

THE LAW OF CORROBORATION WITH
SPECIFIC REFERENCE TO ZAMBIA

A dissertation submitted in partial
fulfilment for the degree of Master
of Laws (LL.M)

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APPROVAL

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ABSTRACT

The domain of this study is entitled "The Law of Corroboration with Specific Reference to Zambia". This is the first study to be made in the area of evidence in Zambia thus the importance of the study. Corroboration in particular, has been a subject of great importance and a subject for discussion by the courts. In Zambia its importance and controversy culminated in the celebrated case of Phiri (E) and Ors. v The People. This case raised important legal issues concerning which there appeared to be doubt and confusion. The court found it necessary to make a definitive pronouncement of law on these issues and a full bench of the court sat to hear the appeal. This case has since then formed the basis of the law on corroboration in Zambia. It was because of this case that my interest in this study was aroused.

The study is divided into Seven Chapters. The first part of the study looks at the sources of law in Zambia. This part discusses the different stages of development of the law since the pre-colonial period. The law of evidence is founded on the basis of English law which was introduced during the colonial period. It may be noted in

this respect that although English law is dominant in this area of law, the courts have built up through case law a system of law which in the long run has made Zambian Courts independent of English decisions.

The study makes a detailed analysis of the law of corroboration. The rationale of corroboration is that some offences are difficult to prove without any other evidence, corroborating them, or that some witnesses cannot be relied on without some other evidence corroborating what they testify to. The study examines the nature of evidence required (1) to corroborate these offences and (2) to corroborate the evidence of different witnesses. From the study it is noted that the most important areas which require corroboration are the evidence of an accomplice and child evidence. The study therefore gives prominence, to those two areas and makes a detailed analysis of what decisions and conclusions the courts have made.

The law of corroboration is not settled in some areas, for instance in the law regarding mutual corroboration. The study discusses this topic and analyses the general rule that witnesses who require

corroboration cannot corroborate one another. Reference is made to the English (11th Report of 1972) dealing with corroboration.

Finally, the study suggests that Zambia should have an Evidence Act. There are countries which have Evidence Acts and they have been working well, for instance India, Kenya and Uganda. The main problem is having the law spread in different books and law reports. This makes it impossible for the judicial officers in remote areas to keep abreast with the law. An Evidence Act will be of use, more especially now that the law on various aspects has been settled by the courts.

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I am indebted to many friends who read through this dissertation, and although their names are not mentioned, I wish to acknowledge the assistance they gave me. I sought their criticism and welcomed their suggestions. I could not have done this work without their informed and congenial guidance.

I have quoted at great length from Zambian cases. I should like to pay tribute to the various judges for the work so ably done by them on every aspect covered in this dissertation. The principles propounded in some of these cases have been a base for my work.

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INTRODUCTION

Among the important areas in the law of Evidence is the law of corroboration. Corroboration has been a subject for discussion in the Zambian Courts as will be seen from this study.

The first Chapter reviews the sources of the law in Zambia in the historical perspective. The law which existed during the pre-colonial period was the customary law of each tribe or community. During the colonial period, English law was introduced alongside the customary law found in existence. During that time the British Policy was to preserve as far as possible the customary law found applicable in each area. This conflicted with the fact that the colonial power wanted to give English law a superior position over customary law. The study analyses the effect of the introduction of English law on customary law. The first Chapter further examines the meaning and application of the common law, the doctrines of Equity and Statutes of general application as far as Zambia is concerned.

The second Chapter is on the subject of corroboration itself. The term corroboration means "to confirm or strengthen" evidence which has already been before the court. A detailed analysis is given as to what amounts to corroboration. The Chapter further

gives the rationale and nature of corroboration.

The Third and Fourth Chapters considers when the law of corroboration is required. Part one examines the need for corroboration as a mandatory requirement and part two looks at when corroboration is required as a rule of practice. Corroboration is mandatory in cases of, children of tender years, speed, perjury, procurement, sedition and affiliation. All these topics are analysed individually. Corroboration is required as a matter of practice in cases of, accomplice, sex, sworn child evidence, confession and single identifying witnesses. Chapter Four deals mainly with accomplice evidence, who an accomplice is and the duty of the court to warn itself in cases of accomplice. The Chapter discusses the celebrated case of Phiri (E) and Ors. v The People. It discusses the principles propounded in that case in detail.

Chapter five considers the law when corroboration is required in sexual cases, confessions, sworn child evidence, and single identifying witnesses. In sexual cases the cautionary rule is discussed. The need for the court to warn itself in cases of child evidence, confessions and single identifying witnesses is examined.

As a cardinal rule a confession must be made freely and voluntarily before the issue of corroboration may be considered. A conviction can be based on a well-proved uncorroborated confession. The study supports a mandatory corroboration warning in view of the fact that confessions are sometimes extorted. In the case of a single identifying witness, the cases formulated guidelines to the effect that a court should warn itself or look for supporting evidence in cases of mistaken or poor identification. The Zambian position is that the need to warn of the danger of relying on the evidence of a single witness is no longer discretionary. The court must warn itself of the dangers of such evidence and only if the witness is found to be reliable and the danger of mistake is ruled out can a court convict without any other evidence.

Chapter Six discusses the law in case of mutual corroboration. The issue posed is whether a witness who himself requires corroboration can corroborate another witness. Some cases oppose mutual corroboration, others support it in cases where there has not been any collusion between the witnesses. The Zambian cases hold that as a general rule, the evidence of a suspect witness cannot be corroborated by another

witness unless the witnesses are suspects for different reasons.

Chapter Seven concludes the study with the author making various recommendations. It is observed that because corroboration law is too technical, convictions are set aside almost by rule of thumb. The courts have a duty to try to minimise these technicalities. The introduction of an Evidence Act is also recommended. Examples should be taken from other countries which have passed Evidence Acts.

