendants. However, in a succinct headnote in *R v Prater* (78) it is stated that, where it appears that a witness, whether a co-defendant, or a prosecution witness may have some purpose of his own to serve in giving evidence, it is desirable in practice that a warning should be given to the jury with regard to the danger of acting on his uncorroborated evidence, similar to that which is given in the case of accomplices, whether the witness can properly be classed as an accomplice or not. This statement was considered by the Court of Appeal in *R v Stannard and Others* (79), where Winn, J., reading the Court's judgment, said this at pages 91 to 92:

> "The rule, if it be a rule, enunciated in PRATER (supra) is no more than a rule of practice. I say deliberately 'if it be a rule' because, reading the passage of the judgment as I have just read it, it really seems to amount to no more than an expression of what is desirable and what, it is to be hoped, will more usually than not in cases, at any rate where it seems to be appropriate to the learned judge, be adopted. It certainly is not a rule of law, and this Court does not think it can be said here that there was any departure' in this respect from proper procedure of trial; still less does it seem that any injustice can possibly have flowed from the undoubted fact that no such warning was given in the present trial."

This was the approach that was adopted by the Court of Appeal in *R v Whitaker* (80).

The foregoing exposition of the law expresses what in our opinion is the right approach in the present case. A7's evidence as against his co-appellants needed to be corroborated or, at any rate supported by what we termed in *Phiri (E) and Others v The People* (81) at page 107, evidence of "something more", that is, evidence of circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice or co-defendant implicating the accused. When we come to consider the alleged participation of each appellant, any piece of material evidence given by A7 which will seem to us to be unsupported in the manner indicated above will be disregarded.

In this case, as in *Stannard and Others* (79), there was no warning given. Evidently, the trial judge could properly have used only those parts of A7's evidence which were corroborated.

p115

(e) *Use of contents of the Chilanga documents*

The fifth set of the grounds pertains to the trial judge's alleged improper use of the contents of the Chilanga documents. It is unnecessary to discuss the subject in any detail as it has already been adequately covered. It suffices to say that A5 and A8 were arrested at Chilanga Farm where the said documents were found bearing their names and military flanks. We consider that the documents were properly used by the trial judge as evidence of odd coincidences against A5 and A8 to show their association with the man at Chilanga Farm. There was thus no misdirection on the part of the trial judge.

(f) *Use of the co-accused's confessions against non-makers*

The sixth and final set of grounds on the subject relates to the trial judge's alleged use of co-appellants' confession statements against non makers. There is substance in this allegation. For example, in his judgment the trial said this:

> "Accused 1 is implicated by PW5 and some of the co-accused in their warn and caution statements."

This was clearly a misdirection because, as we have already pointed out, an out-of-court, that is ex curia, statement made in the absence of the defendant by a co-defendant, is not evidence against the former unless he expressly or by implication adopts the statement as his own. Only the confession that were properly admitted will be considered and only as against the makers.

4. *Alleged wrongful assessment of evidence on credibility*

What ones next is a criticism as to the trial judge's wrongful assessment of evidence on the credibility of two of the key prosecution witnesses. namely, PW5, General Kabwe, and PW68, who for the purpose of this case has been given the name "Bread", on grounds of his own security.

(a) *Credibility of PW5*

As to PW'5, it is argued by, and on behalf of, the appellants that the trial Undue misdirected himself when he found that PW5 was truthful even when the witness had been found to be untruthful on a material aspect, of the case, that is, his failure to report the alleged coup plot and his ours role in the matter.

That PW5 made no report to the appropriate authorities about the said coup plot is common cause. In his testimony, PW5 gave three reasons to account for his silence in the matter. These were; firstly, that in July, 1980', he was assured by A3 that the plan had been abandoned and so he saw no reason for reporting about it, secondly, he feared for his life as he had been told by A3 at their first meeting that if he reported about

the plot to anybody, he would be killed, and thirdly, that he was not in good books with the then Commander of the Combined Defence Forces - his superior - that he was not sure hour his boss might react to such news, that he night turn tables against him, and that he could not by-pass his

boss as the chain of command required him to go thought the boss.

In his ruling at the no case to answer stage, the trial judge said:

> "As to these reasons for his failure to report to the authorities cannot agree that these go to his credit. In my opinion these only go to strengthen the fact of him being an accomplice. In the face of a very serious thing such as the unlawful taking over of the government by unlawful means, I cannot believe that he did not want to report to the authorities because of the chain of command that required him to go through his Commander. Neither can I accept that he feared for his life to such an extent as not to report to the authorities. The fact is that he never reported the matter because he Joined the conspiracy. I find no other reason at all."

And a little later he continued:

> "Having disagreed with the defence on points on which they based their assessment of untruthfulness, I have no hesitation to hold that PW5 was a truthful witness. "

Subsequently, the trial judge said this in his judgment:

> "This witness (PW6) is an accomplice witness and he was indemnified by the State against prosecution for his complicity in the alleged coup plot. In my ruling I did find Gen. Kabwe as an honest witness having observed his demeanour and I have not found anything in the evidence that can make me doubt his honesty or credence. I do not think that he coloured his story in any await because he agreed to turn State wiliness. In my ruling on no case to answer I did say that I did not believe his reasons for not reporting the plan to the authorities, I concluded that he did not report because he was in it; and I still hold that view. In my view, the reasons advanced are an afterthought after the plan was foiled but I will not contradict myself to say that I do not believe his reasons but at the same time say that I find him an honest witness. The point where I have found him lying is not a material point."

We are of the view that the trial judge's basis for assessing the evidence of PW6, to wit, that his lie as to the non-reporting of the coup plot did not go to his credibility, was a misdirection. We are, therefore at large to reassess PW5's credibility on the evidence as a whole. In so doing, we shall bear in mind what we said in *Tembo v The People* (82) at page 226 lines 39 to :

> "When considering the evidence of a witness, and particularly an accused person, who is proved to have lied in material respects it is essential to bear in mind that, unless the untruthful portions

p117

> of the evidence go to the root of the whole story to such an extent that the remainder cannot stand alone, such remainder is entitled to due consideration. The weight of the remainder is of course affected by the fact that the witness has been shown to be capable of untruthfulness, but the remainder must still be considered to see whether it might reasonably be true, it cannot be rejected out of hand."

A complement to the foregoing passage is to be found in *Haonga and Others* (22), where headnote No. (iv) at page 202, lines 1 to 9 reads as follows:

> "Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reasons for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful."

For completeness, we think it desirable to draw attention to two other authorities. The first one is, *Mulwanda v The People* (83), where we said at, page 137, lines 27 to 35:

> "But unfortunately for the applicant these improprieties in the investigations do not assist him. The learned magistrate was fully aware of the circumstances in which the various witnesses in question came to give information to the police. He was aware that they had at first denied complicity, but after having been detaine and threatened with continued detention, they made statements implicating the applicant. The learned magistrate tools all this into account but, as Mr Ponnambalam on behalf of the State rightly pointed out, he relied on the sworn evidence of the witnesses in court."

And the second is *Mattaka* (4), where it was stated at page 504, letters B to C:

> "We are of the view that this assessment of Leballo's evidence by the Chief Justice must be accepted. Broadly speaking, the Chief Justice was satisfied that the main portion of Leballo's evidence was true and this is borne out by the admitted or proved facts, but the Chief Justice found that he would not accept any portion of his evidence as involving any of the appellants except where the evidence was shown by other evidence or by the sequence of events to be true."

It is argued that, on the issue non-reporting, PW5 should have been treated in the same way as PWs 68 and 59: Major Geshom Mubanga (of the Zambia Army) and Christopher Kayukwa, an aircraft technician, armaments, in ZAF, respectively, who, being officer of lower ranks, were disqualified. The evidence was that PW58 had allegedly been approached

p118

and asked by Major MacPherson Mbulo - one of the original accused persons who has since been acquitted - to provide him with about forty army combat suits. Similarly, MacPherson had allegedly approached and asked PW59 to provide him with rounds of ammunition Neither of these witnesses acceded, to there quests nor did any of them make a report about the requests to the appropriate authorities. In his ruling at the no case to answer stage, the trial judge said that, with such approaches, one would have expected PW58 and PW69 to report to the authorities, more so when they realised that the authorities, having become aware of the requests, asked each one of them to make a statement to the police. He went on to say that -

> "These are witnesses with interests of their own to serve. However be as this may, I find no evidence, even from these witnesses linking the requests to the conspiracy which I have already found to have existed."

From this narrative, it becomes plain that, although the trial judge was critical about these witnesses' non-reporting of the requests made to them, he did not disqualify them as alleged. Indeed, MacPherson was acquitted on the premises that, on the evidence before the trial judge, there was nothing - the evidence of PW58 and 59 included - to connect him with the conspiracy. In any case, PW6, unlike PW58 and 59, was found to have been "in it."

It is alleged that PW5 gave unsatisfactory evidence. We are unable to say that, on the evidence as a whole, there is justification in that criticism.

Further, it is contended that the trial judge was wrong to prematurely assess PW5's credibility at the no ease to answer stage by saying that he had "no hesitation to hold that PW5 was a truthful witness."

