THE PEOPLE v 1. EDWARD JACK SHAMWANA AND 12 OTHERS (1982) Z.R. 122 (H.C.)

2. VALENTINE SHULA MUSAKANYA
4. GOODWIN YORAM MUMBA
5. ANDERSON KABWALI MPOROKOSO
8. THOMAS MUPUNGA MULEWA
10. DEOGRATIAS SYMBA
11. ALBERT CHILAMBE CHIMBALILE
12. LAURENT KANYEMBU RODGER KABWITA (1982) ZR 122 (HC)

HIGH COURT
CHIRWA, J.
22ND NOVEMBER, 1981 AND 20TH JANUARY, 1983
(HP/166/1981)

Flynote
Criminal law and procedure - Amendments - Whether court has power to

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itself amend information at close of prosecutor's case - Matters to be considered in amending - Effects of acting under wrong provisions.
Criminal law and procedure - Conspiracy - Whether necessary to prove overt act of treason beyond reasonable doubt - Proof by inference - Whether acceptable.
Criminal law and procedure - Defences - Defence of duress in misprision of treason - Whether available.
Criminal law and procedure - Offence - Treason - Continuous offence - When terminated.
Criminal law and procedure - Treason - Invisible alternative charges - Effect of striking off count of misprision of treason.
English law - Application - locally - Interpretation of English Law (Extent of Application) Act.
Evidence - Accomplices - Corroboration - Need for - Who can corroborate accomplice evidence - When lies may be corroboration.
Evidence - Confessions - Statements taken in breach of Judge's rules - Whether court has discretion not to admit.
Evidence - Judicial notice - When evidence not required to prove.
Evidence - Witnesses - Overt acts in treason - Requirements for witnessing of.
Tort - Duty of care - Lawyer and client relationship - Extent of duty owed.

Headnote
The eight accused were charged with five others, with the offence of treason arising from eleven overt acts. One accused was also charged with misprision of treason but this was struck out after a preliminary objection. One accused was struck off the information on account of illness. At the close of the prosecution case, and after submissions of no case to answer, four of the accused were acquitted. The defence case rested mainly on proof of the case against them beyond reasonable doubt. Several issues arose during the trial.

Held:

(i) Misprision of treason being an invisible alternative charge and hence a minor offence maybe struck off before pleas are taken without misleading the defence or amounting to an acquittal.

(ii) The High Court has the power to itself amend an information to fit the evidence given without application by, or consultation with the parties involved provided no injustice is caused to the accused such as may result when the substantive charge is altered even at the no case to answer stage. And reference to the wrong section as the source of power for the court to amend the information does not nullify the power so existing.

(iii) The English Law (Extent of Application) Act, Cap.4, is an enabling Act in that in the absence of any legislation in Zambia

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on any subject, the English statutes before 17th August, 1911, will apply in Zambia; and in interpreting a statute one has to look at the law existing when it was passed and the mischief intended to be cured.

(iv) Act No. 35 of 1973 is the law applicable in Zambia, not the English Treason Act of 1795; therefore in relation to treason, there is no special requirement as to the number of witnesses to testify before one is convicted.

(v) The court may take judicial notice of facts which are common knowledge and in doing so may simply refer to its own record; for it would be folly for it in an appropriate case to keep aloof on such facts.

(vi) Upon convicting on the evidence of an accomplice the court must warn itself of the danger of so convicting and if the evidence is not corroborated by other independent evidence then the risk of false implication must have been excluded so that it was safe to depend on the accomplice's evidence.

(vii) There is no rule of law that an accomplice cannot corroborate a fellow accomplice provided the dangers of joint fabrication are eliminated; corroboration need not be so in the strict sense but even "something more" such as evidence of lying by the accused.

(viii) The court has a discretion to exclude a confession obtained in breach of the judge's rules and operating unfairly against the accused.

(ix) Where as in the present case conspiracy is laid down as an overt act in a treason charge, this must be proved first before acts of one conspirator are taken to be acts o of the other conspirators in furtherance of a common design.

(x) It is the duty of a lawyer to defend his client no matter how serious the crime is but that duty does not extend to helping the client escape justice or assisting in preventing the course of justice.

(xi) The defence of duress or compulsion is available to a charge of treason or misprision of treason only where it can be shown that the offence was committed by two or more people that the threat of injury to the person pleading the defence was not in the future but imminent and that the threat was present throughout the commission of the offence, in this case continuously since the offence was a continuous one.

Cases cited:

(1) R. v Manchinelli 6 N.R.L.R. 19.

(2) Charles Phiri v The People (1973) Z.R. 168

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(3) Nkole v The People (1977) Z.R. 351.
(4) R. v Smith [1950] 2 All E.R. 449.
(5) R. v Johal & Ram [1972] 2 All E.R. 449.
(6) Harris v R. 62 Cr. App. Rep. 28.
(7) Wallwork v R. 42 Cr. App. Rep.153.
(8) Re Mayfair Property Company [1898] 2. Ch. 28.
(9) MacMillan and Company v Dent [1907] 1 Ch.107.
(10) Commonwealth Shipping v Penninsular and Oriental Branch Service [1923] AC 191.
(11) Craven v Smith (1869] L.R. Exch. 146.
(12) Emmanuel Phiri and Others v The People (1978) Z.R. 79.
(13) DPP v Kilbourne [1973] 1 All E.R. 440.
(14) Credland v Knowles Cr. App. Rep. 48.
(15) Mvula v The People (1963-64) Z.N.R.L.R. 171.
(16) R. v Callaghan 69. Cr. App. Rep. 88.
(17) R. v Straffen [1952] 2 Q.B. 911.
(18) R. v Prager [1972] 1 All E.R. 1114.
(19) R. v Walson [1980] 2 All ER 293.
(20) Callis v Gun 48 Cr. App. Rep. 36.
(21) Herman v R .52 Or. App. Rep. 353.
(22) Lester and Howard v. R. (1960) R.&N. 700.
(23) Quinn Leathem [1901] A.C. 495.
(24) R. v Doot [1973] 2 W.L.R. 532.
(25) R. v Griffiths [1965] 2 All E.R. 448.
(26) Mulenga and Others v R. (1960) R.&N. 12.
(27) R. v Lucas [1981] 3 W.L.R. 120.
(28) R. v Hudson and Taylor [1971] 2 All E.R. 244.
(29) Lynch v Director of Public Prosecutions [1975] 1 All E.R. 913.

Legislation referred to:
Criminal Procedure Code, Cap.160, ss.137 (f), 181, 213, 273 (2).
English Law (Extent of Application) Act, Cap.4, s.2.
Indictments Act, 1915 (England) s.5 (1).
Penal Code, Cap.146, ss. 16,26 (4), 43 (1) (a), 44 (b).
Penal Code Amendment Act, No.35 of 1973, s.3.
Treason Act, 1795 (England), s.5.

For the State: G. G. Chigaga, Attorney-General, J. A. Simuziya, Director of Public Prosecutions, G. Sheikh and S.Balachandran, Senior State Advocates.

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For the first accused: In person.
for the second accused: J.M.Mwanakatwe and B. C. Willombe, M.M. W.

and Co.

For the fourth accused: G. Chilupe, Jacques and Partners.
For the fifth accused: R. Mushota, Lusaka Partners.
for the eighth and twelfth accused: W. A. Mubanga, Permanent Chambers.
For the tenth accused: R. Mandona, Permanent Chambers.
For the eleventh accused: C. Sakala, Legal Aid Counsel .

Judgment

CHIRWA, J.:

The eight accused persons were originally arraigned together with five others. One of them was struck off the information on account of illness and the other four were acquitted after the clause of the prosecution case and on submissions of no case to answer. To avoid confusion with the evidence, these eight accused will continue to be referred to either by name or original numbers, *viz:* Edward Jack Shamwana (accused l), Valentine Shula Musakanya (accused 2), Goodwin Yoram Mumba (accused 4), Anderson Kambwila Mporokoso (accused 5) Thomas Mupunga Mulewa (accused 8), Deogratias Symba (accused 10) Albert Chilambe Chimbalile (accused 11) and Laurent Kanyembu Roger Kabwita (accused 12).

On the original information, all accused were charged with one count of treason, contrary to s. 43 (1) (a) of the Penal Code, Cap.146 and the particulars of that offence were composed of eleven overt acts. Accused number 5 was charged with an additional count of misprision of treason, contrary to s. 44 (b) of the Penal Code, Cap. 146. However after a preliminary objection on the information as laid, this count of misprision of treason was struck off the information so that the trial proceeded on one count of treason against all the accused.