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CHAPTER ONE

SOURCES OF LAW

I. HISTORY

Evidence law in Zambia can be understood better by reviewing the law and its development in the historical perspective. The history of tropical Africa as viewed by Allott could be divided into three phases, namely the pre-colonial, the colonial and post-colonial or independence period.¹ During the pre-colonial period the country was inhabited by different ethnic groups and the legal system was the customary law of each group, tribe or community. Church writing on this period stated that:

"The salient features of pre-colonial Africa from a lawyer's perspective is probably its infinite diversity. There was law, naturally there must be in every society, but the law was geared to the needs of the people it served. These people for the most part were very loosely organized, usually on a tribal, ethnic or language basis. Their economy was at a subsistence level. Relatively small units of population tended to produce only for their own basic needs, and thus to live and work in isolation from the influence or control of others".²

Church's generalization on the type of societies in Africa does not receive support from other writers on African law or from writers on Zambia in particular. The view that most societies were loosely organized for instance was contradicted by Elias who in his book entitled The Nature of African Customary Law³ classified indigenous African Societies into two groups, those with centralized authority, administrative machinery and judicial institutions and those whose political arrangement was very rudimentary and without any strong centralized authority. In Zambia some communities had strong and organized central administration organized either through their kings or chiefs. Examples of such communities were the Bembas, Ngonis and Lundas. Because of their organized administration these communities successfully fought wars and managed to take over other groups or to grab their cattle or land. Gluckman⁴ describes the Barotse of Northern Rhodesia as having had for at least two centuries a government politically organized including a hierarchy of courts which had power to enforce decisions and maintain law and order. The Barotse Kingdom played a big role during the colonial period and still exists as

a recognized kingdom now. One could safely say therefore that there were enormous variations both in structure and content between the legal systems of communities which were at different stages of development. Allott stated that there were differences in societies which were at different stages of economic, political, social and religious development.⁵

Zambia was administered on a tribal basis until 1880 when its administration was taken over by the British South Africa Company (BSA) formed by Cecil Rhodes. In 1924, Zambia, then known as Northern Rhodesia became a British Protectorate and was administered through the colonial office. In 1953, Northern Rhodesia, Southern Rhodesia and Nyasaland became a federation still under the British rule. During this colonial administration English law was introduced in addition to customary law which existed from the pre-colonial period. English law introduced consisted of common law, principles of equity and natural justice and legislation.

In 1964 Northern Rhodesia became independent and came to be known as Zambia.⁶ After Independence

the laws did not change drastically. Many of the laws inherited during the colonial period remained, although efforts were made to re-define which laws were applicable and in some instances new legislation was passed. Taking into account the stages of development from the pre-colonial to the independence period, the sources of law during these periods were customary law, common law and the principles of equity and natural justice and legislation. These sources form the main component of the Zambian law and will now be analysed to understand how the system worked.

1. CUSTOMARY LAW

The fact that customary law has never been written down makes it difficult for purposes of a study to state exactly how it is applied. It has however been established that although it varied from tribe to tribe, area to area and from time to time, there was a measure of basic uniformity of content over a considerable range of matters. ⁷ Customary law has been defined as consisting of a variety of different types of principles, norms and rules and draws its validity from the acceptance

by the community. Some of the characteristics of pre-colonial customary law were its flexibility and simplicity in its operation.⁸ It was informal and always sought to promote the means of bringing about reconciliation between the contesting parties. Alexander Nekam in his lecture on customary law observed that:

"Customary law was a system of keeping the balance of arriving at satisfactory results. It was geared not to intellectual persuasion, but to emotional approval, not to decisions imposed, but to accepted solutions. What the decision maker under customary law achieved was the finding of a balance in accordance with the values of the community. The possibility of such an approach was dependent on the existence of a strong community with all its values equally shared. It was not dependent on these values being consciously realized or on anyone thinking in terms of rules embodying these values. The nature of the community determined the particular way it would solve its conflicts. The decision turned not on the idea of right or wrong, but on a desire to eliminate friction. We are molding peace among you has just been⁹ quoted as summing up the judicial task".

In some of the communities, the main problem of pre-colonial customary law was the lack of an organized system of enforcing sanctions although as already noticed other communities like the Lozis

had the machinery to do this. Another problem was that it was plural and, as such, a person outside that community could not understand all the laws involved. It was not unusual for a person within the community not to know the laws and such a person had to seek guidance from the elders or the leaders.

During the colonial period, the British policy was to preserve as far as possible the customary law found existing within the country. This was done through express enactments such as Orders in Council or local legislation. In 1889, the Royal Charter of October 29th stipulated as follows:

"In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods and testate or intestate succession, thereto and marriages, divorces, legitimacy and other rights of property and personal rights but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof".¹⁰

This legislation permitted the enforcement of customary law in matters of personal law subject to any British laws in force. Four main factors could be noted from

the legislation passed during that period. Firstly, the colonial authority was keen to leave customary law operational among Africans. Secondly its administration differentiated between Europeans and Africans. Thirdly it restricted its application, in other words, customary law had to pass certain tests before it could be applied. Fourthly, as expressed by Ndulo in his article "Ascertainment of Customary law, Problems and Perspectives with specific Reference to Zambia", ¹¹ although customary law was expressly recognized, the colonial administration and its laws tended to emphasise the superiority of common law over customary law. These observations could be clarified by reviewing the different legislation passed during that time.

In permitting the continuance of the application of customary law, the following legislation was enacted. Article 9 of the Royal Charter of Incorporation of British South African Company stated as follows:

"The High Commissioner in issuing such proclamation shall respect any native law or custom by which the civil relations of any native chiefs, tribes or populations under Her Majesty's protection are now regulated, except so far as the same may be incompatible with the exercise of Her Majesty's power and jurisdiction". ¹²

The Northern Rhodesia Proclamation No. 1 of 1913 stated that:

"Nothing in this proclamation shall deprive the High Court of any law or custom existing in the territory and such law or custom not being repugnant to natural justice equity and good conscience".¹³

The law which allowed the application of customary law so far as it was not incompatible with the exercise of Her Majesty's power was later replaced with "so far as it was not incompatible with any written law".¹⁴

Customary law had to pass the tests of not being incompatible with any written law and another of not being repugnant to natural justice, equity and good conscience. The incompatibility test uprooted the application of customary law in areas of "Criminal law"¹⁵ and as such English rules of evidence had to be applied. English law was introduced in other various areas.¹⁶ In the case of Kaniki v. Jairus¹⁷ the court discussed the necessity to exclude customary law if it was repugnant to natural justice and morality.