Although the trial judge's finding arose out of a spirited and even a vehement attack by the defence on PW5's credibility, it won nevertheless a misdirection to make such an assessment which had the trappings of finality, at that stage. It was enough to simply rule that prima facie case had been made out against each one of the appellants. Finality of assessment as to a witness' credibility, especially as to his truthfulness, should be reserved until the final judgment stage, after both sides have been heard, should the defence elect to proffer evidence before they close their case.

The foregoing discussion only serves to underline why PW5s credibility must be reassessed on the totality of the evidence.

(b) *Credibility of PW68*

In considering the credibility of PW68, it is necessary to take note of the facts that this witness has been criticised in three respects. Firstly, it is argued that the trial judge misdirected himself in failing to pronounce the status of the witness who, it is submitted, should have been classified

as an accomplice or a witness with an interest of his own to serve. A recent decision of this Court Combo and Others v The People (84), - is cited in support of the argument. This witness is a Zairean national and was, at the material time, a member of F L N C of which Butter, PW69, was leader in Zambia A6, being leader of a splinter group. Prior to the formation of A6's F.L.N.C., PW68, PW69, A6, A7, A8 and many others, belonged to one political party: the F.L.N.C. The witness was in detention in this country for about two years until September, 26, 1980 when he was set free. The detention was in connection with his alleged involvement with a banned political party called the United Progressive Party (UPP).

On a proper evaluation of the evidence, there in nothing on record to evince that PW68 was an

accomplice or even person with an interest of his own to serve. In Chimbo and Others (84), a case of murder, the trial judge found that the evidence of PW4 an accomplice - was corroborated as to identity by PW2, the victim's wife, who was an eye witness. On appeal to this court, it was pointed out by counsel in relation to PW2 that one of the two unimportant findings of the trial judge was that she was a suspect witness for the reason that she may have had motive to falsely implicate the appellant. We said there that the effect of that ' finding was to place PW2 in the same category as PW4 to the extent that the approach to their evidence would be similar since the danger to be guarded against, namely, the danger of false implication, was exactly the same. We had this to say at page 25, lines 16 to 22:

> "It is the duty of a trial judge, if the circumstances so dictate, to make a finding regarding the status of any particular witness, and while different witnesses can be suspect for different reasons, it obviously does not follow that witness must be regarded as suspect merely because she happens to be the wife of the victim. We do not apprehend from the Judgment below that PW2 was found to have a motive to falsely implicate solely for being a wife."

There is no suggestion in *Chimbo and Others* (84), that the status of every witness must be pronounced. The emphasis there was that, where the circumstances of a particular case so warrant, a trial judge should make finding as to the status of any particular witness. See also *Likando v The People* (85).

Secondly, it is alleged than PW68 had malice, bias and strong motive to falsify and implicate A6 or any of his associates in F.L.N.C. on the evidence, however, we find that, although there was bias on the part of PW68, as against A6 in particular, there was no malice or strong motive as alleged. This was stemmed out of the fact that when PW68 was released from detention, he subsequently discovered from A6 had formed his own splinter political party which was abusing his (PW68) party's name by indulging in activities inimical to Zambia which consisted of plotting to overthrow the Zambian Government. He said he would not be sorry to see A6 in trouble because of what be had done.

p120

This attitude of his would apply to any of A6's associates in F.L.N.C In the light of this bias, it was desirable for the trial judge to warn him self and so his failure to do so was a misdirection. As we said in *Mwambona v The People* (86):

> "Though a witness with bias is not to be regarded as witness with a purpose of his own to serve, nevertheless his evidence should be treated with caution and suspicion."

We are thus at large to reassess PW68's evidence. Provided court is alive to the bias or possible bias of witness and makes due allowance for the same, it may convict even if such evidence is unsupported.

Finally, on this issue, it is submitted that the trial judge misdirected himself in law in failing to regard the evidence of PW68 as unreliable, in view of the fact that he had dishonestly obtained

Zambian Green National Registration Card (reserved only for Zambian nationals) and that his police statement differed substantially from his evidence in court.

As to the first of these allegations, it is common cause that PW68 forged Zambian National Registration Card on the strength of which he was allowed to join the Zambian National Service, posing as a Zambian. This aspect goes to his credibility. Here again we are at large to reasess his evidence.

The second allegation attacks the difference in length between PW68's statement to the police and his evidence in court. The explanation given by him is that the police statement was an abridged version of his evidence in Pert. That explanation sounds credible to us. In any case, it does not necessarily follow that, because there are differences between statement given to the police and evidence given in court, the witness must be disbelieved. Much depends upon the facts of each particular case. However, we do have to point out, as we did in *Miyoba v The People* (87) that, where it is sought to challenge the credibility of witness by reference to previous allegedly inconsistent statement, it is necessary that the previous statement should be formally introduced into the record so that the trial court, and indeed, any subsequent Court on appeal can compare it with the evidence given in court and assess for itself the seriousness of the alleged discrepancies. If this is not done, the previous deposition taken at the preliminary inquiry or statement to the police will not be formally before the court and the court will not be entitled to have regard to the contents of such statement. But even more significant was the determination in headnote (iv) to the effect; that, unless the previous statement has been made part of the record, in one or other of the methods available, the appellate court has no basis on which to assess how serious the alleged discrepancies are and what weight to attach to the evidence of the witness.

5. *The alleged wrong specific findings*

The next major issue is about the alleged wrong specific findings.

(a) *That PW5 was a truthful and credible witness*

p121

The first of these relates to the trial judge's findings at the no case to answer stage (and later reiterated in the judgment) that PW5 was truthful witness. This hall already been discussed and we have said that we are at large to re-evaluate PW5 on the totality of the evidence.

(b) *That PWs 33-37 were tricked*

The second alleged wrong specific finding is that PWs 33 to 37 (whom the prosecution offered as indemnified accomplices) had been tricked at the time of their recruitment in the Mwinilunga District that they were to be farm labourers.

It is quite evident from the evidence, including that of PWs 33 to 37, A7 and the confession statements made by A6 and A7 as against themselves that, at the time of their recruitment, PWs 33

to 37 were told that they were being recruited to work as farm labourers, when in actual fact the ultimate objective was to have them deployed as soldiers. The choice of the source of recruitment - Mwinilunga - was significant in that, on the evidence of A7, some of the ex - Katangese Gendarmes personnel were known to be residing there, some of whom had taken part in an encounter with Zairean security forces at Kolwezi in 1976. In his confession statement, A6 said:

> "They wanted 200 people but Mporokoso said one hundred (100) could do and Gen. Kabwe said the number of 200 was too much, therefore, we agreed at 100. I told them that those people were not at my house at Kitwe, that we were to bring them from somewhere.I told the group that it was not easy for me to organise, those people were somewhere in Mwinilunga. So I had to send someone to organise those people where they were and to send transport to collect them. We agreed on that"

And A7 said in evidence:

> "That money was for the purpose of commencing a journey going to collect soldiers from Mwinilunga...taking them to Kitwe... At that time it appeared we were to overthrow the Zambian Government."

In his confession statement, he (A7) said of the soldiers recruited from Mwinilluga:

> "Soldiers were now to come and fight the Zambian Government. This is how it was arranged that after assisting to overthrow the Government of Zambia then the new Government would assist us who are fighting Mobutu's Government and overthrow him."

A5 and A7 were involved in the recruitment of PWs 33 to 37. PWs 33 and 34 were recruited in August 1980 whereas PWs 35 to 37 were recruited in September of that year. All of them were initially taken to Kishombe Farm in Kitwe and thence to Chilanga Farm.

These witnesses testified that they were about 50 to 65 at Chilanga Farm. When, according to their evidence, firearms were delivered to the farm by Annfield, in the presence of A3 and A6, the weapons were distributed

to the personnel at the farm, each one of them receiving an automatic AK47 rifle and thirty rounds of ammunition. On being issued with guns and ammunition, PWs 33 to 37 were surprised as they had been recruited to work as farm labourers; but when they inquired about the firearms, they were told that these were for the protection of the farm against thieves. As the trial judge correctly found, there was no evidence concerning the presence of thieves at or In the vicinity of Chilanga Farm and that, in any event, the explanation given could not justify the heavy arming of everyone at the farm. These witnesses were not satisfied with the explanation given. Indeed PW 36, Soneka Mashikini together with four others, saw it fit to desert.

According to the evidence of PW68 and A7, when A6 took the first firearm - a Russian made AK47 rifle - to Chilanga Farm and told the people there to learn how to use it, the ex - Katangese soldiers

were jubilant but the Zambians were not. This ties in with the evidence of PWs 33 to 37. In *D.P.P v Kilbourne* (88), it was said (per Lord Reid) at 456, letters B to D:

> "The main difficulty is caused by observations in *R v Manser* (89), to the effect that the evidence of one witness which required corroboration cannot be used as corroboration of that of another witness which also requires corroboration. For some unexplained reason it was held that there can be no mutual corroboration in such a case. I do not see why that should be so. There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits with other statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in. In ordinary life we should be and in law we are required to be careful in applying this idea. We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements we should not accept them as corroborative."

And in *Chimbo and Others* (84), we said this at page 25, lines 35 to 40.

> "There are circumstances when the evidence of one suspect witness could be corroborated by the evidence of another suspect witness provided of course that not only is the suspicion for different reasons but the one supplying corroboration or both of them must be what one might call, for lack of a better expression, an innocent suspect witness."