The trial started on a very slow pace as there were a number of preliminary matters and objections and my ruling on these matters are on record and it would be a waste of time for me to repeat these but where there is need to repeat some portions of the same in this judgment, I will do so. When we settled down to getting evidence, the prosecution called a total of 122 witnesses in the main trial. This obviously necessitated the trial to be very long, but the progress made can only be attributed to the co-operation given to the court by the parties concerned and for this I am very grateful.

At the close of prosecution case and after submissions of no case to answer, I ruled that the present eight accused had a case to answer; accused numbers, 1, 2, 4, 8, 10, 11 and 12, on one count of treason having four overt acts. Accused 5 had a case to answer on misprision of treason having been acquitted on the treason count. After my ruling on no case to answer there were further submissions on the court's power to ascend the information and my ruling on this is also on record. After this ruling fresh pleas of not guilty were entered and after rights to re-call any

prosecution witnesses were outlined to the accused; they all elected not to recall any witnesses.

Having put the accused on their defence on the amended information, their rights were explained to them as to how to conduct their defence cases, they all, except accused 11, elected to remain silent and called no witnesses on their behalf. Accused 11 elected to give evidence on oath and called no

other witness. After the close of defence case 1 heard final submissions.

Before I consider the evidence in this matter. I feel a quick look at the law affecting this case is necessary. I will start with the effect of striking off the count of misprision of treason from the information on application by the defence as this affects accused number 5 it being the count on which he was put on his defence on the information as amended on submissions of no case to answer.

In my ruling, of 3rd December, 1981, I ordered that counts 2 and 3 be struck off from the information as they were embarrassing to the accused persons involved and that, they were prejudiced in the sense that they could not make any proper defence. No plea had been taken on the information and after the counts were struck off the accused were not arraigned on them. To me the striking off of the counts did not amount to an acquittal as an acquittal can only come about on either offering no evidence or insufficient evidence being led, not proving the count alleged. The striking out of the counts meant that the accused did not stand trial on those counts.

After the information was amended at the no case to answer stage, Dr Mushota further submitted and also in his final submissions, that the defence had been misled in that they thought that since the count of misprision of treason had been struck off, the accused was acquitted and they could not prepare their defence to cover the misprision of treason. I cannot help it if the defence misled themselves in law and the court did not misrepresent any facts on the matter. I am still of the considered view that on the principle of possible "invisible alternative charge", misprision of treason was one of those "invisible alternative charges". The invisible alternative charges as put the

R v Manchinell (1) by Bell C.J., are minor offences. In this regard I wish to refer to the case of *Charles Phiri v The People* (2) particularly at p. 171 where Baron, D.C.J., had this to say on construction of s.181 of the Criminal Procedure Code:

> "With the greatest respect to Bell, C.J., we are unable to see how it can be a necessary requirement that a matter getting 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 such a minor offence must be contained as part of 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 is where the offence consists of several particulars and some particulars 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 that portion of the judgment in *R v Manchinelli* (1) and disapprove also of the judgment in *Justin* to the extent that it appears to adopt the earlier dictum."

At p. 173 of the same *Charles Phiri* (2) while not disapproving the approach adopted in *Manchinelli* (1) deciding what is a minor offence by reference to the penalty, Baron, D.C.J., had this to say:

> "It remains to consider what is meant by a 'lesser penalty,' this being the first of conditions postulated by Bell, C.J. At one stage in the history of the English Common Law it was axiomatic that a misdemeanour carried a lesser penalty than a felony, but with the passage of time the distinction between these two categories of crime has lost most of its importance. The codification of the criminal law in many of the former British colonies has further reduced the relevance of such a distinction. However, the distinction is not entirely irrelevant; s.26 (4) of the Penal Code provides that a person convicted of a misdemeanour may be evidenced to pay a fine in addition to or instead of imprisonment."

Further down he says:

> "In our view, therefore, where two offences under consideration are a felony and a misdemeanour and each is expressed to carry the same maximum sentience of imprisonment, the misdemeanour is a minor offence for the purposes of s.181."

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 a minor offence and it is one of those "invisible alternative charges to treasons". I still hold the view that striking off of the Count of misprision of treason before pleas were taken could not and did not mislead the defence. Neither do I agree that the striking off of that count made the court functus officio in the line argued by Dr Mushota. The court did not bar itself from considering misprision of treason as a possible invisible alternative charge. Both amendments did not prejudice accused 5.

As defence raised some objections to the amended information after "no case", it is only fair that I re-consider this matter again for avoidance of any doubt.

In amending the information, the court cited s.213 of the Criminal Procedure Code as its authority vesting it with power to amend. Obviously that was an error as that section is for subordinate courts. However

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the powers for the High Court to amend the information is s. 273 of the Criminal Procedure Code. The question at this stage is; what is the effect of quoting a wrong section, purporting it to give power to the court? In my view, the court has powers to amend information under the law and if a wrong section is referred to, reference to a wrong section does not nullify the powers so existing. The situation can be likened to charging one with an existing and known offence under the law but referring to a wrong section. The charge is not a nullity or bad, it is merely defective and the accused cannot be prejudiced by reference to a wrong section and Zambian cases on this are many and I need only refer to the case of *Nkole v The People* (3). In the present case, does the citing of a

wrong section, as the source of power for the court to amend the information, prejudice the accused persons? In my view the accused are not prejudiced in any way. It is of interest to note that all accused, apart from accused 5 complaining about the amendment of information are not complaining about the deletion of some overt acts. If the court is wrong to amend the information, then the accused should argue that they should be put on their defence on all the eleven overt acts and not only four. They cannot accept deletion of other overt acts and oppose the amendment of some of the remaining overt acts.

I will now consider the operation of s. 273 of the Criminal Procedure Code. The defence feel that the court can only amend an information if there has been an application from either party. Alternatively if the court has power to amend on its own motion, it cannot do so without inciting the parties to express their views. In my ruling this issue, which is on record, I did say that our s. 273 (2) of the Criminal Procedure Code is substantially word for word of s. 5 (1) of the Indictments Act, 1915 of England. Our s. 273 (2) reads as follows:

> "273 (1) 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 order for 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 the court shall deem just."

In the case of *R v Smith* (4) Humphrey J had this to say of the Indictments Act at p. 681:

> "The power to amend an indictment has been since 1915 in s. 5 (1) of the Indictment Act, 1915. The enactment is generally known, was passed mainly for the purpose of pleading in criminal cases. Up to that time the powers of amendments had been very limited, and the subsection was intended to provide that in future the power should be very considerably extended... The argument for the appellants appeared to involve the proposition that an indictment in order to be defective must be one which in law does not change

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> any offence at all and therefore is bad on the face of it. We do not take that view. In our opinion any alteration in matters of description, and probably in many other respects may be made in order to meet the evidence in the case as long as the amendment causes no injustice to the accused."

In my ruling on this issue I did refer to the case of *R v Johal and Ram* (5) especially the judgment of Ashworth J. at pp. 253-254 where he says:

> "In the judgment of this court there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise. The words in s. 5 (1) of the Indictments Act, 1915 at any 'stage of the trial' themselves suggest that there is no such a rule; if the suggested rule had been intended as a limitation of the power to amend it would have been a simple matter to include it in the subsection."

This general trend accepting that the English courts have power to amend indictments has continued and in the case of *Harris v R* (6) in following the decision in *Johal* (5) which decision followed the case of *Smith* (4), Stocker, J., had this to say at p. 32:

> "As to the time at which amendment was made, it may very well be that in very many circumstances application to amend as late as the close of the case for the prosecution would be so likely to involve injustice to an accused person that such an application in many instances might be refused. In this case we see no injustice which could have resulted, and we feel really that Mr Horden 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 art amendment which involved more accurate description of a representation by conduct and that could appropriately be made at the stage at which it was."

From, the English cases of *Smith* (4) *Johal* (5) and i (6) it is clear that courts have powers under s. 5 (1) of the Indictments Act, 1915, which has similar provisions with our s. 273 (2) of the Criminal Procedure Code. It is also clear from these cases that before an amendment is made due consideration ought to be given whether the amendment about to be would cause injustice to the accused persons and I will revert to this aspect of the matter later.

Section 273 of the Criminal Procedure Code already, quoted above is silent as to how the power to amend the information is evoked. Because of the absence of specific provisions of how the powers are to be evoked, practice set in and it has usually been at the instance of the prosecution or the court itself. Surely it cannot be said. that the court cannot, in its motion, see that the information is defective. An information can be defective in many ways, either it does not disclose an offence or it is not supporting, the information later. If the information is amended by the court on its own motion, it can only do so after hearing all the prosecution

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evidence, and at this late: stage the amendment would depend on its form. To me on the plain interpretation of s. 273 of Criminal Procedure Code if the court does not see any defect in the information, the accused or the prosecution may draw the attention of the court to the defect and amend the information.