The case concerned a Lala custom of "Akamutwe" under which a surviving spouse had to pay compensation to the relatives of the deceased spouse. Such payment was made in the belief that it was the surviving spouse who was responsible for the deceased's death or it was used as a means of purifying or releasing the surviving spouse from the deceased's spirit so that she would be free to re-marry. In this case it was the husband who had died and the wife was required to pay compensation to the deceased's relatives. When the case came up in court, it was decided that this custom was "contrary to natural justice and morality". In this respect however, the court stated that it did not mean that it was an offence to observe that custom but rather that it could not be enforced in a court of law.

The contention was how this standard of justice and morality was measured. In the case of Gwao Bin Kilimo v. Kisindi¹⁸ a Tanganyikan court observed that the standard of justice and morality which a British court in Africa could apply was its own British Standard. It was clear from several other cases that

merely a detestable aspect of paganism which it was their duty to wipe out in the name of Christian Civilization. ²¹ Most African Christians did not follow customary law and adopted Western ways of life. They contracted Western marriages, took up jobs and received education at different levels. Customary law remained operative mostly in the rural areas or among the less educated people.

Whether the introduction of English law brought positive or negative results has been an issue of contention. Nekan ²² claimed that the impact was destructive as it weakened the old communities and lured away their leaders, dissolved the old type communities and brought a gradual disappearance of the law that kept them together. Elias's view was that it brought positive results. In his observation he stated that:

"English law has impinged upon African law in two main respects (a) in its modifying influence on those aspects of indigenous customary law which have so far survived. The impact of British legal and cultural invasion and (b) in its creative role of supplying the deficiencies of the traditional law and usage brought about by the new commercial and economic value. The second category embraces the introduction of Criminal law and procedure and Mercantile law". ²³

The situation today is that customary law having been abolished in significant areas, operates in very trivial matters. It is only administered in the local courts²⁴ although litigants can appeal to the Subordinate Courts, and High Court. This sort of restriction to the lower courts was criticized by Mvunga who in his article, "Application and Administration of Customary Law in Zambia"²⁵ argued that customary law should have original jurisdiction in superior courts for it to become entitled to the benefits of judicial opinions of those courts. Though this argument could be valid, there might be the danger of making customary law too complex in its application if this were to be done. Litigations instituted in these courts have very complex rules of procedure which would be contrary to the rules of customary law. It would also deny people who cannot afford the expenses of paying for litigation, easy access to the courts.

The government has however recognized the need to bring about codification and unification of some of the customary laws and has embarked on that task. One example has been the The Wills and Inheritance Bill, 1982²⁶ which deals

with the unification and codification of all the customary laws of succession in Zambia. More needs to be done in this field. The government should reform all the laws which appear too alien and complex to the community and should go back to customary law relying on indigenous, cultural and morals values. It should also get rid of some customs which seem to hold up progress and replace them with those which bring about development. The Law Development Commission has embarked on this task and it is evident that change will come although not as fast as it is desired.

2. COMMON LAW

As Church observed, Zambia like most countries formerly ruled by Britain is recognized as having a common law system.²⁷ This description is supported by its history as well as by the current statutory guidelines and judicial declarations. The most crucial legislation which introduced common law in Zambia is the English Law (Extent of Application) Ordinance of 1963 which provided that:

"Subject to the provisions of the Zambia Independence Order, 1964 and to any other written law -

- (a) the common law and
- (b) the doctrines of Equity and

- (c) the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911): and
- (d) Any statutes of a later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; shall be in force in the Republic".²⁸

This legislation having been used in different countries was given different interpretations by writers from common law countries. Church described it as vague and ambiguous ²⁹ noting that there was doubt about the significance of the 1911 date, about precisely which pre - 1911 English Statutes were applicable and what the terms doctrines of equity and common law meant.

(i) The date of Reception

The legislation provided that the pre-1911 law would apply. What was not so clear and which raised doubts was whether this date applied to all the elements of the received law, namely common law, the doctrines of equity and the statutes of general application or whether it only applied to the statutes of

general application. Allott's ³⁰ view was that it applied to all the three elements mentioned above and his contention was that common law never changes. This argument was not supported by Park ³¹ who argued that the date did not apply to common law and in particular to case law. His contention was that judges pass their decisions without attempting to discriminate between cases decided before or after 1911. He stated:

"To regard courts as bound by pre-1900 cases, but not by those decided after that date would result in the worst of all possible worlds. It would produce all the difficulties of attempting to crystallize a developing system of case law at a particular moment, and furthermore might well compel, the courts to observe outdated rules which are inappropriate to the second half of the 20th century and have been abandoned by the courts of England".³²

If one was to take the interpretation given by Allott, that would mean that judges would apply cases which have been overruled either due to a wrong principle of the law or an oversight on the part of the judge. The judges would have to apply those cases even in circumstances where valid reasons could be advanced for changing the decision. This

would result in a catastrophic situation. Seidman in his article "The reception of English law in Colonial Africa Revisited",³³ contended that on the plain meaning of the statute either construction was possible. He however proposed that the intended meaning would be to regard English Common law as of the date of reception as the starting point and then develop from it a body of law responsive to the colonial situation.

The intention of the colonial administration in passing such a legislation was to subject the country, or its colony to English law, but since the legislation passed in addition to the reception statute also provided that the local conditions³⁴ should be taken into account, there was no doubt that it never intended that common law should be stagnant. The judges in Zambia and also in other common law countries did not give the statute the interpretation given by Allott, but applied the common law as at the date they made their decisions and as such did not apply outdated and overruled decisions. One could at this stage conclude that from the views given by various writers and from the judicial interpretation

and practice, the date of reception only applied to the statutes of general application. The position in Zambia today is that the pre-1911 statutes of general application in force in England apply to Zambia except where there is a repealing statute in Zambia not in England.

(ii) Meaning of Common law

On the meaning of common law, Church ³⁵ stated that the rules of today are to a high degree derived from preceding decisions of courts in similar past cases. If a judge, or any other person, wants to determine the answer to a legal question, he reviews past judicial decisions and analogizes from them to the facts of the current case. Common law therefore entails the system of following past precedent. On referring to common law one talks about the doctrine of 'Stare decisis' or the doctrine of past precedent.