Discussing the position of PWs 33 to 37, the trial judge said in his judgment :

> "These witnesses, although found in the situation they were, I would describe them as innocent accomplices, innocent the

p123

> sense that although they were recruited by accused Chilambe and Mulewa (i.e. A7 and A5), they were tricked that they were to be farm labourers when in fact they were intended to be soldiers of an illegal army. To some, like PW36 Mashikini, when they realised that they were not to be ordinary farm labourers, after the guns were brought to the Chilanga Farm, they deserted."

To this extent, the position of PWs 33 to 37 appears to be covered by *Melbourne* (88) and *Chimbo* (84). In any case, their evidence was, not in any way challenged by any of the appellants. In our judgment, the trial judge was correct in finding that PWs 33 to 37 had been tricked at the time of their recruitment that they were to be farm labourers. It seems to us that the finding that the witnesses were tricked must relate to the initial recruitment and we do not understand the learned trial judge to have meant that it was valid for all time. Obviously, those who remained at Chilanga Farm and received arms must have become aware of their altered positions. In any case, the witnesses were put forward as indemnified accomplices and they have to be treated in that light.

(c) *Illegal army for Coup purposes and engaged in a shoot-out*

The trial judge's finding that there was an illegal army camped at Chilanga Farm has been criticised. It is, however argued, especially by A6, that there was no army at all at Chilanga Farm. It is indisputable that there was an armed band of men at Chilanga Farm. PW68, who had twice been taken to the farm by A6 and A7, and once by A6, referred to the band of men there as an "army" and the trial judge found that those men had constituted an illegal army. There was ample evidence in support of the trial judge's finding. For instance, A7, PWs 33 to 37, PW68 and PW85, all testified to that fact. Further evidence of this is to be found in the ex curia statements of A6, A7 and of A8 as against themselves. Other evidence is to be found in the testimonies of the security officers who raided the farm and who captured, at one stage or another, a good number of the men who had been there. Moreover, there was evidence, 3C not only of the men at the farm, each one of whom was armed with an AK47 automatic rifle and thirty rounds of ammunition, but also of the presence of para-military uniforms and the Chilanga documents which have previously been discussed, some of which bore names and military ranks of some of the men at the farm, as well as numbers and/or type of firearms issued to them. The trial judge's finding on this issue was, therefore justified.

The next criticism is that the trial judge erred in finding that the illegal army was for the purpose of overthrowing the Zambian Government. Here again, the finding was amply supported by the evidence of A7, PW5, PW68 and the Chilanga documents. For Instance, during his cross-examination by A1, A7 came out quite clearly and testified that he was "recruiting people for the purpose of forming an illegal army." Although the initial objective had been to recruit personnel in order to fight against the Zairean Government, the witness stated that, as it turned out "we were to fight the Zambian Government and this is what has brought

me in trouble." It is further evident from A6's confession as against himself that the immediate tam of the armed men at Chilanga Farm was to overthrow the Zambian Government.

Equally criticised is the trial judge's finding that the illegal army was involved in a shoot-out with the Zambian security forces at Chilanga Farm. It is asserted that there was an exchange of fire between two platoons of Government security forces led by Major Allan Kalebuka PW 71, and Major Patrick Sitwala, PW 72, but that there was no shootout as such between the security forces and the men at Chilanga Farm.

It is not in dispute that on October 16th, 1980, at about 0400 hours, there was a combined operation at Chilanga Farm consisting of about 300 men drawn from the Zambia Army, the Zambia National Service and the Zambia Police; and that PW 71 ordered that the farm be surrounded and attacked on three fronts. On the evidence of PWs 71, 72, 73 Detective Inspector (Zambia Police) Chrispin Muyambango - and PW 81, Constable Energy Moya, there was obviously a shoot-out between the Security forces and some of the men at Chilanga Farm, during the early hours of October 16th, 1980. PW 81 became a victim of the shoot-out he was shot in his left leg by an enemy in civilian clothes. The hostile forces were not without casualties: David Mujinga, described as sergeant in the Chilanga documents (exhibits P. 141, P. 142A, P. 142C and P.142D), and A8, described as Captain

(exhibits P.141, P.142A and P.142C), were wounded and captured during the operation. A few others were also wounded, one of whom died on the spot, but David Mujinga died later.

Two other shooting incidents occurred, the first one at about 08.00 hours and the second at about 100 hours. The State concedes that, due to lack of communication, there was on these occasions, some confusion resulting in an exchange of fire between two platoons of the security forces.

The picture than emerges is that, during the early hours of October 16, 1980, shoot-out took place between the security forces and the armed band of men at Chilanga Farm. Subsequently, however, there was crossfire between two platoons of the security forces. It follows that the trial judge's finding that there was shoot-out between the security forces and the hostile forces was not misdirection.

(d) *That A3 and A6 went with A7 to buy motor vehicles*

As to the purchase of motor vehicles, it is contended that the trail judge misdirected himself in point of fact when he found that A3, A6 and A7, (having agreed to overthrow the Zambia Government) went together to buy Land - Rover registration number AAD 5842 from three Way Parking; VW Combi No. ANA 1452 and Ford Transit No. ADA 9951 from Duly Motors.

On the testimony and confession of A7 and the evindence of PW25, Eric Johnson, the Land - Rover was purchased by A7.

p125

Both the VW Combi and the Ford Transit are attributed to A6, supported by PW30, William Chewe, sales representative with Duly Motors.

It is common cause that all the three motor vehicles were used by A5, A7 and A8 in the recruitment and transportation of personnel from Mwinilunga to Kishornbe Farm in Kitwe and thence to Chilanga Farm.

Apart from A7's evidence that A3, A6 and himself went together and bought the Land - Rover, there is no other material to suggest that A3 (let alone A6) was also present at the time. Thus the inclusion of A3 by the trial judge in the purchase of motor vehicles was erroneous, Is the evidence against A3 had been given by co-accused, A7, whose evidence was unsupported (and the judge did not; warn himself as to the danger of acting on it in the absence of corroboration). The criticism in this regard is well founded.

(e) *That Annfield distributed guns at Chilanga Farm on October 15, 1980 in the presence of A3 and A 6*

There has been an attack on the trial judge's acceptance of evidence of the distribution of guns, the argument being that the evidence should have been disallowed since there was no specific overt act for this specific and separate act. Having previously covered this issue, there is no further need to go over it again. It suffices to say that, as the evidence complained of went to the direct proof of the

conspiracy overt act, no question of misdirection arises.

It is further argued that the trial judge erred in finding that Annfield has delivered firearms to Chilanga Farm in the presence of A3 and A6.

The trial judge accepted the evidence of PW28, Peter Chisanga and also of PWs 33 to 37 that Annfield was seen here in Lusaka and at Chilanga Farm on the evening of October 15th, 1980, the very evening when he was seen delivering firearms at Chilanga Farm and witnessing their distribution to the men at the farm.

PW28's evidence that Annfield had been in Lusaka on October 14th and 15th, 1980, was in direct conflict with that of PW54, Esinati Sakala, whose testimony was that Annfield had left Zambia on the 14th of that month. There was no specific finding on the point; the triad judge merely accepted the evidence without resolving the conflict; but there was overwhelming evidence on the matter to show that Annfield had been seen in Lusaka and at Chilanga Farm on the evening of 15th October. The evidence of PW 54 stands alone.

The substance of what we have just said above applies to A3 and A6 as well. Although no specific date is mentioned, A6 as against himself confirms in his confession Annfield's delivery of firearms and rounds of ammunition to Chilanga Farm. The confession statement reveals that he witnessed Annfield deliver 30 AK47 rifles and 3 000 rounds of ammunition.

p126

On the evidence, therefore, the trial court was right in holding that Annfield had delivered firearms to Chilanga Farm in the presence of A3 and A6, for distribution to the men there assembled.

(f) That PWs 33-37 Implicated, A8

In his judgment, the trial judge found that PWs 33 to 37 had implicated A8. This was an error because the record shows that none of these witnesses ever made such a reference to A8. The complaint in this regard is valid one.

6. Corroboration

We now return to the important issue of corroboration, certain aspects of which have already been discussed.

The crucial evidence against the appellants, with regard to the commission of the offence, comes from PW5 and PWs 33 to 37, all of whom are indemnified accomplices; PW 68 who, though not an accomplice or a witness with an interest of his own to serve, was biased witness as against A6 and, A7, a co-defendant at the trial, whose evidence falls in slightly different category.

As we have already indicated the trial judge properly warned himself about the danger of acting on the uncorroborated evidence of PW5 and PWs 33 to 37; but he was silent in relation to the evidence of PW68 and A7: this was misdirection on his part. We shall have to consider later whether, on the

facts of this case, the proviso to section 15(1) of the Supreme Court Act should be applied. In considering whether or not the conviction should stand, we are at liberty to review all the facts of the case, always bearing in mind that the trial court had the opportunity of hearing and seeing the witnesses when they gave their evidence. However, this Court will, in the exercise of its powers, quash any of the convictions or all of them, even though the trial judge duly warned himself of the danger of convicting on evidence which requires corroboration if, after taking into account all the circumstances of the case, we come to the conclusion that any of the convictions, or all of them, cannot be supported, having regard to the evidence and would, for that reason, be rendered unsafe or unsatisfactory.