The defence submitted that if the court wishes to amend the information on its own motion, it should invite parties to express their views and for authority para. 50 of Archbold, 39th Edn. was quoted. This requirement is not in s.5 (1) of the Indictments Act 1915, (or s. 273 of the Criminal Procedure Code), it is therefore a practice. I have no quarrel with this practice. But in Zambia the practice is that generally the courts do not amend information or charges unless at the "no case" stage. I do agree that that is within the meaning of "at any stage of trial", but our own practice is that the parties are never invited to express their views. It is at a stage where the matter may be finally concluded if there is no case to answer. The practice as contained in para. 50 of Archbold *supra* may perhaps be applicable here in Zambia at any stage of the trial other tha0n at no case to answer stage. At the "no case" stage, the parties will have made their submissions and those submissions cover or touch the evidence adduced *vide* the information as it stands. I hold the view

that when the court amends the information, at no case stage it does not ask for the views of the parties. On this I have the *Harris* (6) case in mind where the recorder amended the indictment at the no case stage, the parties were not asked for their views, he amended the indictment on their arguments on no case to answer and on his own motion.

I will now consider the question of injustice and that the amendment to overt act 2 is prejudicial in that it was done merely to fit in with the evidence given. The authorities (English) I have referred to already all say that no amendment should be allowed if it would do injustice to the accused, and that if the amendment is brought in late it may very well cause injustice.

The amendment complained of is the change of venue from the house of one Annfield to the house of the first accused. To have a proper perspective of this matter one has to consider whether this amendment is in form only or is in substance in that the meeting place is an important ingredient of the overt act. I still do not agree with the defence that place of a meeting in the instance case is an ingredient of the overt act. What is substantive in the overt act is:

(a) the meeting itself;
(b) the time of the meeting;
(c) what was discussed; and
(d) the people attending such a meeting.

As was said in *Johal* (5) at p.353 referring to the case of Harden (1962) 46.Cr App. Rep. 90:

> "The effect of the decision is that when an amendment; of a particular count is under consideration it may be a question of

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> degree whether the proposed amendment is no more than the correction of a misdescription or on the other hand involves a substitution of a different charge. "

In the case of *Harris* (6) Stocker J. at p.31 said:

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

In the instance case the amendment was not of altering the substantive charge and substituting it with a new one it was a simple matter of correcting misdescription of a place where the meeting was held. All the defence submitted that the amendments have caused injustice. What injustice has been caused? As was observed by Stocker J. in *Harris* (6) at p. 32 a passage already quoted, it is not sufficient to merely state the general principle that injustice had been done, the injustice must be pinpointed. This the defence have failed to do as after the amendment was done the court was about to take fresh pleas and ask the accused if they wished any of the prosecution witnesses recalled; the objections were raised and even after overruling the objections none of the accused exercised their rights to have any of the prosecution witnesses recalled for the purposes of further cross-examination on the amended charge.

This to me only shows that there was no injustice caused to the accused by the formal amendment. I therefore still hold the view that the formal amendment even at that late stage did not cause any injustice to the accused.

In any event it appears that the place where offence is committed is not vital in certain cases as is stated by Goddard. L.C.J., in the case *Wallwork v R* (7) at p. 156:

> "The only other point in the Act (Indictments Act 1795) to which I need call attention is that it is provided in r. 9 of schedule 1: ' Subject to any other provisions of those rules it shall be sufficient to describe any place, time, thing, matter, act or omission whatever 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 Royles' 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 simple count to charge him with more than one offence of incest and the words 'County of Sussex or elsewhere ' in to 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."

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Rule 9 in the schedule referred to above is word for word our s.137 (f) of the Criminal Procedure Code. The offence here (overt act) is that a meeting was held between specified dates, between specified people where a certain subject was discussed, here in Lusaka. The specific spot where the meeting was held to me would be surplusage, to use the word of Goddard, L.C.J.,in the *Wallwork* (7) case *supra*. The offence is clear enough even without mentioning the venue, the amendment was therefore unnecessary and does not cause any prejudice or embarrassment to accused persons.

It was further argued that the amendment was done merely to fit in with the evidence. I think there is nothing wrong in doing that. That is what is involved in amending an information to fit with the evidence adduced, and I hold that that is what is meant by " *amendment of the information as the court thinks necessary to meet the circumstances of the case* " in s.273 of the Criminal Procedure Code and this was held in the case of *Smith* (4) at p.681 by Humphrey J.,:

> "The argument for the Appellants appeared 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 in matters of description, and probably in many other aspects, *may be made in order to meet the evidence in the case so long as the amendment cause 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 as the same, but in 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 . "
>
> *(italics my own)*

Dr Mushota submitted that it was wrong for the court to amend the information by itself in the sense that if the Court had power under s.273 of the Criminal Procedure Code that power was to direct the prosecution to amend the information and not the manner adopted by the court. With due respect, the word " order " as used in s.273 of the Criminal Procedure Code does not necessarily mean only " direct ". The practice in Zambia is that once the court has decided to amend the information or charge it amends the charge or information filed in court on its own. It does not order the prosecution to file on amended information as ordered. I therefore still hold that the amendment of the information at no case to answer stage is perfectly in order and causes no injustice, prejudice or embarrassment to the defence.

I will now deal with another legal issue brought out by the defence. They submitted that although s. 47 of the Penal Code was repealed by Act 35 of 1973, the law still stands that at least there ought to be two

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witnesses to one overt act or one witness to one overt act and one witness to another overt act of the same kind of treason. It was submitted that if Parliament intended to change this law, it had not succeeded as by virtue of s.2 of the English Law (Extent of Application) Act, Cap. 4. all statutes in force in England on 17th August, 1911, are in force in Zambia and that under the English Treason Act, 1795, the requirement which was previously in s. 47 of our Penal Code is still law. This sounds a noble submission and a noble way of interpreting a statute.

In the first instance I will deal with the English Law (Extent of Application) Act, Cap.4. My understanding of that Act is that it, is an enabling Act in that in the absence of any legislature in Zambia on any subject, the English statutes before 17th August, 1911, apply in Zambia. Where specific Acts exist in Zambia on a given subject the English Acts do not apply because Zambia is a Sovereign State and legislates on its own. Equally where Zambia enacts an Act with similar provisions to the English statute the Zambia Act is used and not the English statute. Therefore, before the passing of Act 35 of, 1973 the English Treason Act 1795, was not applicable as two similar statutes cannot apply concurrently. It would be absurd if it were otherwise.

What is the effect of Act 35, of 1973? I seek guidance from what Lindley, M.R., said the case of *Re Mayfair Properly Company* (8) at p 35:

> "In order properly to interpret any statute it is necessary now as it was when Lord Coke reported Heydon's case to consider how the law stood when the statute to be construed was passed, what the mischief was which the old law did not provide, and the remedy provided by the statute to cure that mischief."

In *Mac Millan and Co., v Dent* (9) Fletcher Moulton, L.J., put it this way at 120:

> "In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act - not only the common law, but the law as it then stood under the previous statutes in order properly to interpret the statute in question. These may be considered to form part of the surrounding circumstances under which the Legislature passed it, and in the case of a statute, just as in the case of every other document, you are entitled to look at the surrounding circumstances at the date of its coming into existence, though the extent to which you are allowed to use them in the construction of the document is a wholly different question."

In interpreting Act 35 of 1973, one has to look at the law when the Act was passed. The law required that in treason one cannot be convicted unless there have been two witnesses to an overt act or one witness to one overt act and another witness to another overt act of same kind of treason. That was the law in Zambia and England. Act 35 of 1973 changed this law. This was the mischief that existed before the Act was passed and Parliament

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intended to cure this mischief. I cannot accept that the Zambian Parliament intended to cure the local mischief in order to use the foreign mischief. Parliament is presumed to act reasonably. I do not, therefore accept that the English Treason Act 1795, whose similar provisions were repealed in Zambia is applicable in Zambia by virtue of s. 2 of Cap. 4. The law in Zambia at the moment, in relation to treason, is that there is no special requirement as to number of witnesses to testify before one is convicted. This offence can be proved like any other criminal offence.

The defence criticized my ruling on no case to answer when, at p. 33 I said that Gen. Kabwe, PW5, was an innocent person having been acquitted on a charge of receiving goods believed to have been stolen or unlawfully obtained. I went on to say that he had been acquitted on this court's cause number HPA/70/1982. It was submitted that I based my findings on evidence not before the court and that such evidence was irregularity obtained in that nobody was called to produce the said record containing the acquittal. It was further submitted that the proper procedure should have been as the one adopted by this court when the record of the proceedings of the lower court in this case were produced by the Senior Clerk of Court, PW122.

The proceedings in the lower court were referred to in the course of these proceedings and these references were made from copies of the record. Since there was need to produce the original, the custodian had to produce it.