There has been no disagreement among the common law scholars as to the meaning of the term common law, what has been the contention is whether it was the common law of England which applied. In countries like Kenya and Uganda the statutes of those countries specifically

stipulated that it was the common law of England that applied. As for Zambia the statute did not specifically mention which common law would apply. However, Church and Allott agreed that it was the common law of England.³⁶ Nwabueze did not subscribe to this view. When discussing the Nigerian situation which had the same provision in its statute as Zambia, he stated that:

"It is wrong to suggest that our courts are absolutely bound by the specifically English text or version of common law. Though its basis is admittedly the system and habits of legal thought of Englishmen, the common-law can no longer be regarded as an exclusively English heritage. Having adopted the English habits of legal thought, we are to apply and develop them according to our own lights and circumstances and not to regard ourselves as absolutely bound by their particular elaborations in the English courts".³⁷

The writer's view was that the courts should look and be free to apply common law from the common law countries outside England and then choose which formulation was best suited to the country's needs and conditions. Many judges in the common law countries however assumed that it was the common law of England that applied and applied the English

precedent as a rule. As for Zambia the case of Kaniki v Jairus³⁸ held that it was the English common law that applied. Although this was a High Court case and not a Supreme Court decision there was no doubt from a review of various Zambian cases that the Courts without hesitation applied English precedent, mainly during the colonial period.

(iii) Principles of Justice, Equity and good Conscience

The reception statute provided for the application of the doctrines of Equity in Zambia.³⁹ In addition to that the application of customary law was allowed so long as it was not repugnant to natural justice, equity and good conscience.⁴⁰ This provision now appears under section 16 of the Subordinate Courts Act. The same section further provides for the courts to be guided by the principles of justice, equity and good conscience in cases where no express rule is applicable to any matter in issue. Equity was and is therefore used as a control for the application of customary law and also to fill the gap where there is a lacuna in the law.

Equity as is understood by most courts is fairness or being just. The English principles of

justice have been developed over a long time and are clearly spelt out. What one has to consider is whether these principles of justice as understood and applied in England according to English standards should be applied in total to Zambia. When applying customary law it was noted that it was the English standards which were used to determine what customary rule was unjust,⁴¹ but what is unjust in England may well not be unjust in Africa. The courts of today should as much as possible depart from colonial policy of strictly adhering to the English standards to determine what is just or unjust. They should as much as possible take into account the African values and tradition so that the law does not seem too alien.

3. LEGISLATION

(i) The Statutes of General Application

The reception statute provided that the pre-1911 statutes would apply to Zambia.⁴² The problem with this was that some of the statutes were outdated but had to be applied because of the date limitation. The second issue was the criteria to be used to

determine what statutes were or were not of general application. At first it was held that to be of general application the statute had to be applied not only in England, but also in Ireland and Scotland as well, a position which was overruled in 1940.⁴³ In determining which statutes were of general application two tests were set by the case of Attorney-General v. John Holt and Co.,⁴⁴ one was by what courts was the statute to be applied in England and secondly to what classes of the community it was to be applied. If the statute applied to all civil and criminal courts as the case may be, to all classes of the community, there was a strong likelihood that it was in force within the jurisdiction. The majority of the statutes held to be of general application were concerned with land and conveyancing, or with commercial dealings. Park in his book entitled Sources of Nigerian Law⁴⁵ agreed that a statute to be of general application should apply to all classes of the community in England and not to a certain section and should not be applied by a certain court but by all courts.

(ii) Other Statutes

Another technique used for legislating was by enacting a local statute or ordinance which would

spell out the law. For instance the 1911, Northern Rhodesia Order in Council provided that the High Court should exercise its Civil and Criminal jurisdiction:

"Upon the principles of and in conformity with the substance of the law for the time being in force in and for England ----- provided that no Act passed by the parliament of the United Kingdom after the commencement of this order shall be deemed to apply to the said territory".⁴⁶

This legislation authorized the application of English law which was in force in England in Civil and Criminal Procedure by the High Court. Another legislation provided that:

"The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may----be exercised by the court in conformity with the law and practice for the time being in force in England".⁴⁷

Here no attempt was made to spell out the detailed rules but English law that was in force for the time being would apply. This technique seemed to be better than where the law applicable was subject to the limitation of a fixed date. In this case the receiving

country benefited from any amendments or changes which were effected. The third technique was by enacting the English statute in full into a local statute. In Zambia The Companies Act and the Penal Code were some of the examples of the adoption which were effected and there were many others of that nature.

Local Circumstances

The application of common law and the statutes of general application in Zambia was limited by the condition "so far as local circumstances of the country permit". For instance section 14 of the 'Subordinate Courts' Act stipulated that:

"All British Acts declared by any Act to extend or apply to Zambia shall be in force so far only as the circumstances of Zambia permit, and for the purpose of facilitating the application of the British Acts, it shall be lawful for a subordinate court to construe the same with such verbal alterations, not affecting the substance, as may be necessary to make the same applicable to the proceedings before the court -----"48

The task of determining whether local conditions permit a certain legislation to be applied was left to the court. During the colonial period most of the judges were aliens who hardly knew what the local conditions were. It needed a person more conversant with the local conditions to be able to administer the law as required. In the case of Nyali Ltd v Attorney-General Lord Denning dealing with this requirement held that "subject to local circumstances" should be liberally construed. He stated:

"It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English Oak, so with the English Common law. You cannot transplant it to the African Continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over; but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The Common law cannot fulfil this role except with considerable qualifications".⁴⁹

The need to take into account local conditions could not be underestimated, Newbold in his article "The value of Precedents Arising from cases decided in

East Africa as compared with those decided in England",⁵⁰ argued that a blind adherence to judicial precedent without taking into account local conditions could do considerable amount of harm to the community, a degree of harm which cannot by any means be compensated for by any certainty in the law.

Although the ideal situation was to take local conditions into account, this was not the case in many instances. Church⁵¹ observed that English law was applied literally without consideration of local conditions, a view held by many other writers. He stated that in nearly all the more ordinary decisions that had been published, the needs and public policies of Northern Rhodesia were completely ignored in favour of that English case or rule found to be closest in point.