In defining what constitutes corroboration, Lord Reading, C.J., said R 'in the classic case of *v Baskerville* (89), at Page 667:

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

In *Credland v Knowler* (90), the Lord Chief Justice said, at page 56:

> "As has been pointed out over and over again, where the question is whether person's evidence is corroborated, the whole story has not

p127

> to be corroborated, because if there is evidence independent of the person whose evidence requires corroboration which covers the whole matter, there is no need to call that first person at all. The evidence has only to be corroborated in some material particular ...' by some other evidence."

Corroboration or supporting evidence is a requirement that seeks to guard against the danger of deliberate false implication by singly or jointly fabricating story against the accused. In *Phiri (E) and Others* (81), less technical approach to what is corroboration as matter of law, was recognised. We indicated there, at page 107, lines 14 to 18, that it was enough to adduce evidence of "something more" namely, circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the accomplice implicating the accused. As the learned authors of Phipson have indicated in paragraph 320-17: "The whole point of looking for corroboration of 'suspect' evidence is to see whether it is to be believed."

In regard to the effect of having an adequate warning as to the danger of acting on the evidence of an accomplice, it would appear that English courts sire adopting a more liberal attitude. Take, for example, the case of *R v Thorne and Others* (91), where Lawton, L.J, reading the judgment of the Court of Appeal, said at page 16:

"Provided trial judge gives an adequate warning about the danger of acting on the uncorroborated evidence of an accomplice, jury may convict. It is not for the Court to adjudge that they cannot. If there is anything in the judgment of *Turner and Others* (37), which says otherwise, then what we said was per incuriam. Common sense, however, must be applied to the problem of assessing the value of accomplices evidence. The repentant offender of previous good! character who is trying to purge his conscious by giving evidence should be regarded as more reliable than villain like O 'Mahoney who had an obvious motive of carrying favour with the police... If jury, after proper warning and on adequate direction as to the evidence, do convict, this court should not interfere merely because there was nothing to corroborate or to support that evidence. To do so would be to usurp the function of the jury."

The observations expressed in *Thorne and Others* (91), appear to be in consonance with those expressed by the Federal Supreme Court of Rhodesia and Nyasaland (per Clayden, F.J.) in *Mulenga and Others v Regina* (92), at pp. 14 to 15.

In England, the jury, as trier of issues of fact, is not required to give and does not give, reasons for its verdicts. Where, however, judge is as here, the trier of issues of both insects and law, he is required to give reasons for his conclusions. As we pointed out in *Phiri (E) and Others*

(81) at pages 106 to 107, lines 44 to 8, a judge a sitting alone or with assessors, must warn himself, and the assessors, if any, as to the dangers of convicting on the uncorroborated evidence of accomplices; and by examining the evidence and considering whether in the circumstances of the case those dangers have been excluded. In doing so, the judge should clearly reveal his mind on the matter by setting out the reasons for his conclusions.

But, in case where no warning as to corroboration was given in circumstances in which it should have been given, an appellate court must always ask itself whether there is such clear and convincing corroborative evidence as to make it inevitable for trial court, properly directing itself, to arrive at the same conclusion. We wish to recall what said in *Butembo v The People* (93), at page 194, lines 15 to 35:

"Mr Okafor on behalf of the appellant urged as his major ground of appeal that the magistrate had nowhere warned himself of the desirability for corroboration and that his failure so to warn him self should lead to an acquittal. He cited in support of his argument the case of *R v Trigg* (94) where the court at page 101 suggested that cases where no warning as to corroboration was given in circumstances in which it should have been given should not broadly speaking be made the subject of the application of the proviso.The court went on to suggest that to apply the proviso in such circumstances must be regarded more as exceptional than as any sense a regular matter. We must with respect question the value of using words such as 'exceptional' or 'regular matter' in this connection. It is settled law, as indeed *Trigg* (94) acknowledges, that in a proper case, notwithstanding that no warning as to

> corroboration has been given when it should have been given, a conviction may be upheld. The test is se out in the case of *R v Lewis* (95), where Lord Hewart, C.J., said at page 364: 'The question for this court is, does there exist in this case corroboration of such manifest cogency that the conclusion is not to be resisted that the jury properly directed would certainly have arrived at the same conclusion.' "

In some cases, moreover, as here accomplices of a class may be mutually corroborative, where they give independent evidence of separate incidents and where the circumstances are such as to exclude the danger of a jointly fabricated story. (see per Lord Hailsham L.C., in *Kilborne* (88), at pages 35 to 40 (supra). PW5, PWs 33 to 37 and, we may add, PW68, belong to such a class. Further, there is supporting evidence from the Chilanga documents; the street map of Lusaka (i.e. exhibit P112): the discovery of AK47 automatic assault rifles at Chilanga, Annfield's house and behind Lupele's house, Pamodzi Compound at Ndola; and A7. On all this material, it is undeniable that, in general terms, there was adequate corroborative evidence supportive of Count 1 so far as the existence of a coup plot is concerned.

p129

Proof of overt acts

Before considering the alleged individual involvement of the appellants in this case, it is necessary to ascertain whether there was cogent evidence before the trial court in support of the four overt acts laid under the first count.

The principal overt act is the first one which implicates all the appellants, save A4, in a conspiracy for the overthrow of the Zambian Government by unlawful means.

(a) Overt Act 1

As to the nature of a conspiracy, whether the conspiracy be a substantive offence or an overt act, a useful guide is to be found in a brief but an up to the point headnote in *R v Growths and Others* (96), which reads:

> "To prove the existence of conspiracy, it must be shown that the alleged conspirators were acting in pursuance of a criminal purpose held in common between them. The conspirators may join in the conspiracy at various times; any one of them may not know all the other parties, but only that there are other parties; and any one may not know the full extent of the scheme to which he attaches himself; but each alleged conspirator must know that there is in existence or coming into existence a scheme which goes beyond the illegal act which he agrees to do and must attach himself to that scheme."

(See also per Paul, J., at page 290; or page 453, (1965) 2 All, E.R.).
In *DPP v Doot and Others* (97), Viscount Dilhorne stated at page 613:

> "A conspiracy is usually proved by proving acts on the part of the accused which lead to an unlawful act."

And the headnote says that :

> "Although conspiracy is complete as crime when the agreement is made, it continues in existence until it is terminated by completion of its purpose or by abandonment; or frustration, and so long as there are two or more parties to it intending to carry out its design."

(See also Viscount Dilhorne's observations at page 613).
The establishment of the existence of conspiracy is generally a matter of inference to be drawn from certain criminal acts of the accused persons, done in pursuance of criminal purpose which is common to them. The learned authors of Archbold state in paragraph 15-66:

> "The acts and declarations of any conspirator in furtherance of the common design are admissible in evidence against any other conspirator..."

On the evidence as whole and, especially that of PW5, PWs 33 to 37, PW 68, PW 85, PWs 1 to 4, PW6, PW63, PWs 71 to 73 the Chilanga documents, the street map of Lusaka (i.e. exhibit P112), the discovery of firearms and rounds of ammunition, the acquisition of paramilitary

p130

uniforms, A7, it is abundantly clear that the commission of the first overt act was fully established. The first priority of the conspirators was to overthrow the Zambian Government and the second one was to overthrow the Zairean Government, on a quid pro quo basis. To this end, meetings were held at A1's house, A3's office, Annfield's house and House No.175, Kasangula Road, Roma Township. Annfield acquired the Chilanga Farm and a care-taker was hurriedly evicted therefrom. There was mounted a recruitment campaign for personnel from Mwinilunga who were mainly ex - Katangese soldiers, some of whom had taken part in the Kolwezi uprising in Zaire, and motor vehicles were bought for the purpose; those men were camped at Chilanga Farm; and they were ordered not to visit any of the surrounding villages in search of beer or anything else. When A6 delivered the first AK47 rifle, he addressed the men at the farm and told there to start practising how to use it as time to overthrow the Zambian Government was at hand. PW85 was then given the responsibility of looking after the AK47 rifle. AK47 firearms were delivered by Annfield, inter alios, and each and everyone there received a firearm and thirty rounds of ammunition, paramilitary uniforms had been acquired as well as exhibit P.112, the street map of Lusaka. It was arranged to arrest the President, the Secretary - General of the Party and other high ranking leaders, including defence and security chiefs.

We have earlier on indicated that we would re-assess the credibility of PW5 and PW68 on the totality of the evidence. Their evidence as it affects any individual appellant will be considered at a later stage, but for the present purposes we wish to consider their evidence only as it relates to the existence of the coup plot. The scheme outlined by these witnesses was to the effect that the President would be taken into custody at gun point; and that other leaders would be arrested. The existence and fact of the illegal army was consistent with the scheme as outlined and it is clear that PW5 and PW68 have been supported by other evidence as noted above. It is also clear that the area

of agreement and consistency between their evidence and the remainder of the evidence and the proven circumstances are such that on the whole and on the totality of the evidence their evidence on the important issues was credible and can be relied upon.