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 source, namely cause 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 Service* (10) at p. 212:

> "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 to refer."

It would be folly for the court, in a appropriate cases, to keep aloof on facts of common knowledge. Again as Lord Summer said in the same *Commonwealth Shipping* (10) at p. 211:

> "My Lords, to require that a judge should affect a cloistered aloofness from facts 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."

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Furthermore, this court is entitled to look at its own record. Kelly, CB, said at p. 149 in the case of *Craven v Smith* (11):

> "The first question is, whether we are at liberty to look at the record to ascertain the nature of the auction. It is said we cannot - first, because it is not verified by affidavit: and, secondly, because it is not alluded to in the rule. Now, I am of opinion that the court is always at liberty to look at its own records and proceedings. . . . I feel no doubt, therefore, that we may look at this record."

With those authorities I still feel I was correct to say that Gen. Kabwe was an innocent man. To use his conviction in the subordinate court on the charge of receiving as a basis of ascertaining his credibility or honesty is therefore wrong. I did not receive any evidence, I merely took recognisance of the fact of his acquittal.

The prosecution in their submissions have conceded that some of their witnesses are accomplices such as PW5, 33-37. I will now therefore deal with the law on accomplices. There is no doubt that the law requires that evidence of an accomplice must be corroborated by independent evidence. This need of corroboration only arises if the accomplice has been found a credible witness. The court should warn itself of the danger of convicting on uncorroborated evidence of an accomplice and in this case I am seized of this danger throughout. If it acts on uncorroborated evidence of an accomplice, it must be satisfied that the risk of false implication has been excluded. As was put by Baron, D.C.J., in the case of *Emmanuel Phiri and Others v The people* (12) at p.92:

> "In the case of an accomplice there must, in addition to the fact in his honesty, be other evidence which, though not constituting corroboration in law, yet satisfies the jury 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. The nature and sufficiency of this supporting evidence will depend on the circumstances of the particular case."

Who may provide the corroboration? The defence submitted that one accomplice may not corroborate another accomplice. On this issue I would refer to the case of *D.P.P. v Kilbourne* (13)

where although their Lords were faced with a sexual offence, they dealt with the general issue of corroboration wherever it is required. At p. 453 of the report Lord Hailsham of St Marylebone, L.C., had this to say:

> "It seems to me that the only way in which the doctrine on which the decision of the court of Appeal was founded (in *D.P.P v Hester* [1972] 3. All. E.R. 1056) can be supported, would be if there were some general rule of law to the effect that witnesses of a class requiring corroboration could not corroborate one another. For this rule of law Counsel for the respondent expressly contended. I do not believe that such a rule of law exists. It is probably true that the testimony of one unsworn child cannot corroborate the

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> testimony of another unsworn child but if so this is probably because this is expressly prohibited by statute."

At p.454 he went on to say:

> "I do not, therefore believe that there is a general rule that no persons who came within the definition of accomplice may be mutually corroborative . . . In particular it does not necessarily apply to accomplices of Lord Simon's, L.C.. in third close (in the *Davies* case) where they give independent evidence of separate incidents and where the circumstances are such as to exclude the danger of a jointly fabricated story."

And further down on the same p. he goes on:

> "There is no general rule that witnesses of a class requiring corroboration cannot corroborate one another if otherwise admissible and relevant as probative."

In the same report Lord Reid at p.456 says:

> "The main difficulty in the present case is caused by observations in *R. v Manser* to the effect that evidence of one witness which requires corroboration cannot be used is corroboration of that of another witness which also required 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 particular statement, one naturally looks to see whether it fits in 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 . . . 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."

From what their Lordships said above, it is clear that there is no such a general rule of law that an

accomplice cannot corroborate a fellow accomplice provided, of course, the dangers of joint fabrication are eliminated.

Further on the authority of *Emmanuel Phiri's* (12) case this corroboration need not be corroboration in strict law, but something more that goes to confirm what the accomplice has said, thereby eliminating the risk of false implication. Further, I bear in mind what was said by Goddard, L.C.J,, at p. 56 in the case of *Credland v Knowles* (14) that:

> "As has been pointed out over and over again, where the question is whether a person's evidence is corroborated, the whole story has not to be corroborated, because if there is evidence independent of the person whose evidence requires corroboration which covers

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> the whole matter, there is no need to call the first person at all. The evidence has only to be corroborated 'in some material particular' . . . by some other material evidence."

On the question of confession, it is undisputed law that *ex curia* statement by an accused is only evidence against the maker of that statement but should that statement be repeated in court on oath, it becomes evidence against all others affected by it. Further, *ex curia* statements have to be proved to have been made freely and voluntarily. In the present case all accused persons gave statements and were given in evidence except accused number 8 whose statement was rejected after a trial-within-a-trial. Again all statements were received in evidence after trial-within-a-trial except those by accused Shamwana, Kabwita, and Musakanya. Of those that trials-within-a-trial were held only accused Symba and Mporokoso gave evidence. Generally, the common grounds for objection were breach of Judges' Rules in that warn and caution was not administered at the beginning of the recording of the statements; police brutality in that some accused were in chains and statements were recorded at gun point; and the general unfair conditions in prison as they were all in custody at the time My rulings on the admissions of these statements are on record and I adopt my reasoning in those rulings in trip judgment

The Judges' Rules which are said to have been breached are rr. 3, 7 and 8 and these are reproduced here below:

> "3. Persons in custody should not be questioned without the usual caution being first administered.
> 7. A prisoner making a voluntary statement must not be cross examined, and no questions should be put to him about it except for the purposes of removing ambiguity in what he has actually said, for instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
> 8. When two or more persons are charged with the same offence and their statements are taken separately, the Police should not read these statements to the other persons charged, but each of such parsons should be given by the Police a copy of such statements and nothing should be said or done by the Police to invite a reply. If the person charged desires

to make statement in reply, the usual caution should be administered."

Judges' Rules are not rules of law but formulated by the courts for the guidance of the police for fair treatment of the suspects or arrested persons. The breach by the police of these rules does not automatically render the statements so obtained inadmissible, there is always the discretion of the judge to exclude such statements. In objecting to the admissibility of some of the confessions, serious allegations of police brutality

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were made but no evidence was called. Serious irregularities by the police were made but no evidence was led, and as I said, referring to the case of *Mvula v The People* (5) that where serious allegations of brutality and violence are made against the police, it is the duty of the defence to call evidence to support such allegations. Statements from the bar, however moving or convincing, are no evidence at all and in the absence of supporting evidence to such serious allegations, I found the allegations baseless. In fact such allegations were denied on oath by accused 11. The failure to call evidence to support serious misconduct by the police is deprecated by the courts even up to now, *see R v Callaghan* (16) per Waller, J., for those accused who gave evidence I found them to be lying in their allegations against the police for reasons I gave in my rulings. For accused 12, there was no trial-within-a-trial as the grounds of objection did not warrant the holding of the same. My reasons are on record. The only uncontroverted fact is that these statements were taken in breach of Judges' Rules to the extent that the usual caution was not administered the beginning of the taking of the said statements when all the accused were in custody. That fact, i.e. the breach of Judges' Rules, does not automatically render such statements inadmissible, the judge may exercise his discretion. In the case *R v Straffen* (17) Slade, J., said at p 214:

> "I can deal very shortly, first of all, with the second ground of appeal, which is based on what are known as the Judges' Rules. Those rules are designed to secure that no advantage should be taken of a *prisoner who is in custody and whom the Police have already made up their minds to charge with the commission of an offence* by requiring that in such a case they should first administer the usual caution before making inquiries of him. The rules have no force in law in the sense of making answers given by an accused to any inquiries made in breach of them inadmissible, it is a matter for the discretion of the Judge to decide in each case whether, when inquiries are made in contravention of the rules, the answer should be admitted or not."
>
> *(Italics my own.)* See also the case of *R v Prager* (1972) (18).

I am mindful that like all judicial discretions, this discretion has to be exercised judicially. In the *Straffen* case the police had already made up their minds to arrest him for an offence. In the present case although accused were suspects, the police had not made up their minds to arrest the accused. The police, in terms of the rule 1 of the Judges' Rules, are entitled to question any one whether suspect or not in order to find out the author of a crime. The only difference here is that the suspects were in custody,. Having found during the trials-within-a-trial that all statements were free and voluntary, I have to decide whether by virtue of breach of the Judges' Rules I can exclude them. Exclusion here is excluding than from being taken into consideration in deciding whether the

accused were guilty of the offence or not although such restatements have been admitted in evidence. Even at this stage the court may consider exercising that discretion per the authority of *R v Watson* (19).