The strict adherence to English precedent is always defended on the basis of the need for certainty and uniformity. These principles however should not override the need to take into account local conditions in order to make the application of the law to the local inhabitants meaningful. The law should not remain alien to the people to whom it is applied for the sake of these principles and that is why when independence came

the situation had to change. There was a move from the strict adherence to English precedent to some sort of flexibility. There were many cases in which courts explicitly stated their determination not to be bound irrevocably by the past. ⁵²

The present position as far as English precedents are concerned is that they are of persuasive value but the rigidity of the colonial era has disappeared. Zambian Courts have built up their own precedent which although based on English law has been modified to suit the local circumstances. The Supreme Court has done a lot in areas like criminal law, criminal procedure and evidence in building up local precedents, and this may be attributed to the Zambianization of the bench. More and more locally published legal materials have assisted the bench in being less reliant on English precedents. Reliance is also made on precedents from other common law countries like those in East Africa, West Africa and India which have gone through similar colonial administration. Besides carrying out law reform as earlier mentioned, more and more locally published materials are needed. For a country to be able to build its own legal system it needs its own locally developed and published materials.

2. THE POSITION OF EVIDENCE LAW OF CORROBORATION

Corroboration is required in two instances, in one it is a mandatory requirement and there are legislative provisions which provide that a person shall not be convicted under those provisions without corroboration. Another instance is where a corroboration warning is required. In this case although the court may convict on the uncorroborated evidence of a witness, it must warn itself of the dangers of convicting without it. In both cases the requirement that the corroborative evidence must implicate the accused in a material particular is a common characteristic.

I. THE MANDATORY PROVISION

Most of the Zambian Statutes which provide for corroboration as a mandatory requirement were drawn from the corresponding English Statutes. There is therefore great reliance on the English Statutes in terms of their application and interpretation. The following are some of the Zambian Statutes which have similar provisions and restrictions as the English Statutes. There were some

which were excluded, and this was due to The English Law (Extent of Application) Act. 53

The following statutes require corroboration to be applied:

- (i) S.122 of the Juveniles Act, Cap. 217 which is similar to S.38 of the English Children and Young Persons Act, 1933.
- (ii) S.192(3) and (4) of the Roads and Road Traffic Act, Cap. 766 similar to the English Road Traffic Regulations Act, 1967.
- (iii) SS. 104 and 107 of the Penal Code dealing with perjury similar to the Perjury Act, 1911 of England.
- (iv) SS. 140 and 141 of the Penal Code dealing with the procurement and defilement of girls or women which corresponds with the English Sexual Offences Act, 1956.
- (v) SS. 57 and 59 of the Penal Code AcCap. 146 requires corroboration in cases of sedition but under English law there is no requirement for corroboration in cases of sedition.

There are some English Statutes which are only applicable in England. The following are the Statutes applied only in England. Section 1 of the Treason Act, 1795 which penalizes the compassing of the death or restraint of the Queen, Places of Religious Worship Act, 1812 providing for disturbance of religious meetings, S.146(5) of Representation of the People Act, 1949 which deals with impersonation

at election and S.4 of the Affiliation Proceedings Act, 1957 as amended by the Affiliation Proceedings Amendment Act, 1972.

Zambian Law no longer requires corroboration in cases of treason although this used to be a requirement under S.47 of the Penal Code, Cap. 146. This section infact required the evidence of two witnesses. Section 47 was repealed by Act No. 35 of 1973 of the Penal Code. The repeal came after the state lost in the case of Chipango and Ors. v The People⁵⁴ in which the appellants were charged with treason. When the state lost the case, the requirement of two witnesses to give evidence was repealed.⁵⁵ This repeal was confirmed in the recent treason case of the People v Shamwana and Ors. when the judge held that:

"Act No. 35 of 1975 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. This offence can be proved like any other criminal offence".⁵⁶

As regards the Places of Religious Worship Act, 1812, the Zambia Penal Code Cap. 146, S.129 makes it an offence to cause a disturbance at religious assemblies but does not provide for corroborative evidence to be found before a person can be convicted of the offence. Again the Electoral (National Assembly Elections) Regulation, Cap. 16 S.75 creates the offence of personation at election but no corroborative evidence is required. However in Zambia, as regards affiliation proceedings, the law applicable is S.4 of the Bastardy Laws Amendment Act, 1872 (35 and 36 Vict.C.65) of the United Kingdom. This law is applicable and stipulated under The Subordinate Courts Act, Cap. 45, Section 20(f)(g). The Section requires corroboration of the mother's testimony as to the paternity of the complainant in affiliation proceedings.

When the law provides by statute that there should be corroboration then it means that the court can never convict without it. It was held in the case of R v Shillingford⁵⁷ that where corroboration is required by Statute, it is wrong to warn

the jury that it would be unsafe to convict on uncorroborated evidence. It must be warned that it would be impossible in law to convict without corroboration. The above case was followed in the case of R v. Wilson and following the same principle the judge held that:

"It is established by authority that when one has a provision in the statute like 'a person shall not be convicted of an offence under this section on the evidence of one witness only, unless the witness is corroborated in some material particular by evidence implicating the accused', the customary warning to the jury about the danger of convicting in absence of corroboration is insufficient. The jury must be told in clear terms that, unless the corroboration required by statute is forthcoming they cannot convict".⁵⁸

The case of R v Campbell⁵⁹ dealing with the unsworn evidence of a child which needs corroboration as a statutory requirement put it strongly that if the only evidence implicating the accused is that of the unsworn child, the judge must stop the case. The same view was held in the case of Siakakuyu Julias v R.⁶⁰

The emphasis of this rule seems to be the need for certainty. It is necessary that when the law makes a mandatory provision, then the courts must comply otherwise there might be a relaxation and it would not achieve the purpose which the legislature needed to bring about.

THE CORROBORATION WARNING REQUIREMENT

The warning for corroboration is when a judge is required to warn the jury or himself of the dangers of convicting on the uncorroborated evidence of a witness. The jury is told of the dangers associated with the witness's evidence and what evidence there is which may support the case in a material particular and what aspects need to be corroborated. In England where there is a jury system, the judge warns the jury but in Zambia since there is no jury system, the judge sitting alone or with assessors warns himself of these dangers.