(b) Overt Act 2

In regard to the second overt act, the only crucial viva voce evidence that implicated A1, A2 and A3, was that of PW5 who had testified as to the alleged plan for the diversion of the Presidential aeroplane to a pre-arranged place where he was to fall into the hands of armed men and to be forced, at gun point to renounce the presidency. In finding that; the second overt act had been proved, the trial judge relied upon the confession statement of A3 and the interrogation notes concerning A2. But, as these ought not to have been admitted in evidence in the first place, they have now been expunged from the body of evidence in this ease. There was no evidence from PW5 to the erect that either A6 or A7 was present at the alleged meeting as was wrongly implied by the trial judge since A7's evidence related to totally different meetings.

p131

At the end of the day, the evidence of PW5, in so far as the second overt act is concerned, is left uncorroborated and, consequently, this overt act falls away on its own inanition. A1, A2 and A3 cannot, therefore, be convicted on the basis of the second overt act.

(c) Overt Act 3

As to the third overt act, this was established on the evidence of PWs 33 to 37, A7, the discovery of firearms and rounds of ammunition, and the Chilanga documents.

(d) Overt Act 4

The fourth overt act concerned A6 alone, the allegation being that he was in command of an illegal army stationed at Chilanga Farm. The fact and existence of an armed band of men (termed "Illegal Army") was fully established by the evidence of PWs 33 to 37, PWs 68 and 85 and A7 in his evidence as already noted. It was also established by the evidence off the various prosecution witnesses from the security forces who participated in the various tasks carried out at Chilanga Farm. The question whether or not A6 was in command of the illegal army will be discussed later when we come to consider his alleged involvement in this case.

We propose to discuss the second count when we deal with the position A4.

7. Individual involvement

The only substantive issue that remains for our consideration is the alleged individual involvement of the appellants in this case.

The second overt act having fallen away, A1, A2 and A3 are now faced with one overt act only: the first (i.e. the conspiracy) overt act. However, A5. A7 and A8 still have the first and third (i.e.

recruitment) overt acts to contend with, while A6 has the first and fourth (i.e. leadership of the armed men at Chilanga Farm) overt acts.

(a) A1

As against A1, there was evidence of direct implication from PW5 who testified inter alia, that A1 was in the coup plot and that his house was used as one of the meeting places for plotting purposes. This was also testified to by A7. The trial judge was, however, in error when he found that A1 was, in addition, implicated by "some of the accused in their warn and caution statements", because those statements, being ex curia were evidence only against the makers

Besides PW5 and A7, is the evidence of odd coincidences surrounding the apprehension of A1. Since the circumstances of A1's arrest are interwoven with those of A6's arrest, these will now be considered simultaneously.

House No. 6525, Kasangula Road, Roma Township, Lusaka apparently belonged to a Mr Peters who, on proceeding on study leave abroad, left his domestic servant, PW4, in the servants quarters at the

p132

premises and, by arrangement, Mrs Ross, PW6, took charge of the house and actually lived there. On October 21st, 1980, PW6 received a visitor - A6 - whom she had previously known in Angola, and allowed him to live in the house.

On October 23rd, 1980, as a result of information received, the Commissioner of Police at State House, PW1, rushed to House No. 6525, Kasangula Road, together with other police officers and caused it to be surrounded by para-military police. A1's fiat 132 GLS car was parked outside the house. PW3, Assistant Superintendent Bwalya, was on surveillance dudes outside the house. PW4, who was off duty and resting at the servant's quarters, saw A6, whom he had known for about three days run out of the back door of the house and jump over a wire fence .PW1 then ordered A6 to stop running away and, when he did not stop, he was shot at and wounded. PW1, who had not lost sight; of A6, then apprehended him and caused him to be taken for medical treatment.

Prior to the shooting, PW3, using powerful binoculars, had seen, through window panes, two persons in the said house seated and facing each other. Just before the shooting was heard PW2, Senior Superintendent Zulu, entered the house, only to find A1 alone. The back door leading to the servant's quarters was wide open. A1, whom PW2 knew before, then stood up holding a glass of beer in his hand and asked what was going on. Without answering the question, PW2 asked him where the people he had been with were. A1 replied that he was alone, adding that the witness may have seen servant go through the back door. Asked how he knew the house, A1 explained that he had received directions by telephone. When PW3 entered the house, he found A1 standing with PW2 and saw half full glass of beer on a small table A1 told PW3 in answer to a question that somebody had served him with the beer. After the house had been searched, A1 accompanied the police witnesses to the Force Headquarters. Whilst on the way there, A1 said, on his own accord, that; he was "stupid to have been caught in this." Asked way? He replied "I am a lawyer of this man

you have been looking for." Asked what he meant by being stupid, he said he was going to become Chief Justice as the substantive holder of the post had gone abroad.

On all this evidence, which was accepted by the trial judge, it is obvious that the beer must have been served by A6, as PW6 was away at the time and PW4 had gone off duty and was then resting at his own quarters when he suddenly saw A6 run out of the house through the back door.

The trial judge was justified in finding that A1 had told a lie by stating that he had been alone in the house when he had, in point of fact, been with A6. He held that lies told out of court may, under certain circumstances, amount to corroboration and cited *R v Lucas* (98), where Lord Lane, L.C.J.; had this to say, at page 123:

> "Statements made out of court, for example, statements to the police, which are proved or admitted to be false may in certain :

p133

> circumstances amount to corroboration. It accords with good sense that a lie told by the defendant about a material issue may show that the liar knew if he told the truth he would be sealing his fate ... To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to material issue. Thirdly, the motive for the lie must be a realisation of guilt and fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie for example, in an attempt to bolster up a just case, or out of shame or out of a wish to conceal disgraceful behaviour from the family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated that is to say by admission or by evidence of an independent witness."

The trial judge found that all the conditions set out in *Lucas* (98), had been fulfilled in this case. We do not think he can be faulted in his finding, on the evidence before him. (Contrast *Kate v The People* (99), as well as The *People v Swillah* (100)). The fact that A1 told a lie and showed remorse at the loss of opportunity to act as Chief Justice, was inconsistent with an innocent relationship between him, as a lawyer, and Ad, as his client. A1's submission that he did not lie when he said that he was alone in that house is untenable having regard to the evidence to which he had referred. A1 further argues that, even assuming that he had lied and expressed regret and so forth, as we find he did, then, the same was not corroborative of PW5. We will in a moment revert to this argument.

Further, and as the trial judge properly found, it was too much of a coincidence that A6's name - DEO-by which he appears to be popularly known, should appear on exhibit P.106, which is A1's personal cheque book; containing counterfoils Nos 674276 and 674277 since, in a lawyer/client situation, a cheque book belonging to A1's law firm-Shamwana and Company-could have been used. The use of A1's personal cheque book was, in the circumstances, indicative of the existence of a special relationship between A1 and A6.

Finally , there was what the trial judge termed "overwhelming evidence" but which he did not care

to specify. As we see it, such evidence can only relate to A7; occupation by A5 and A7 of House Plot No.175 of Subdivision 144A, Kasangula Road, Roma Township, belonging to PW63, Mrs Dorothy Mwanza; and a Forest Products Cheque.

In his evidence, A7 implicated A1 in the coup plot. A7 firmly stuck to his guns when he was cross-examined by A1, In regard to PW63's house, after it had been built in 1972, she retained A1 for the purpose of letting it out. At handled all the transactions pertaining to that house, including rent. PW63 was last paid rent in August, 1980, through A1, when he told her that a tenant she had found unsatisfactory would be vacating the house "in two or three days' time." She told A1 to hand over keys to Bitwell Kuwani but

p134

the keys were never handed over as instructed. Instead, A1 allowed A5 and A7 to live in the house rent free. A5 and A7 were both soldiers belonging to A6's political party, the F.L.N.C. - with military ranks of Chief Adjutant and Captain, respectively. In other words, these were A6's men. In actual fact, A5 was A6's official driver. Hence, the fact that A1 made- PW63's house available to A5 and A7, contrary to instructions, is strong evidence against him. At argued that the evidence surrounding PW63's house was hearsay and inconclusive and that evidence should have been called front the Lands and Deeds Registry, or that the cost, in the alternative, should have visited that house. We are satisfied that the whereabouts of the house, the fact that it belonged to PW63 and the fact that it was occupied by A5 and A7 were all established by ample evidence. Indeed, this piece of evidence, that is, the fact of accommodating A5 and A7, whose only known connection with A1 is in the scheme, does render support to PW5 and to A7 and so excludes any possibility that A1 was being falsely implicated or that PW5 and A7 had fabricated his involvement.

The foregoing apart, there is the evidence of PW 118, Assistant Superintendent Boniface Chiluba, who produced in evidence Exhibit P.109, a Barclays Bank; of Zambia Ltd cheque book belonging to Forest Products and Development Corporation Ltd. (counterfoil No. 034243 of October 9th, 1980, shows that cheque bearing the same number was endorsed "cash" and made payable in A6's name. A1 was at, the time Director of Forest Products, etc. and, as the cheque book - Exhibit; P.109 - was under the control of A1, this constituted evidence of special relationship which in turn is evidence of an odd coincidence, supportive of his involvement in the coup plot. It follows also that though the lie, the remorse, and so forth, may not by themselves be sufficient corroboration, yet considered together with the other matters which we have discussed they do constitute corroborative evidence.