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The basis on which discretion is exercised is that although the evidence is relevant and admissible, if it would operate unfairly against the accused or it has less probative value, then it should be excluded. Authorities on this are many such as *Callis v Gun* (20) and *Herman v R.* (21). The fact that the statements were recorded in breach of Judges' Rules is in itself not *prima facie* proof that the statements would operate unfairly against the accused. Unfairness against be shown and I have not been assisted on this point, perhaps because there is none. All counsel kept on hammering the point that "since the statements were recorded in breach of Judges' Rules, they must surely operate unfairly against the accused".

However, be ale it may, I will look at the circumstances under which the statements were recorded. All accused were persons under Presidential detention orders issued under the Preservation of Public Security Regulations. All the time when statements were recorded, although initially the Police may have been responsible for detentions, at this stage they had no control. However all, the same, the accused were in custody for the purposes of r. 3. Now what unfairness or prejudice had occurred to the accused? There is evidence that although no usual caution was administered at the beginning of the statements, as soon is accused started incriminating themselves. the caution was administered and the accused continued talking. As I said earlier on that 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's interests as son as the accused started incriminating 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. Even counsel were unable to pinpoint the prejudice or unfairness.

Whilst on the question of confessions, I will briefly refer to the interrogation notes taken from Mr Musakanya, exhibit "P100". I made it clear; when delivering any ruling on the notes that they were being admitted in evidence not as a statement by Mr Musakanya, as they do not qualify to constitute a statement, but as notes made by the witness to remind himself of what Mr Musakanya said, i.e. to refresh his memory see *Lester and Howard v R.* (22). These notes were objected to by Mr Mwanakatwe for Musakanya on the grounds that:

(a) The Judges' Rules had been breached.
(b) Cumulative behaviour on the part of the State render it, but for it, that no statement would have been made or if made it, would be unreliable and if admitted it would be prejudicial to the accused.

In my ruling, I did consider the question of prolonged questioning which I said could amount to oppression but that was vitiated by the provision of a bath, offer of food and long break before the next morning. I am of the view that any element of unfairness was removed. The only question remaining was that he was questioned whilst is custody without the usual caution being administered. My views on this have been

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adequately dealt with above when I was dealing with warn and caution statements from other accused persons. It is a question of injustice or unfairness but I see none myself.

It is law that in treason evidence is led to proof of the overt acts. In the present case one of the overt acts is conspiracy. Before the commencement of trial, even at the close of prosecution case, it was argued that the overt of conspiracy should not be included in the information, or alternatively if it is put there, better particulars should be given. My rulings on the issue are on record and I need not go through them again.

As I said in one of my rulings that conspiracy is a very difficult offence to prove because of its very nature of secrecy, and yet the burden of proof never changes, it is always beyond reasonable doubt. It has been said that "A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law or to do that which is wrongful and harmful towards another person," per Lord Brampton in the case of *Quinn v Leathem* (23) at p.528. It has also been said that "conspiracy is usually proved by providing acts on the part of the accused which lead to the inference that they wore acting in concert in pursuance of an agreement to do an unlawful act", Per Viscount Kilborne in the case of *R. v Doot* (24) at p. 540:

In the case of *R. v Griffiths* (25) Paull J., had this to say on conspiracy as an agreement and as to conspirators at p.453:

> "They may join in at various times, each attaching himself to that agreement; any one of them may not know all the other parties but only that there are other parties; any of them may not know the full extent of the scheme to which he attaches himself. What each must know, however, is that there is coming into existence or is in existence, a scheme which goes beyond the illegal act which he agrees to do."

However, where conspiracy is laid down as an overt act in a treason charge, this must be proved first before acts of one conspirator are taken to be acts of the other conspirators in furtherance of that common design.

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 1255 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 proceedings, he had no objections. 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.

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Having looked at the law that affects this case, I will now deal with evidence adduced in the matter. As I have pointed out already, the prosecution called 122 witnesses and there was only one witness for the defence. Some of these witnesses were very long and to go into full details would amount to reproducing the whole case record which is composed of fifteen typed volumes. It would be easier to deal with the evidence if I briefly review the evidence relied upon by the State on each overt act, i.e. on the remaining four overt acts. As the case is now completed, the court is entitled to consider the evidence on the totality, i.e. all the evidence in this case, both that by the prosecution and the defence.

Overt act 1 - conspiracy. For this overt act, the State called only one witness, Gen. Kabwe, PW5. He testified that he was a member of Lusaka Flying Club and sometime between April, 1980, and May, 1980, whilst at the club he was approached by accused 4, Mumba, whom he had known before having been together at school. Accused 4 told the witness that he had something serious to talk to him about and later he informed the witness that there was a plan to carry out a *coup d'etat* in Zambia and the witness was one of the participants. He was told that the plan was at a very advanced stage and it would be carried out within a week or two and that it was financed by powerful people, both within and outside Zambia. PW5 told accused 4 that he did not take him seriously and the coup would not succeed but was told to go and think about it.

A week later they again met at the Flying Club, like the first meeting, the second meeting was not pre-arranged. Accused 4 invited PW5 to meet some people the following day at 1900 hrs but PW5 did not keep his appointment but after two days they met again at the Flying Club where accused 4 asked PW5 why he did not turn up for the meeting, the witness said that it was due to pressure of work. However, they left later to meet a person called Pierce Annfield. The witness had met Annfield before in the offices of accused 5 where he asked Annfield to sign some mortgage forms as he was a lawyer by profession. At that meeting in accused 4's Office, Annfield had invited PW5 to visit him at his house but this visit to Annfield's house with accused 4 was not in response to that invitation. Anyway they went to the house of Annfield where they also found Mr Sikatana who was accused 3 and has since been acquitted. He was introduced to Mr Sikatana and immediately Mr Sikatana left. Annfield then asked PW5 whether accused 4 had told him anything and he agreed and after a short discussion the meeting broke off but they were to meet again. He was then driven back to the club by accused 4. After about a week, accused 4 went to the witness's house on a Sunday and invited him for a drink. As they were driving out accused 4 told him that they were going for another meeting. They went to Annfield's house and as they were approaching it they saw that Annfield was driving out. Accused 4 parked his car by the road and witness saw accused 2 being dropped from another car in front of Annfield's house. Accused 2 got into Annfield's car and he, the witness, and accused 4 drove off, followed by Annfield. Accused 4 informed the witness that they were going to Shamwana's house. At accused 1's house they found him and he opened the

gate for them and they drove into the yard and they were joined by Annfield and accused 2. They all went into accused l's house and exchanged greetings. After this, accused 2 introduced the subject about the plans to topple the Zambian Government and they asked for his views. The plan outlined to him was to divert the Presidential plane to some pre-selected place and there force him to renounce his office and hand it over to someone else. Announcements would then be made in the

news media, radio and television to that effect. It was emphasised that they did not want any loss of blood unless absolutely necessary. In order to carry out this plan, in his capacity as Chief of Air Staff, they wanted PW5 to arrange for the diversion of the plane and find suitable pilots to undertake the task.

After execution of the plan, some key leaders such is Secretary-General of UNIP, the Prime Minister, Secretary of State for Defence and Security, Zambia National Defence Force Commander, Service Chiefs including himself would be arrested to forestall counter-coup. He would be released after sometime. When accused 2 introduced the subject, all present, that is accused l, 4 and Annfield took part in the discussion without disassociating themselves. It was brought out to the witness that whoever the pilot was that executed the plan he would be "emolumented" one way or the other.

After the plan was outlined the witness commented that although the things in the country may not be perfect, the manner of changing the Government as outlined was not the best solution and also that from his observations, the Defence Force would not support change of Government in that manner because they were loyal to the leadership and Government and, politically, the masses were behind the leadership and Government. After making these observations, the point of inducement arose and Annfield left the meeting and came back with K500.00 and gave it to the witness to be used to induce some ZAF pilots to undertake the task. The witness took the money but used it on his personal things.

After this second meeting, the witness kept on seeing accused 4 at his office over the construction of his house by accused 4's company, Mumgood Flooring, and he was being asked what progress had been made but he kept on saying none until he was finally told by accused 4 that he should forget about it as the whole thing had been dropped. On one of the many visits to accused 4's office he found a man whom he was told was Symba, accused 10. The witness, with all this information about the planned coup, never reported to any authorities and he gave his reasons as:

(a) As early as July, 1980, he had been assured by Mr. Mumba that the whole thing had been dropped and he saw no reason for reporting.
(b) He was afraid for his life as when he was first approached by accused 4 he was told that if he reported this matter to anybody he would be killed.

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(c) He did not report to his boss as he was not in good books with him and because of the chain of command, he would not by-pass his boss to report to any other authority.

However, be as it may, this witness was picked up and detained and interrogated for many hours and after that he too was arrested and in fact committed to High Court for trial. However, later on he turned State witness and was issued with an indemnity. That although he described his stay in prison as traumatic, that and the indemnity did not influence his statement, he gave his statement according to what he knew in the matter.