The requirement for the warning may be classified into two categories. One is where the

judge has an obligation to warn himself and failure to do so may result in a conviction being quashed unless the proviso could be applied. This is what is regarded as the 'peremptory' requirement. The second one is where there is no obligation on the judge to warn himself, but as a matter of practice, he uses his discretion to do so. This is regarded as the 'discretionary' requirement. Accomplice evidence, sexual cases and sworn evidence of children fall under the peremptory class whereas identification and confession cases fall under the discretionary category. The distinction is discussed in more detail later in another Chapter.⁶¹

CHAPTER TWO

MEANING AND RATIONALE FOR CORROBORATION

I. The Meaning of Corroboration

To "corroborate" means "to support or strengthen (an opinion, belief, idea etc) by fresh information or proof".¹ This definition is supported by Heyden who defines corroboration as "evidence tending to confirm some fact of which other evidence is given".² These definitions may sound too simplistic when it comes to finding corroboration in legal cases. The term was defined in the case of R v Baskerville by Lord Reading, C.J and his holding has been accepted in other cases in Britain, Zambia and other common law countries. Lord Reading stated that:

"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which

confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it ---- corroborative evidence is evidence which tends to show that the story of the accomplice that the accused committed the crime is true, not merely, that the crime has been committed, but that it was committed by the accused.

----- the corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime". 3

This case brought out all the elements which have to be considered before the evidence can be held as corroborative. These elements are:

- (i) That corroborative evidence must be independent testimony from the evidence to be corroborated.
- (ii) It must be in a material particular by evidence that implicates the accused.
- (iii) It must show that the evidence that needs to be corroborated is true.
- (iv) It must have probative value.
- (v) It need not be direct evidence but may be circumstantial evidence.

Courts take into account these factors in determining whether evidence is corroborative, although the circumstances and nature of the issues

will also determine what amounts to corroboration. In addition to these elements, courts have gone further and considered other factors such as, the conduct of the accused on previous occasions, the distressed condition of the complainant, evidence of opportunity, medical evidence the physical condition of the complainant, the lie or lies told by the accused, silence of the accused, failure to deny the offence and whether an early complaint was made. Each one of these various requirements is separately discussed below.

(i) CORROBORATION MUST BE INDEPENDENT TESTIMONY FROM THE EVIDENCE TO BE CORROBORATED

One of the characteristics of corroboration is that it must be independent testimony from the evidence that is to be corroborated. In other words as stated in the case of R v Whitehead⁴ for evidence to amount to corroboration it must be extraneous to the witness who is to be corroborated. A witness cannot therefore corroborate himself and corroboration must come from another source. Courts will dismiss cases where the only corroborative evidence found is that of the complainant or the person to

be corroborated. This principle of independent testimony was accepted and emphasised in the case of Nsofu v. The People when the judge stated that:

"What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged".⁵

The same principle was approved in Kalimukwa v. The People⁶ when the appellant court held that it was satisfied that the Magistrate properly and correctly advised himself that there was corroboration and that it was from an independent source.

The need for an independent source can be justified on the ground that if the corroborative evidence emanates from the complainant himself then it will only be necessary for him to repeat his story some twenty five times in order to get twenty five corroborations of the story.⁷ Repetition of the story from the same person only shows consistency of conduct. Again if the story is told by persons who have merely obtained the same infor-

mation from the complainant, this would not amount to independent testimony because those people could concoct the story or collaborate with the complainant. The law is therefore very strict on having the testimony from an independent source other than that to be corroborated.

There are a number of cases which discuss what amounts to independent testimony. In the case of R v. Whitehead,⁸ Whitehead was charged of having had unlawful carnal knowledge of a girl of 15 years whilst she was in his service. The girl had told her mother who in turn took her to the doctor. The mother's testimony was held to be corroborative of the girl's testimony. On appeal, the court held that what the girl told her mother could not amount to corroboration of the girl's story because it proceeded from the girl herself and therefore it was merely the girl's story at second hand. The court further held that in order that evidence may amount to corroboration; it must come from an independent source, a source extraneous to the witness to be corroborated.

This was the same view held in many other cases which discuss the meaning of independent testimony. In the case of R v. Coulthred⁹ the appellant was convicted of indecent assault of a boy aged 13 years. The boy was taken to a tent by the appellant and the two shared a bed. The boy made complaints of the indecent assault committed upon him by the appellant to the other boys and to his uncle. On the issue of corroborative evidence, it was held that the evidence of the other boys and the uncle lacked the essential quality of coming from an independent quarter. In the Mwelwa v. The People Case,¹⁰ the trial magistrate made reference in his judgment to the fact that the complainant made an early complaint to her sister-in-law and her husband. He considered that evidence as corroboration. On appeal, the court stated that there were many decided authorities which held that such evidence could not be regarded as corroboration and that it only went to the issue of consistency on the part of the complainant. Repetition of the story therefore does not have any value as far as corroboration

is concerned because the testimony is essentially from only one witness.

The case of R v. Redpath¹¹ demonstrated what amounts to independent testimony. In this case the appellant was convicted of indecent assault on a seven year old girl. The girl alleged that she was playing on the moor with two friends when a man whom she identified as the appellant, pulled her to the ground and indecently assaulted her. Her mother said that she came home trembling and in a terrible state and immediately made a complaint. Two witnesses who were near the scene stated that they saw a motor car parked by the moor and a man whom they identified as the appellant walked towards the girl and later returned and drove off. No sooner had this happened than the little girl emerged from the moor in a very distressed condition. One of the witnesses took her home. The appellant denied being near the scene and ever seeing the moor. The girl's complaint to the mother was held to be evidence of a consistent story but not

corroboration. However the court found that the observation of the witness, who took the complainant home, an independent by stander, was strong evidence corroborating the girl's story. In the Canadian case of R v. Jessean¹² the complainant testified that she had been raped by both accused, that they threatened her with knives and tore off her clothing and she eventually managed to escape by running naked into the street. The defence was consent. The court found that in the circumstances of the case and considering the nature of the damage to the clothing, the torn clothing was held not to be evidence from the accused herself but independent from her evidence and corroborative of her testimony that she did not consent to the act. This is different from the evidence of a complaint to another person because it is independent evidence in itself.

From the decided cases, it is evident that independent testimony is evidence which comes from an independent person other than the accused or a person to whom a complaint is made by the accused.

It may come from an independent by-stander as in the case of Redpath or from an independent source which is not part and parcel of the complaint. Evidence of torn clothes was considered an independent source from the evidence of the complainant. Independent testimony therefore should emanate from persons or sources extraneous to the complainant or the person to be corroborated.

(ii) CORROBORATION MUST BE IN A MATERIAL PARTICULAR BY EVIDENCE THAT IMPLICATES THE ACCUSED

This characteristic goes to the very nature and purpose of corroboration. Corroboration must be in a material particular by evidence that implicates the accused, meaning that it must relate to material evidence implicating the accused with the commission of the crime. Different views have been advanced as regards this element.