(b) A2

With regard to A2, there is the evidence of PW5 which directly implicates him. The evidence pertaining to the interrogation noted has already been discarded (and so also has A3's alleged confession statement on which the trial judge erroneously relied). The confession statement of A6 is relevant only against himself as its maker and irrelevant as against A2. In the absence of any other receivable evidence against A2, what is left behind is the evidence of PW5 which stands alone. We leave the matter at that, for the time being.

(C) A3

We now move on to consider the position of A3. Here again, the appellant is directly implicated by the evidence of PW5 which shows that it was A3 who actually brought the witness into the coup plot. A3's alleged confession statement has been thrown out for the reasons already given. But, against him, is the evidence of PWs 33 to 37 which is supportive of PW6's evidence of direct implication. On their evidence

p135

it was A3 who, after they and others had been brought over from Mwinilunga, via Kishombe Farm in Kitwe, and been left on the outskirts of Lusaka by AS and A7, transported some of them, including PWs 33 and 34 to Chilanga Farm. 'This arrangement was devised by A7, obviously as a security measure, although the recruits were told that the Land - Rover, which has brought them to Lusaka, was not allowed to go into town. There is the further evidence from PWs 33 to 37 that A3 was present when Annfield delivered the firearms and rounds of ammunition and that he witnessed their distribution to the men at the farm. There was cogent evidence that A3 and A6 used to take food to the farm. As PWs 33 to 37 testified from positions different from that of PW5, the possibility of their joint fabrication with PWS is ruled out on the authority of *Phiri (E) and Others* (81). There is in fact no evidence to suggest that they ever met him. Moreover, the evidence of PWs 33 to 37 was unchallenged by any of the appellants.

To the evidence of PWs 33 to 37 must be added that of PW 85 Hilario Mwansa, which is to the same effect. It follows, therefore, that the submission by this appellant that he was merely helping a friend - Annfield - to deliver food to his workers is untenable and was in any case not in evidence. A3 was entitled to remain silent at his trial but then, as we said in *Simutenda v The People* (101), the court will not then speculate as to the possible explanations for any events alleged against him. Its duty will be to draw the proper conclusions from the evidence it has before it. See also *Chimbini v The People* (102) .

Further, on the evidence of A7, let alone that of PW5 and of PWs 33 to 37, A3 played an important role of co-ordination in the coup plot. It was A3 who initially interested PW5 here in Lusaka, and A6 and A7 at Kitwe, in the coup plot and travelled with them from Kitwe to Lusaka When A6 and A7 were unable to be booked in any of the hotels in Lusaka A3 provided them with accommodation for two days. A7 sometimes met A3 in his (A3's) office; and so did PW5, to discuss matters pertaining to the coup plot.

Besides, there was the evidence of odd coincidences adduced by PW104, Detective Inspector Samson Kakwisa. When this witness searched A3's house, he found in his bedroom his address book Exhibit P.94, containing, inter alia, the following: "Deo Robert, Itimpi, Telephone No.711037" and the name "Albert Kaniki." Albert Kaniki is in fact Colonel Itad Kaniki Albert, one of A6s leading followers, and whose name appears in the Chilanga Documents, namely, exhibits P.140, P.141, P142A, P.142C, P.142D and P.142E.

In addition to the discovery of exhibit P.94, PW104 found in A3s' office drawer, exhibit P.95 - an envelope addressed to "Deo Symba. House No.177, Woofram Road, Itimpi Kitwe." Exhibits P.94

and P.96 provide evidence of a link between A3 and A6 and, therefore, constitute evidence of "something more", in accordance with the requirements set out *Phiri (E) and Others* (81).

p136

(d) A4

Next for consideration is the position of Ad, Anderson Mporokoso, who was convicted on the second count of misprision of treason. The prosecution evidence against him consisted of his own alleged confession statement, but this has now been excluded from evidence. The only other evidence against him comes from a co-appellant A7. But, as it turns out that there was no evidence on which he could have been called upon to defend himself at the close of the case for the prosecution, A7's evidence is to be disregarded, on the authority of Hahuti (23). The result is that there was no evidence on which A4 could possibly have been convicted on the second count.

(e) A5

We come to the position of Ad. This will naturally be examined in relation to the first and third overt acts.

As regards the lust overt act, following the enrolment by A3 of A6's and A7's co-operation and participation in the conspiracy, A7, on receiving K2,000 from A6 out of the K10,000 that the latter had himself received from A3, was sent to Mansa, at A6's behest to go and "get a soldier by the name of Eli Defose" but, instead, he recruited his brother - A5 - who was a driver and told him that their were going to work together in F.L.N.C. At that stage, A5's recruitment must obviously have been for a dual purpose: the overthrow of the Zambian Government, to be followed by the overthrow of the Zairean Government.

It was not in dispute that, after A5's recruitment, he became A6's constant; companion, being the latter's official driver and, although he did not actually participate in meetings as such, he drove A6 to the various meeting places.

A5, took an active part, together with A7 and A8, in the recruitment and transportation of personnel from Mwinilunga to the outskirts of Lusaka, via A6's Kishombe Farm, some of whom he drove up to Chilanga Farm, using a Ford Transit van. Evidence of his direct implication in the conspiracy came from the unchallenged evidence of PWs 33 to 37. The trial judge's findings that AS was not there driver, is supported by the evidence of PWs 33 to 37, PW68, A7, and the Chilanga documents - exhibits P.142C, and P.142D. On this evidence, A5 held a position of responsibility having been allocated the military rank of Chief Adjutant. Indeed, PW33 regarded him as one of his bosses. He was present when Annfield took firearms to the arm on two occasions (including October 15th, 1980) when the ex - Katangese soldiers reacted with jubilation but the reaction of the Zambian recruits was indifferent.

When A5 was captured by the security forces, early on October 16th, 1980, he told a lie to PW 71, Major Kalebuka, by saying that he was coming front the neat form where he had been visiting his in-laws; and that he was on his way to Kafue where he lived. What we have said in connection

with A1 about defendant's lies, equally applies to A5, and so, we need not say anything more on this

p137

On A5's apprehension, he was identified by David Munjinga who had also been captured. When David later died from shot wounds sustained awing the security forces' "cleaning up" operation, it was A5 who identified the body to a doctor. Both A5 and David appear in the Chilanga documents, the latter featuring as a plain soldier in exhibits 139, P140; as a corporal in exhibits P142C; and he had an AK47 rifle, No. 72F. 5310, recorded against his name.

The fact that A5 was recruited by A7, his young brother, who was fully aware of the true reason for his recruitment, that they jointly recruited personnel from Mwinilunga and brought them to Lusaka where special precautions were taken by leaving the recruits on the outskirts of the city, some of whom he personally drove to Chilanga Farm; that he and A7 stayed together at House No. 176 Kasangula Road, Roma Township, which was used as a meeting place for the conspirators and as a food store for the men at Chilanga Farm, and wherein he and A7 were obliged to sleep in a toilet at night as there were no curtains; that he was in association at the farm with the recruits, that is, the ex - Katangese soldiers and few Zambians; that he was present when firearms were distributed to all the recruits, including himself, A7 and A8; that his name appeared in the Chilanga documents with the military rank of Chief Adjutant; and that he told a lie on apprehension, is all a manifestation that he was fully involved in the affairs of the conspirators. The trial judge's inference of Ad's involvement in the conspiracy was, therefore, perfectly in order as it was the only inference that could reasonably be drawn on the evidence before him.

Coming now to the third overt act, as A5 was aware of the conspiracy he was equally aware that the recruitment of personnel was in furtherance of the conspiracy. He knew of the existence of the illegal army at Chilanga Farm and the reasons for its existence. All this is evident on the record, including the evidence of PWs 33 to 37, PW68, PW85, A7, the Chilanga documents, as well as exhibit P.112, the street map of Lusaka.

African be seen, there was adequate evidence against A5 respect; of both the first and the third overt acts.

(f) A6

From what we have seen in our discussion of A5's involvement, A6 was also directly implicated by the unchallenged evidence of PWs 33 to 37 in so far as the first overt act is concerned.

It is quite clear from A6's own confession, as well as from the testimony of A7 that, when he and A7 were recruited into the conspiracy by A3, the trio travelled together by road from Kitwe to Lusaka where he and A7 were introduced to a group of "financially powerful Zambians," whose scheme was to overthrow the Zambian Government. A6 was introduced, inter alia, to A1-, Annfield and PW5, and some meetings took place. The scheme appealed to A6 as it entailed a mutually of

p138

purpose the overthrow of the governments of Zambia and Zaire, in that order. Annfield made arrangements for the acquisition of Chilanga Farm. A6, on the other hand, dispatched A7 to the Luapula Province to get a soldier called Eli Defose, but instead, A7 recruited his own brother, A7, who became A6's regular driver. Some funds having been made available by A1 and A3, motor vehicles were purchased for use in the recruitment of soldiers. Acting on A6's instructions A5, A7 and A8 proceeded to Mwinilunga to recruit ex - Katangese soldiers, which they did; but they recruited also some Zambian villagers, as is evidenced by PWs 33 to 37. These recruits were ultimately brought to Chilanga Farm and, from time to time, food was provided to them by A3 and A6.