This witness 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 way because he agreed to turn State witness. 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 after-thought 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. The material points of his evidence in relation to this case are whether he was approached by accused 4 and told of the plan and invited to attend meetings; whether he did attend such meetings and what was discussed and agreed; and the people who attended the meetings.

Having found Gen. Kabwe a truthful witness, as he is an accomplice, I will look for corroboration, i.e. evidence that will confirm the material points relevant to the case, evidence that should rule out the possibility of false fabrication of the story.

Before I look for such corroborative evidence, I should put into record that this witness was threatened and interrogated for a prolonged period before he gave his statement in October, 1980. When the offer of his turning State witness was made to him he got legal advice from his counsel on it and he accepted the offer and when he gave the statement, on which his evidence in court was based, he repeated the same story as told to the interrogators in October, 1980. I do not think that he stuck to his story because of the promised indemnity, I say so because he was told when the offer to turn State witness was made to him that evidence against him was negligible, which in ordinary English means that such evidence could not stand against him. There was no motive to fabricate the story against some of his co-accused, he was told that there was no sufficient evidence against him and he would have preferred an acquittal by a court of law. He made it clear in evidence, in re-examination, that he told the police what he knew and what was the truth, and I accept it.

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I will now consider whether there is independent corroborative evidence to support the material aspects of Gen. Kabwe's evidence. As was pointed out in *D.P.P v Kilbourne* (13) case witnesses in a class that need corroboration may corroborate each other and as was said in *Mulenga and Others v R.* (25) at pp.15-16 by Clayden, F.J.:

> "Every Appellant, except appellant No.3 had a statement in which he had admitted being present ad the meeting, though denying that there was any conspiracy at it. Quite correctly these admissions were regarded as corroboration of the evidence of the accomplice in respect of each particular appellant who made the admission."

I further bear in mind that conspiracy can be proved by inference drawn from the words or acts of the accused person. The matter would be easier if each accused is considered separately against this overt act of conspiracy.

As far as accused 4, 10, and 11 are concerned they clearly corroborate the evidence of PW5 insofar as existence of the Coup plan is concerned. They knew the plan although they may not have been in it from the start; but when they got involved they never disassociated themselves from it. Their

confession statements corroborate the evidence of PW5 on the authority of *Mulenga and Others* (26) already referred to. As to accused 2 the corroborative evidence is contained in the interrogation notes written by PW110, Mr Kaulungombe. I have dealt with this matter already it is very unlikely that an accomplice, PW5, should talk of the plan of diverting the Presidential plane and the accused 2 talks of it or suggests the plan to conspirators. This cannot be a mere coincidence. I find that accused 2 was telling lies when he said that he put the suggestion of diverting the President's plane to some place and force him to renounce his office as a joke. He was not joking.

I therefore accept that sometime in April or May, 1980, Gen. Kabwe was approached by accused 4 at Lusaka Flying Club and was told of the plan to topple the Zambian Government. I accept that he did go with accused 4 to the house of Annfield and that subsequently he attended a meeting at the house of first accused which meeting was also attended by accused 1, 2, 4 and Annfield. At that second meeting the plan of diverting the Presidential plane was told to him and he was asked to arrange for necessary personnel to carry out the plan and that he was given K500.00, by Annfield to use it for inducement of ZAF pilots. I accept that he did not use this K500.00 for the purposes for which it was given to him but spent it on personal things. Having accepted the K500.00 and having spent this money on personal things and having failed to report this matter to authorities, I can only conclude that Gen. Kabwe joined the conspirators although he may not have been a very active member.

I further accept his evidence that he was arrested for treason together with others and was interrogated for some considerable period and that he did give the interrogators a statement. I accept that he was approached by the State through his lawyers that the State wished him to turn State evidence and that after legal advice from his lawyers, he accepted the offer and his evidence is based on what he had told the interrogators

in October, 1980. I do not accept that he has coloured his evidence any way.

Accused 1 is implicated by PW4 and some of the co-accused in their warn and caution statements. From cross-examination of the witnesses, it is clear that accused 1 denies being involved with co-accused. He says that he knew accused 10 when his firm, i.e. accused l's firm, acted for accused 10 in one matter when accused 10 was detained. His association with accused 10 was therefore an innocent one. Accused 1 was found at house number 6525 Kasangula Road, Roma Township, on 23rd October, 1980. The circumstances of his apprehension were that police got some information that a man they came to know as Symba, involved in the shoot-out at Chilanga Farm on 16th October, 1980, was at that house in Roma. Police went there and on entry they found accused 1 seated in the lounge.

There is no doubt from the evidence of PW4, Raphael Lungu, and PW6, Mrs Rose, whose evidence I accept, that accused 10 was keeping up in that house. It is significant also to note that accused 10 was apprehended the same afternoon as accused 1 except that he was apprehended off Mugoti Road, a road behind Kasangula Road. When accused 1 was found in this house he was asked where the people he had been with were he replied that he was alone and that perhaps the police had seen a servant who went through the back door. He further stated that he did not know the owner of the

house and that he came to the house after being given directions on the phone. He was asked to accompany the policeto Force Headquarters and on the way, on his own motion, he told PW2 that he, accused 1, was " stupid to have been involved in this thing". On being asked why, he said he was a lawyer for the man the police were looking for. He explained that he was stupid because he was to be Chief Justice the following week as the incumbent was going on a course abroad.

It should be observed that when the Police burst into the house in Roma, no names of the people they were looking for were mentioned and accused l's statement that he was a lawyer of the man they were looking for confirms the evidence of PWs 4 and 6 that accused 10 had been in that house. Accused 1 therefore told a lie to the police at first when he said that he was with nobody and the police may have seen a servant.

It is the undoubted duty of a lawyer to defend his client, no matter how serious the crime is but that duty does not extend to helping the client escape justice or assist in perverting the course of justice. Accused 10 himself states in his warn and caution statement that he saw the police from a window and he left the house using the back door. Why should accused 1 tell a lie on the people he was with? If the meeting was an innocent, client/lawyer meeting, why allow the client to go out of the house using the back door when they realise police had arrived at the house? From PW117, John Ng'andu, we get another piece of evidence. He asked accused 1 why he was involved in this matter as he had known him to be High Court Commissioner and a lawyer. Accused 1 replied to the effect that he acted as a lawyer on the sale of the farm between Mr

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Milner and Annfield and that he acted as lawyer for accused 10 when accused 10 was detained. He further explained to the witness how he was arrested. He said he got a telephone call from a relative saying that another relative was sick in Roma Township and he went there and he was arrested. On being asked about the people found at Chilanga, he said he was not responsible for these, it was accused 10 who knew about them. Can all this information, be for innocent purpose? There was no sick person in the house number 6525 Kasangula Road, Roma, so why tell lies that he went to the house to see his sick relative. Lies told out of court, may under certain circumstances amount to corroboration. In the case of *R v Lucas* (27) Lord Lane, C.J., had this to say at p.123:

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

In the same case, Lord Lane, C.J., gave conditions under which a lie may amount to corroboration. On same p. 123 he said:

> "To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realisation of guilt and fear of the truth. The jury should appropriate cases be reminded that people sometimes like, for example, in an attempt to bolster up a just cause, 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."

From the evidence, which I accept, accused 1 was apprehended from house number 6525 Kasangula Road, Roma Township and on that day accused 10 was in the house. I accept that before PW4 saw para-military police officers surround the house, he saw accused 10 jump the backyard wire fence and after visiting the scene I draw the conclusion that he jumped into the yard of house No. 6232 on Mugoti Road and I accept that later PW4 saw one elderly person being brought out of house number 6525 Kasangula Road, Roma Township and from the evidence of PW2 and 3 this elderly man is accused 1 as no other person was found in the house; I also find that both accused 1 and 10 had been together in the house. The lies told by accused 1 that there was nobody in the house when police came and the running away, through the back door, of accused 18 make their meeting in this house not an innocent one. Further lies that accused 1 went to this house to see a sick relative clearly go to show other than an innocent visit. The little to conspiracy of accused 10 as told by PW5 is corroborated by his warn and caution statement and the odd coincidence of meeting one of the conspirators under the circumstances revealed and the lies told to let the meeting appear an innocent one do corroborate PW5 that first accused was one of the conspirators.