One view is that corroboration is independent evidence tending to verify any part of the suspect's testimony. This means confirming any aspect of the suspect's testimony disregarding

the issues of whether that evidence is essential or whether it connects the accused with the commission of the offence. This view does not seem to have received recognition even on review of the decided cases. It can be dismissed on the ground that courts are concerned with issues and cannot dwell on issues which are irrelevant to the case before them when coming or trying to make a finding. Another view is that corroboration should amount to independent evidence of the whole of the suspect's testimony. This means that whatever the suspect says or alleges should be corroborated in total or that there should be another testimony which is on all fours with that told by the suspect. This view has also been criticized. For example in the East African case of R v. Taibalt Mohammedhai¹³ the court held that corroboration does not mean that there should be independent evidence of all that the witness relates or else his testimony would be unnecessary. It would indeed be impossible to get a witness who is in a position to relate the full story without drawing himself into a position of being a suspect or an accomplice. The case of R v.

Baskerville held it unnecessary for corroboration to confirm all the circumstances of the crime, otherwise the evidence of the principal witness would not be essential to the case. In this case Lord Reading laid down the meaning of a material particular and stated that "it is evidence confirming the material circumstances of the crime and of the identity of the accused in relation to the crime rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it".¹⁴ The emphasis here therefore is on two elements, one is the need to confirm the material circumstances or what would be termed as the material issues in the case and secondly the identity of the accused in relation to the crime. In other words, the evidence must show that an offence was committed and that it was the accused who committed it. Nsofu v The People¹⁵ adopted the meaning given in the Baskerville's case and held that the corroborative evidence should confirm that the suspect witness is telling the truth in some part of his

story, which goes to show that the accused committed the offence with which he is charged.

It has been argued that it is not necessary to confirm all the circumstances of the crime but only material circumstances. What are these material circumstances or what has been termed the material particular? Some cases say that in rape cases all the essential elements of the offence established by the testimony of the witness must be corroborated. These elements are, sexual intercourse, non-consent, and the identity of the accused. However, Baskerville's case emphasises that in order to determine whether a particular item of evidence is capable of corroboration, it is necessary to determine first, the relevance of that evidence to the issues of the offence or in other words, the relevancy of that evidence to the issue in dispute. It follows therefore that even in a case of rape, if the accused admits sexual intercourse with the girl but denies that it was without consent, the court should look for corroboration on the specific issue of consent but will not look for corroboration on issues of sexual intercourse and identity as these would not

be in dispute. On the same principle it can be argued that before the court determines what requires corroboration, it has to look at the issues involved.

Zambian cases and many English cases have supported the holding in the Baskerville Case. In the case of Nsofu v. The People¹⁶ three girls were alleged to have been defiled by the appellant. The medical evidence was positive that the three girls had been defiled. The magistrate found corroboration from the medical evidence and held the appellant liable. On appeal, the trial magistrate was held to have erred in regarding the medical evidence as corroboration of the commission of the offence by the accused. The court found that in this case it was necessary to find corroboration of the identity of the culprit which was the material issue in the case. The medical evidence, the court observed, only corroborated the evidence that there was sexual intercourse but did not connect the accused with the offence and being a case of defilement consent was not in issue as the girls were under the age of sixteen. Identity was the material issue or

the material particular in the case. In cases of defilement, there could be a situation where age may be the issue and therefore the court does not have to find corroboration at all. In R v. Redpath¹⁷ a case whose facts have already been stated, the appellant denied having been near the scene of the incident. The issue in question became that of identity. The court found that the observation of an independent bystander was strong evidence corroborating the complainant's story. The material particular in this case was identity of the accused. In R v Jessean,¹⁸ the complainant alleged that she was raped by the accused. The defence was consent. The material particular or issue in dispute was consent since identity and sexual intercourse were not **denied**. The court found corroboration from the fact that the complainant's clothes were torn and that this went to show lack of consent.

Another aspect which is emphasised is that the evidence must implicate the accused. In other words the corroborative evidence must show that it was the accused who committed the offence.¹⁹ The

case of R v Parish elaborated on this point adequately when the judge stated that:

"I think evidence which may be corroborative of the evidence of a female person in such a case is evidence which may, in law be considered by the jury as evidence of a material particular implicating the accused in the commission of the crime alleged. A particular is material in this sense, if it may in the opinion of the jury, show or tend to show that the testimony of the female person that the offence was committed and committed by the accused is true, thus being relevant to the issue, which the jury is called upon to decide". 20

The necessity for corroboration as to the identity of the accused was again confirmed in the case of Nsofu v The People when the principle in the case of R v Baskerville was adopted in total by Baron, D.C.J. He stated as follows:

"For evidence to be corroboration as a matter of law it must not only tend to confirm that the offence has been committed, but must tend to confirm also that it was the accused who committed it. The magistrate was quite correct in regarding the medical evidence as corroboration of the commission of the offence, but if he regarded it as corroboration also that it was the appellant who committed it then he was clearly in error, and if he failed to direct his mind to the necessity for corroboration of the identity of the alleged culprit he was equally in error". 21

Once it is accepted as already discussed that there must be corroboration on all the essential elements of the charge, that is, all issues which are relevant in establishing that an offence was committed, and all issues which are relevant in connecting the commission of the crime with the accused, we come to what a material particular is. That, is corroboration in a material particular by evidence that implicates the accused.

(iii) THE TRUTH OF THE STATEMENT

The case of R v Baskerville²² stated that the corroborative evidence must show or tend to show that the story of the accomplice that the accused committed the crime is true. Given its literal meaning, the statement implies that the corroborative evidence is used to determine the truthfulness of the witness's story. This principle given in Baskerville's case was supported by the case of D.P.P. v Kilbourne when the court stated that:

"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life,

one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits with other statements or circumstances relating to the particular matter. The better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits".²³

The case of Nsofu v The People adopting the principle given above held that "corroboration is independent evidence which tends to confirm that the prosecutrix is telling the truth when she says that the offence was committed and that it was the accused who committed it".²⁴ In other words, the independent testimony confirms the truth of the prosecutrix's statement.