A7's testimony was that the men at Chilanga Farm had been recruited for the purpose of forming an illegal army. This is supported by A6's own confession statement as well as by the evidence of PW68 who had on occasions been taken to the farm by A6 and A7. There, PW68 saw two categories of men the ex - Katangese soldiers whom he knew belonged to F.L.N.C. and with whom he had been in Angola, such as Colonel Kankuku Modest and Major Hilario Wanda, PW 85. On one occasion when PW 68 was taken by A6 to the farm, A6 had with him a Russian made AK47 automatic ride to pacify the men there by reassuring them that more firearms were on their way. When A6 addressed the men, PW 68 saw that those who had been with him in Angola were happy but the Zambians were not. This was supported by PWs 33 to 37 and was reinforced by the subsequent-desertion of PW36, Soneka Mashikini together with four other persons. As promised by A6, more firearms arrived at Chilanga Farm and were distributed to the men camped there; and para-military uniforms were distributed to 48 men. Support for all this is to be found in the evidence of PWs 33 to 37, PW68, PW85, A7 and A6's own confession statement.

There is, as we have previously seen, the further evidence of A6's apprehension given by PWs 1, 3, 4 and 6, which it is unnecessary to recount again, suffice it to say that, on being shot and apprehended, he pleaded with PW1 not to be killed as he was a soldier who had merely been employed, adding that he would give information to the witness. There was the further evidence that, as a result of information given by A6 to PW119, 30 AK47 rides, described by forensic ballistics expert, PW96, Lieutenant - Colonel Siakaluma Sianzibulo of the Zambia Army and PW105, Assistant Inspector Henry Chisha of the Zambia Police, as commando type or para-trooper assault rifles, similar to those recovered at or in the vicinity of Chilanga Farm were discovered concealed in Annfield's house.

There was, in addition, the evidence of counterfoils numbers 674276; and 674277, contained in exhibit P.106 - A1's personal cheque book - which portrayed the existence of a special relationship between A1 and A6, beyond the usual lawyer/client relationship.

Apart from all that was the evidence of a letter addressed by A6 to A1 and ,Sikatana and also of his name and address having been found

p139

in A3's address book and of an envelope which had been found in A3's office drawer, addressed to A6.

The fourth overt act may be divided into two parts: firstly, the existence of an illegal army, and the purpose thereof; and secondly, the leadership of the said army.

There was, in regard to the first part of the fourth overt act, overwhelming evidence, not only of the amassing of firearms, but also of the existence of an illegal army at Chilanga Farm and of the immediate purpose thereof, namely, the overthrow of the Zambian Government. Such evidence came from PWs 33 to 37, PW68, PWs 71 to 73, PW85, A7, A6's confession statement and the Chilanga documents in which 24 out of some 30 AK47 rifles recovered at, and within the precincts of, Chilanga Farm, were listed. Also of significance is the City of Lusaka Street Map, exhibit P.112.

As to the second part of this overt act, there was the evidence of PWs 33 to 37, PW68, PW85, A7 and A6's own confession statement, which left A6's leadership of the said illegal army in no doubt at all. In his confession statement, he complained to A1 at House No. 6525, Kasangula Road, Roma Township, that his (A6's) group had suffered casualties on Chilanga Farm being overrun by the Zambian security forces, whereas A1's group had incurred no such casualties. In his confession statement, and on the evidence of PW68 and A7, A6 referred to the personnel at Chilanga Farm as his men. A7 specifically testified that A6 was the leader of the men camped at the farm.

In his capacity as leader of F.L.N.C., A6 had given directives for the recruitment of soldiers from Mwinilunga who were predominantly ex - Katangese soldiers and also members of his party. The recruitment was undertaken by three of his own men, all of whom had military ranks: A5, a Chief Adjutant, A7, a Captain and A8, also Captain. The recruits were initially taken to his Kishombe Farm before being conveyed to Chilanga Farm. It was, therefore, natural that he (in conjunction with A3) should provide food for his recruits.

When signs of frustration began to appear among the recruits over the belated arrival of armaments, it fell on A6, as leader of F.L.N.C and of the men camped at Chilanga Farm, to travel to the farm, in the company of A7 and PW68, and, having taken with him a Russian AK47 automatic rifle, he addressed them, showed them the firearm, and reassured them of the impending arrival of more firearms. Sure enough more firearms did arrive. Furthermore, when he instructed A7 to take surplus firearms to the Copperbelt Province for concealment, he turned down A7's request to be accompanied by A6, as he needed the latter, being his driver, since he knew he was being looked for by the police and it was his intention to spend that night (i.e. October 1516, 1980) at Chilanga Farm. When A7 left for the Copperbelt Province, as instructed, and the security forces having overrun Chilanga Farm, A6 gave orders

p140

to his men to disappear, as they were not in a state of preparedness at that point in time. In his confession statement, he explained his reaction to the critical situation in these terms;

> "Since we were not prepared to fight and that we had no ammunition, it was impossible for us to do anything against the army. So I ordered everybody to disappear and run away and leave the guns in the bush. It was dark and they disappeared. I was the last to leave. Most of those people were just brought to that farm they did not know even the direction of Lusaka,

and only a few knew. I had told them that since they had experience of the Kolwezi war, they should disappear. Because the attack was a surprise, there was no time to make plans."

All this then articulates A6's leadership role of the men who were camped at Chilanga Farm which, as already stated, is beyond doubt. This appellant submitted in the alternative that in the event of this Court holding that there was an illegal army, as we find there was, this circumstance is consistent with his alleged freedom struggle against the government in Zaire and not the overthrow of the Zambian Government. But in the light of the evidence to which we have previously drawn attention, this submission cannot stand.

(g) A7

As we now consider A7's alleged involvement in this case, it will be recalled that a great deal has already been said about his position. Like A5 and A8, he is confronted with the first and third overt acts in respect of which he is a self-confessed conspirator.

We start with the first overt act. Here again, the evidence of PWs 33 to 37 directly implicated A7 and so did his own evidence as well as his confession statement. Also directly implicating A7 was the evidence of PW68 and PW85. On all this evidence, A7 was recruited into the conspiracy together with A6, by A3. In turn, A7 brought in A5 and, acting together with A5, recruited, inter alia, PWs 33 to 37. A6 had told him to recruit about 100 ex - Katangese soldiers. A7 was aware, right from the beginning of his involvement this case, to the end, what the true nature of the task ahead was, to wit, the overthrow of the Zambian and the Zairean Governments. He informed PW68 how he had collected two lots of firearms from the city centre, covered with pockets of potatoes and onions, and taken them to Chilanga Farm. He was a principle recruitment officer for purposes of the conspiracy. He stated in his testimony, as well as in his confession statement, that he knew that the recruitment was for the purpose of establishing an illegal army to overthrow the Zambia and Zairean Governments. He purchased a Land - Rover with funds received from A1 through A3, in order to facilitate the recruitment of the ex - Katangese soldiers and other personnel such as PWs 33 to 37.

When A6 was briefly in detention, A7 unsuccessfully suggested to A6 to allow the recruits to return to Mwinilunga. A6 referred him to A1 to obtain some more funds for purposes of recruitment, as the "revolution was on." A7 did as instructed. He then continued to play

p141

his part in the coup plot by, inter alia, his sustained participation in the management of the affairs at Chilanga Farm, including the provision of food. He confirmed this in his evidence when he said that, when A6 was in detention, he "took over the effective running of the men at Chilanga Farm." He continued to obey A6's instructions during his (A6's) period of detention and thereafter and he was, inter alia, instrumental in the concealment of the extra firearms in Ndola.

As we have noticed, A5 and A7 lived together at House No.175, Kasangula Road, Roma Township, which had been made available to them by A1.

Equally indicative of A7's involvement in the conspiracy are the Chilanga documents, exhibit P.142 (b) which depicts him as a Captain, but exhibits P.141, P.142A, P.142C and P.142D speak of him as a Lieutenant - Colonel.

After Chilanga Farm had been overrun by security forces, A7 then sold to PW77, Nyantunta, the Ford Transit van he had used for transporting the surplus firearms to Ndola.

From what has been said above, we are satisfied that there was strong evidence against A7 on the first overt act.

In our discussion of the first overt act in connection with A7, the third overt act has also been sufficiently covered. It is, therefore, enough to say that there was ample evidence as to A7's principal role in the recruitment of soldiers and of his knowledge that they were to be used for the dual purpose already adverted to. Such evidence was adduced by PWs 33 to 37 and A7 himself, both in his testimony in court and his confession statement. Further evidence came from PWs 68, and 85 amend the Chilanga documents, including the street map of Lusaka, exhibit P112.