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The lies told by accused 1 were deliberate, they are material in the sense that they were to convey innocent, i.e. innocent association with a conspirator to plan to overthrow the Zambian Government. They were certainly told after realisation of guilt and fear of the truth and that if accused 1 told the truth he would be sealing his fate. The lies are clearly lies from evidence of PW4 and 6 in that accused 10 was in house number 6525 Kasangula Road and yet accused 1, denied his presence except for the presence of a house servant. Further there was no sick person at this house in question and it was never suggested that PW6 is a relation of accused 1. His remorse for being involved in the "thing" when he was to be Chief Justice the following week is clearly a testimony of guilt and regret. I am satisfied that accused 1 is linked to the conspiracy to over throw the Government by unlawful means. There was no need for accused to regret being involved with accused 10 as his lawyer if that was the only involvement and there was no need to have remorse due to the fact that he was to be Chief Justice the following week. If his association with accused 10 was on the footing of client/lawyer, there would be no need to regret being involved with him as he was doing his duty as a lawyer, no matter how grave the offence his client might have been facing.

It is on evidence that accused 10 has generally been referred to as "DEO". It is too much of coincidence that his name should appear in exhibit "P106" on counter folios 674276 and 674277. This exhibit is a cheque book of the personal account of accused 1 and if there was that client/lawyer relationship, these should have appeared in the cheque book for Shamwana and Company. This exhibit is referred to not because of the allegation by the prosecution in their information that accused 1 gave money to accused 10 for the purposes alleged, but to show the relationship existing between these two accused persons. The file kept by Shamwana and Company on accused 10, exhibit "P111" shows no payments made by the firm to accused 10, it only shows one payment by or on behalf of Symba for K400 being fees for work done in his detention case. There is no evidence that Messrs Shamwana and Company were retained by accused 10 as his lawyers. The matter on which they had a brief was over his detention in August, 1980,and this was

revoked on 8th September, 1980, per copy of the revocation order in exhibit "P111." I have no hesitation, from the conduct of accused 1 and 10 on 23rd October, 1980, to conclude that the meeting at house number 6525 Kasangula Road, Roma, was not an innocent meeting, it was a meeting of conspirators trying to find out what to do next as one conspirator, accused 10, was wanted for the shoot-out at Chilanga. I am satisfied that accused 1 is involved in the conspiracy to overthrow the Zambian Government as narrated by PW5. The coincidences and lies are something more which although may not amount to corroboration in strict law, they confirm what PW5 said. They eliminate the possibility of false implication by PW5 of accused 1 in the conspiracy.

I will now deal with accused 8, Thomas Mulewa. According to accused 11, Chilambe, accused 8 is his elder brother and that he collected him from Mansa after he and accused 10 had had a meeting at Lusaka

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with Mumba, accused 4, Annfield and others at which he, accused 11, and accused 10 were persuaded by the others to help them to overthrow the Zambian Government and in turn they would help them in over-throwing the Zairean Government. He collected accused 8 to help him in recruiting soldiers for the two ventures and he was to be a driver. He, indeed i.e. accused 8, agreed, and they came together to Kitwe and he was involved in recruiting such persons as PW33 Alick Muzeya, PW34 Lewis Masuba, PW35 Emmanuel Kafumbo, PW36 Soneka Mashikini and PW37 Francis Muteba. According to accused 11, when recruiting these soldiers, they never told them the truth. They were being told that they revere recruited as labourers, to work on a farm in Kitwe. The reason for telling lies was the very fact that if the recruits were told that they were to be soldiers to overthrow the Zambian Government the secret would be revealed.

Accused Thomas Mulewa was apprehended in the early hours of 16th October, 1980, in the vicinity of the Chilanga Farm by PW 71, Major Kalebuka. On apprehension he stated that he was from the next farm where he was visiting his in-laws. After apprehension, he was identified by David Munjinga who was also one of the people captured at the farm. This David Munjinga died as a result of the, injuries he received from the shooting at the farm and it was accused Mulewa who identified the body to the doctor who conducted a post-mortem examination at the University Teaching Hospital, as that of David Munjinga.

Accused Mulewa was identified by PWs 33-37 us a person who recruited them to work as farm labourers. Their evidence was not challenged at all, and I accept their evidence that they were recruited by accused Mulewa and Chilambe. I accept that they were told that they were to be farm labourers, but as accused 11 said, and as I found in my ruling on no case to answer, they were tricked that they were to be farm labourers. They were recruited to be soldiers in the illegal army. When accused Mulewa was apprehended and told PW 71 that he was from the next farm visiting his in-laws, he was telling lies. I have no hesitation in concluding that Thomas Mulewa was one of those people at the Chilanga Farm.

Exhibits "p 139"-"p 142" were found within the vicinity of the Chilanga Farm. It is not mere coincidence that some of these documents bear the name of accused Mulewa and is described as "Chief Adjutant". It is also no mere coincidence that the name of David Munjinga should be found

on some of these documents. He was issued faith AK47 rifle and ammunitions, exhibits "P63" and "83" respectively. I do not accept that Thomas Mulewa was a mere driver of accused Symba. He was fully involved in the affairs of the group of conspirators and was given the responsibilities of Chief Adjutant. He could not be given the title of adjutant if he was not fully aware of the aims of this group. PWs 33-37 were recruited at different times by accused Chilambe and Mulewa and transported first to Tshombe Farm in Kitwe and then to Chilanga farm here in Lusaka. The witnesses, although found in the situation

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they were, I would describe them as innocent accomplices, innocent in the sense that although they were recruited by accused Chilambe and Mulewa, 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. This clearly shows their innocence. The evidence of PWs 33-37 does not show that they concocted the story and they do corroborate each other on recruitment, supply of the guns and ammunition. From the evidence I am satisfied that 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.

As regards accused 12, Kanyembu, he was also apprehended at the Chilanga farm and at the time of apprehension, he was armed with an AK47 rifle with eight rounds of ammunition, exhibit "PG2" and "90" respectively. He was apprehended when the security forces went to the farm. His name appears on exhibits "P 140" and "P 142". On exhibit "P 140" gun number 73BK 2262 exhibit "P 73" is recorded against his name. Being with a different gun on apprehension can be explained that there was confusion when Security Forces attacked the farm and he picked any gun. Being armed with an AK47 at a farm where there were other armed men can be nothing other than that accused was with that group.

On exhibit "P 142 (C)" he is described as a captain. I refuse to accept that that group of people at the farm was there for the purposes of farming, giving them work was a mere further method of concealing the true purpose of their presence. Arming over sixty people with AK47 rifles can hardly be attributed to farming. Even if it is accepted that there were thieves on or around the farm, the farm could not need protection by arming all those present and accused 12 was one of those so armed. On the totality of the evidence, I am satisfied beyond all reasonable doubt that all the accused persons, except accused 5, did conspire together to overthrow by unlawful means the Government of the Republic of Zambia as by law established. They all may not have been together when the idea was originally mooted out, but certainly they joined together later.

The defence put forward is complete lack of knowledge of the whole venture. This is what I gathered from cross-examination of the prosecution witnesses. With the overwhelming evidence adduced by the prosecution, this defence cannot stand. All accused persons were involved in this matter and I reject their defence of innocence.

Further accused Chilambe put forward the defence that he later withdrew from the whole venture and he took ninety guns from the farm so that they could be used in Zaire. I find it difficult to

accept this bearing in mind his conduct. It should be remembered that the ninety guns he took to Ndola and which he showed the Police after arrest were

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surplus after arming everybody at the Chilanga farm. It should also be noted that his organisation had been looking for guns and as there were surplus guns at the farm, it was natural that they keep the surplus safely somewhere from where they could collect then later and use in Zaire. He buried them secretly and this was in October, 1980. He never took any positive step to inform the authorities about either the plans or the guns, until he was apprehended in December, 1980. Further, when accused Symba was in detention, he had every opportunity to tell the authorities about the plans if he was afraid of the presence of his leader Symba but he never did. This conduct cannot be of a person who had disassociated himself from the venture. If the shoot-out had not taken place, I am very certain that he would have come back to rejoin the group and proceed with it to execute their plans. I reject his defence that he disassociated himself at any reasonable time. He remained on the Copperbelt because the group at Chilanga farm had been dispersed by the Zambian Security Forces and he did not know where his leader Symba was. He was like a lost sheep.

As conspiracy has been proved, any act or omission done by any conspirator in pursuance of the conspiracy is deemed to be an act or omission of co-conspirators. When I was dealing with the evidence of Gen. Kabwe, I did refer to the meeting he had with accused 1, 2 and 4 together with one Annfield. At this meeting he was told of the plan to overthrow by unlawful means, the Government of the Republic of Zambia and a suggestion was put to him to how to do it. It was suggested that a Presidential plane be diverted to a pre-selected place where the President would at gun point be ordered to renounce his office and hand it to someone else. That meeting was clearly in furtherance of the conspiracy. The fact of meeting taking place and the plan discussed is corroborated by warn and caution statement of accused 4 and the interrogation notes in respect of accused 2. Accused 10 does confirm of a meeting in his warn and caution statement. In his evidence, accused 11 did confirm of the meeting where PW5 was being persuaded to do some acts. All these were done in pursuance of the plan already agreed upon. I am satisfied that overt act number 2 of a meeting held to persuade PW5 to make arrangements to divert the Presidential plane has been proved beyond all reasonable doubt.

On the evidence, having agreed on the plan to overthrow the Zambian Government, by unlawful means, I accept that accused 4, 10 and 11 proceeded to buy the following motor vehicles: Land - Rover AAD 5842 from Three - Way Parking: VW Combi ANA 1452 and Ford Transit 40 ADA 995 from Duly Motors. These vehicles were used to transport recruits from North - Western Province to Kitwe and then to Lusaka. I have already held that these recruits were cheated that they were to be farm labourers when in fact they were to be soldiers in an illegal army. PWs 33-37 were recruited and transported at different times and there is no suggestion in their evidence that they concocted the story against accused 4, 8, 10 and 11 and 12 about their involvement in this matter. These witnesses were truthful witnesses whose evidence was not

discredited in any material way by the defence. I am satisfied that although these witnesses said that they were recruited as farm labourers, they were tricked as was confirmed by accused 11. No reasonable person can accept that farm labourers can do farm work with AK47 assault rifles and thirty rounds of ammunition each. Although they did some farm work, that was just to hoodwink the poor innocent souls. If they were told the truth, it is doubtful if any of them could have agreed to be recruited as is demonstrated bar PW36, Mashikini, who after seeing the guns, he and some friends deserted the farm. I am satisfied that accused 8, 11 and 12, in pursuance to the conspiracy did recruit the men listed in the new overt act 3 for the purposes of turning these into soldiers to be used in overthrowing by unlawful mean the Government of the Republic of Zambia as by law established. As these people were recruited as a result of the conspiracy, the recruitment is deemed to be the act of all accused persons.

There is evidence before this court from PW68, Bread; PW69, PW85, PWs 33-37 and accused 11 that accused 10 was the leader of this group. He took an active part in looking after them at the farm and according to PW68 he took the first gun to the farm and this fact has been confirmed by the accused himself in his warn and caution statement admitted in evidence. There is no doubt in my mind that accused 10 was in command of this group. This group was unlawfully armed with weapons, of war, AK47 assault riffles, they were armed for a war-like operation and they were therefore an army. They needed not to be trained like professional soldiers. I am satisfied beyond doubt that accused 10 was in command of this army at Chilanga farm whose aim was to overthrow by unlawful means the Government of Zambia as by law established; the new overt act number 4 has been proved.

On the totality of the evidence, I am satisfied beyond all reasonable doubt that between 1st April, 1980, and 16th October 1980, accused numbers 1, 2, 4, 8, 10, 11 and 12 did conspire to overthrow, by unlawful means, the Government of the Republic of Zambia and as a result of such conspiracy did endeavour to persuade Gen. Kabwe to arrange for the diversion of the Presidential plane to a pre-selected place where the President would, at gun point, be forced to renounce his office and hand over his office to someone else. I am satisfied further that in pursuance of the said conspiracy, accused 8, 11 and 12 went to North - Western Province to recruit men who were to form an illegal army which was to be used in overthrowing by unlawful means, the Government of the Republic of Zambia as by law established and that the said illegal army was under the command of accused 10. I am therefore satisfied beyond all reasonable doubt that the prosecution has proved the case of treason, contrary to s. 43 (1) (a) of the Penal Code. Cap. 146, against the said accused numbers 1, 2, 4, 8, 10, 11 and 12 beyond all reasonable doubt and I convict each and everyone of them at charged.

I will now proceed to deal with the case against accused Mporokoso. Having been satisfied beyond all reasonable doubt that treason had been committed, I will now consider whether accused Mporokoso was aware

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of the treason being committed and that he failed to report to the authorities. The evidence against him is mainly that his warn and caution statement admitted in evidence after a trial-within-a-trial. Further there is the evidence of accused 11 in court that accused Mporokoso attended meetings

where this plan was discussed at Shamwana's house and in Mumba's office.

In his warn and caution statement accused Mporokoso agrees that he was approached by accused Mumba sometime in about March or April, 1980, and was told of the planned coup and he attended a meeting with accused Mumba and accused Shamwana at accused Shamwana's house. He was co-opted into the plan so that he assists in the military way since the planners were all civilians. He was asked to go and look for willing officers in the Army and Airforce. To assist him in his task, he was given K1,000 cash but he spent this money on personal matters. On meeting accused Mumba and on being asked the progress made, he said that the people he wanted to contact were out on operations. In May, 1980, he left for Yugoslavia on official business and on return he was told by accused Mumbo that they had made lot of progress in recruiting personnel and these were ex - Gendarmes of Katanga and two of their officers would be in Lusaka shortly. He met these officers in June, 1980, and these were Deo and Chilambe accused 10 and 11 respectively. He met them at accused 1's house where it was explained to him that the Gendarmes would assist in staging a coup in Zambia and in return the Zambians would assist them in staging a similar one in Zaire. Responsibilities were then shared, he was to find arms and possibly uniforms. He was to meet Deo the following day in Mumba's office but did not do so. However, later they did meet and Deo expressed his disappointment in that accused Mporokoso did not turn up for the meeting. With all this information, accused Mporokoso did not report to the authorities, giving the excuse than he was told that he was the only military personnel they had contacted and if the information leaked to the authorities, he would be the first suspect and he would be shot.

I will now consider this defence of duress or compulsion in respect of accused Mporokoso. The defence of compulsion is provided for under s. 16 of the Penal Code, Cap. 146, which reads:

> "16 A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omits to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence.',

To avail oneself to the defence under s. 16 of the Penal Code, following conditions must be satisfied:

(a) offence must be committed by two or more people;
(b) offence must be committed whilst all the time the offender

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> is compelled try do it through threats of instant death or grievous bodily harm if he refuses;
(c) Future injury will not avail one to the defence.

Accused Mporokoso in his warn and caution statement already referred to *states* that he did not report to the authorities because he was told that he was the only military man and that if the information leaked he was to be the person responsible and he would be shot. It will be noted from

his warn and caution statement that he was approached by accused 4 around March or April, 1980, and between this time and 16th October, 1980, he had been out of the country twice, first to Yugoslavia and secondly to West Germany. It should also be noted that accused Mporokoso was not always with accused 4 or any of the accused persons. He was not in contact with them every day. He had ample opportunity to report to authorities and seek protection.

As was said in *R v Hudson and Taylor* (28) at p. 246 by Widgery, L.J.:

> "It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. Threats must be a 'present' threat in the sense that it is effective to neutralise the will of the accused at that time."

In the present case, the offence of failing to report a treason or misprision of treason is continuous offence and unless it can be shown that the threat was "present" all the time, I do not see how the defence can stand. As I have said, the accused was not constantly under the "present" threats of co-accused and I very much doubt if such a defence is available to an offence such as misprision of treason as this is a continuous offence. One commits it as from the time he knows of the plan by others to commit treason and he fails to report. He is only relieved once he reports to the relevant authorities. I am aware of what Lord Morris of BorthY-Gest said at pp. 917 and 918 in the case of *Lynch v Director of Public Prosecutions* (29) in answer whether duress should be recognised as a defence:

> "The answer that I would give to these questions is that it is proper that any rational system of law should take fully into account the standard of honest, and reasonable men. By those standards it is fair that actions and reactions may be tested. If then someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay heed to the miserable agonising plight of such a person? For the law to understand how not only the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed. In posing the case where someone is 'really' threatened I use the word 'really' in

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> order to emphasise that duress must never be allowed to be the easy answer of those who devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant. Where duress becomes an issue the courts and juries will surely consider the facts with care and discernment."

Further down on p. 918 he says:

> "The law must I think, take a common-sense view. If someone is forced at gun point either to be inactive or to do something positive-must the law not remember that the instinct and perhaps the duty of self-preservation is powerful and natural? I think it must. A man who is

attacked is allowed within reason to take necessary steps to defend himself. The law would be censorious and inhuman which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys."

Considering this defence in the present case, I am of the view that the defence of duress or compulsion fails. The threats although may have been uttered were not immediate, they were as to the future, that he would be shot.

Further accused Mporokoso did not disassociate himself from either accused Mumba or others. He made himself available to these people. He kept on having meetings with these people. He kept on going to accused 4's Office. He could have avoided the dominance of these threats, he could have sought police protection. As I said, the crime of misprision of treason is a continuous one and there is no evidence that, any of the accused were always near him so as to keeps the threats fresh. The conduct of the accused was such that he cannot avail himself to the defence under s.16 of the Penal Code, Cap.146. His deference fails. I therefore find the accused guilty of the offence of misprision of treason or contrary to s. 44 (b) of the Penal Code, Cap. 146. and I convict him accordingly.

All accused convicted