On behalf of A7, Sir Sakala has submitted that his client dissociated himself from the coup plot and that, in any event, he could not have exercised his free will in the matter since, being under the direct subjection of A6, his leader in F.L.N.C., he was afraid of him. It is argued by Mr Sakala that, although, when faced with the accusation of treason, A7 volunteered in his confession statement, exhibit P.102, to tell PW116, Detective Chibuye, the truth of what he knew about it, what he had done and why he had done it, and that, although it is conceded that this appellant should have foreseen that his actions would result in the toppling of the Zambian Government, he should be absolved in the matter, on the grounds that he was under the direct subjection of A6 the leader of F.L.N.C.; that F.L.N.C. was not an ordinary organisation, it being an organisation of persons highly sophisticated in matters of sabotage and war, persons who had fought in Kolwezi (in Katanga), persons who had fought in Angola and who wanted to fight against the Zairean Government; and that, as such, A7's intention could not be presumed from what he did, as he was unable to exercise his free will .

p142

Apart from the aspects of the alleged dissociation and lack of free will, the submission would, in a suitable case, be more appropriate only in mitigation. Although A7 once expressed his reservations to A6 about members of F.L.N.C. joining hands with some "financially powerful Zambians", and once suggested, during A6's detention, that the men at Chilanga Farm be allowed to return to Mwinilunga, purely on the strength of his own testimony; his confession statement; his subsequent actions, conduct, and declarations, including the making of trips to Mwinilunga for the purpose of recruiting soldiers who were to form an illegal army and whose immediate pre-occupation was to topple the Zambian Government; his assumption of the leadership role during A6's detention; the provision of food to the men at the farm; what he said to PW68 about the coup plot and his active part in it; and inter alia, his transfer of surplus firearms to Ndola, at A6's request, for concealment in order to have them readily available for use in Zaire at a later date; the allegations of dissociation and lack of free will are rendered completely nugatory. The evidence against A7 on both the first and the third overt acts was not only cogent, but also overwhelming.

(h) A8

Finally, A8's alleged involvement in the coup plot falls for consideration. Here, it is convenient to discuss both the first and the third overt acts together.

The only evidence against A8 on the first overt act is one of his association with some of the conspirators, namely, A5, A6 and A7; his association for a period of two days with the men at Chilanga Farm, and the appearance of his name and the military rank of Captain on the Chilanga documents (exhibits P.140; P141; P142A; P142C; P.142D and P.142E). 'there was, however, no direct evidence that he was aware, that the immediate goal was the overthrow of the Zambian Government. On the other hand, there was abundant evidence that he knew of a plot to overthrow the Zairean Government by force and that his involvement in the recruitment of personnel from Mwinilunga was primarily in fulfillment of that objective. To this extent, the ex curia statement is no more than exculpatory. It is that exculpatory statement that best unfolds how he came to be in this case.

In December, 1979, A8 paid a visit to Kitwe, Zambia, from Zaire. There he met A6 whom he knew before and with whom he had shared a house in Lubumbashi, Zaire. A6 invited him to live with him at his House No.177, Wooford Road, Itimpi. A8 lived there until January 24th, 1980, when A6 took him to his Kishombe Farm where he joined others in doing farm work under the overall supervision of PW 85, Hilario Mwansa. In July, A8 returned to A6's house in Itimpi and there found three persons, including Kankuku Modest. Later that month, A7, whom he had known in Zaire as a detective police officer, visited A6's house and "told them how very bad" Zaire had become.

In August, A6 returned from Lusaka and said that he had bought a farm there. Thereafter, A6 sent A5 and A7 " to look for employees"

p143

using Land - Rover pick-up. They returned with eighteen men who were put at Kishombe Farm "just to go and till the land."

In September, A6 sent A8 together with A5 and A7 to Mwinilunga to look for some more people, using two Land - Rovers and a Ford Transit Van. After recruiting eighteen men, A5 and A7 took them to Kishombe Farm, leaving A8 at Mwinilunga to look for more people.

On September 24th, 1980, A5 and A6 returned to Mwinilunga and found A8 had recruited fourteen men. Together with A5, A7 and another person, they found sixteen more recruits and all of them then returned to Kishombe Farm with thirty recruits, thereby bringing the total number of recruits to forty-eight.

When Kalubi Zakaria, a Zairean, arrived at the farm from Brussels, he told A6 that he (A6) should train those people how to use guns so that they could go and fight in Zaire. A6 replied that he would, in the first place, take all of them to Lusaka where they would undergo training.

In September 1980, A5 and A7 started to transfer the men from Kishombe Farm to Chilanga Farm.

On October 14th, 1980, A8 came to Chilanga Farm where he found 52 people, including Kankuku Modest and PW85. A7 and others told him that the farm belonged to a European by the nerve of Annfield but he (A8) never saw him. He found firearms already there.

On October 15th, A6 gave a gun and thirty rounds of ammunition to everyone, including A8. PW85 then started to train the men at the farm how to use firearms allocated to them. According to him (A8), if "war was to come" A7 A5, PW85, Jean Maria Mumba, Albert Kanyika and Kankuku Modest would, inter alios, bear the responsibility and would lead the men into battle.

Later, A6 came and told A8 and others, including A5, PW 85, Jean Mumba and Albert Kanyika, all of whom featured on exhibit P.139 of the Chilanga documents, to follow him along a foot path leading into town. After travelling a long distance, security forces opened fire at them. A8 suffered a shot wound and ended up being captured by the Zambian Forces. He could not say how A6 and the others had managed to escape. He found himself at the University Teaching Hospital. He said in his statement:

> "and I did not know where the others went to up to now, but we did not go to Zaire."

All this makes it clear that, if A8's conviction is to be upheld, this can only be done by drawing an inference to that effect, bearing in mind that the inference to be drawn must be the only one reasonably possible. The critical question is, therefore, whether, on the facts of this case, the inference of A8's guilt was the only one that could reasonably be drawn?

It seems to us that the evidence against A8, unlike the evidence against A5 let alone that against the rest of the appellants, with the exception

of A2 and Ad, to show that he was aware that their scheme extended also to the overthrow of the Zambian Government, was rather tenuous. Even after his capture, he was able to maintain in his ex curia statement that he did not know where the others in his company had gone to and, to quote his own words: "but we did not go to Zaire." This expression of his goes to reinforce the suggestion that the only objective that was operating on his mind was the overthrow of the Zairean Government. There was indeed ample evidence to show that he was committed conspirator in that connection. That is not, however, the offence with which he was charged. Since the ultimate or broad objective in this case, as has already been indicated, was to fold: the overthrow of the Zambian Government, in the first place and, thereafter, the overthrow of the Zairean Government; can it be said that A8's guilt in regard to the overthrow of the Zambian Government was the only inference that could reasonably be drawn on the facts of the case? We think not. In the circumstances, it would be unsafe or unsatisfactory to uphold his conviction; in other words, neither the first overt act nor the second one was established beyond a reasonable doubt.

8. The Proviso to section 15 (1) of the Supreme Court Act, Cap.52

Before we conclude, we would like to make some observations about the application of the proviso to section 15 (1) of the Supreme Court Act. Under that subsection, this Court must allow an appeal against conviction if, in its opinion, the judgment of the court below should be set aside (1) on the ground that, in all the circumstances of the case, it is unsafe or unsatisfactory; or (2) on the ground of wrong decision on any question of law; or (3) on the ground that there was a material irregularity in the course of the trial.

However, the Court's duty to allow an appeal in any of the circumstances set out above is subject to the proviso that, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, it mater dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

It has been urged by, or on behalf of, the appellants that this court should not exercise its discretion by applying the proviso on the grounds:

(1) That misdirections are so grave that they would not be cured by such application;
(2) That the circumstances of the case are such that it would be inappropriate to apply the proviso;
(3) That the proviso cannot be applied where, in a case requiring corroboration, as here, reliance is placed on the evidence of "something more"; and
(4) That in capital cases, the proviso should be applied sparingly.

p145

In our judgment, the first and second points raised above, are relevant and worthy of consideration; but the third and fourth points are misconceived: first of all, evidence in the nature of "something more" is good enough to provide the requisite support where this is necessary; secondly, there is no rule of law or practice that limits the application of the proviso to cases other than capital ones. In deciding whether or not the proviso should be applied in any given case, the test is whether, even if the matters complained of had not occurred, the trial court would, on the facts of the case, certainly have arrived at the same conclusion. In *Phiri (E) and Others* (81), it was said, at page 123, lines 38 to 39, that the proviso exists for the purpose of promoting the interests of justice (see also page 107), lines 34 to 39, ibidem). Cases in which the proviso has been applied in this country are legion. Such cases include *Phiri (E) and Others* (81), *Zonde and Others v The People* (103) and *Musongole v The People* (104).

It must be mentioned that, whether the proviso should be applied in any particular case, depends on the facts of that case, and also of each individual appellant where there are two or more appellants.

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In the case now before us, we have given due consideration to the trial judge's misdirections against the backdrop of the totality of the evidence, including the need to look for corroboration and the requisite warning as to the danger of acting on uncorroborated evidence that requires corroboration. Having done so, and for the reasons already given, not only are we unable to apply the proviso in

respect of A2, Valentine Musakanya; A4, Anderson Mporokoso; and A8, Laurent Kanyimbu but also that there is no evidence on which their convictions can be sustained. The appeals by these three appellants against their convictions are allowed; their convictions are quashed and their sentences are set aside.

With regard to A1, Edward Shamwana. A3, Godwin Mumba, A5, Thomas Mulewa; A6, Deogratias Symba; and A1, Albert Chimbalile we are satisfied that, on the totality of the evidence and, regard being had to the overwhelming and corroborative nature of such evidence, even if the misdirections hereinbefore referred to had not occurred that is to say, had the trial judge properly directed himself, he would certainly have arrived at the same conclusion. We, therefore apply the provision and dismiss the appeals against their convictions.
Appeals for A2, A4 and A8 allowed. Appeals for A1, A3, A5, A6 and A7 dismissed.