The principle which has been established is that the court must go through a two-step process. It must first determine whether the testimony made by the witness is true and thereafter decide whether there is any corroboration in a material particular of the witness's testimony. If the court disbelieves this testimony, then the issue of corroboration would not even be raised and no amount of corroboration ought to suffice to fill the deficiency.²⁵

The cases of Phiri (E) and Ors v The People and Machobane v The People ²⁶ laid down this principle as follows:

"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanity, the question of his needing or being capable of giving corroboration does not arise'.

This court made the same point in Machobane (1) when we said at p.103 that:

'To say of the witness with an interest that they seemed to be honest does not constitute (a special and compelling) ground; if they did not give an impression of honesty the question of accepting their evidence would not arise on any test'.²⁷

The Supreme Court in both cases ruled out the possibility of accepting evidence which is not credible or where the witness does not give an impression

of honesty. What does not seem to tally with the above holding is the decision on the issue of credibility which was given in the case of Shamwana and Ors. v The People when the court stated that:

"When considering the evidence of a witness, and particularly an accused person, who is proved to have lied in material respects, it is essential to bear in mind that, unless the untruthful portions of the evidence go to the root of the whole story to such an extent that the remainder cannot stand alone, such remainder is entitled to due consideration. The weight of the remainder is of course affected by the fact that the witness has been shown to be capable of untruthfulness, but the remainder must still be considered to see whether it might reasonably be true; it cannot be rejected out of hand.

Where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his evidence is reduced, although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reasons for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful". 28

Shamwana's case contrary to what is stated in the case of Phiri (E) and Ors. holds that that part of the statement which is found to be credible should be accepted, which means that it could either be ~~corroborator~~ or used as corroboration. This type of evidence would have been totally rejected for purposes of corroboration in the Phiri (E) and Ors. Case. Another issue which stands for contention is whether the courts need go through a two-step process, that is first determining the credibility of the witness and then finding corroboration. The whole basis of corroboration is that the statement of an accomplice or any other person requiring corroboration is unsafe or may be untrue, thus the corroborative evidence assists the court to decide whether that evidence is true. In many cases, there may not be any other evidence which the courts can use to determine the issue of credibility except by resorting to the corroborative evidence itself. If for instance a prosecutrix in a rape case alleges that she has been raped by the accused, the court cannot at this stage determine whether the witness is honest or not. She could very well

be a liar but it is only the corroborative evidence which can either prove or disprove her statement. In this respect therefore the holding that the court should first find that the witness is credible and then look for corroboration falls and cannot be supported. The issue of credibility and corroboration are normally considered together and it is only where the witness's testimony is discredited at the outset that corroboration is not even considered. An illustration of a few decided cases will show this.

In R v Jessean²⁹ a case already discussed in this study, the complainant alleged that she was raped by the two accused, a fact which was denied by the accused. The corroboration was found from the nature of the damage to her clothing. In this case the court was faced with two testimonies, one from the complainant alleging rape and the other from the accused claiming that there was consent. The corroborative evidence was used to determine whose testimony was true and the court found that the complainant could not have consented. In this case if the corroborative evidence was not used,

the court could not have possibly been in position to believe the complainant on her own testimony alone. In the case of Machilika v The People.³⁰ The appellant was convicted of rape. The complainant alleged that violence was used against her and that she sustained severe injuries. She told the court how she had been assaulted and struck with blows and how she was dragged through the bush and that her face was swollen. The evidence of the doctor who carried out the physical examination on her shortly after the alleged rape was that there were no injuries or evidence of violence on her. The court on appeal found that the complainant's evidence was untrue and stated that "once a complainant is shown to be untruthful in material respects, such as the use of violence, her evidence can carry very little weight, since her evidence of rape cannot be separated from these allegations of violence". In this case the issue of corroboration was not even raised and the conviction was set aside on the basis of the statement of the complainant being untruthful. Unlike in the Jesseau's case where the evidence of torn clothing was held to be corroborative, in this case the fact that violence

was not present negatived or contradicted the complainant's evidence. Had the fact of violence been accepted, the issue of corroboration would have been considered at the same time.

(iv) PROBATIVE VALUE OF CORROBORATIVE EVIDENCE

It is well established that the corroborative evidence must have probative value on the issues to be corroborated. That is, whether it meets the requirements of independence and materiality. If the evidence meets those two requirements then it is relevant to the issues to be corroborated. Wakeling writing on corroboration in Canadian Law states that:

"Before a judge can leave evidence to the jury as capable of being corroborative, it must at least be relevant to the issues on which corroboration is required, and as such, it must be sufficiently probative on those issues so that if it is accepted by the jury, it will tend to show that the story of the principle witness is true. It must be sufficiently probative of the essential issues in that testimony so as to be capable of swaying a reasonable jury on the issue of credibility". 31

When one talks of probative, then it means that, that fact is expected to happen, that it is most probable that it happened and that there is no other rational conclusion but that it happened. If there is no other rational conclusion other than that the fact happened as stated in the evidence then it means that the corroborative evidence would not be consistent both with the innocence and guilt of the accused or respondent. ³² Again the evidence must not be equally consistent with the truth as with the falsity of the witness's story on a particular issue. ³³ In the case of Senat v Senat, ³⁴ a wife petitioned for divorce on the ground of her husband's adultery with other women. One of the women produced an address book in which she had noted the name of the respondent and his address. Another woman (P) alleged that she worked in the matrimonial home and was aware of the lay out of the matrimonial bedroom. She also produced in court a coat which she alleged was given to her by the respondent but no evidence was adduced to connect him with it. The court

held that none of the matters relied on amounted to corroboration because they were consistent both with the innocence and guilt of the respondent being evidence of opportunity only. The evidence therefore lacked probative value to the issues involved. In the case of Macdonald v R the judge supported the principle in Senat's case. He stated that:

"Corroboration must not be so meagre that it should create a mere possibility that the accused has committed the crime for which he is charged. It should be strong enough to sufficiently impress the mind of the jury not with the probability of a conjecture but with the probability of the truth of a fact put in evidence. It need not be conclusive but it will be sufficient if it is presumptive provided that the facts independently proven and from which inferences are drawn are consistent in tending to show the guilt of the accused and are inconsistent with any other rational conclusion that the accused is a guilty person". 35

Only when there is no other inferences which can be drawn from the proved facts, can it be said that the evidence is inconsistent with any other rational conclusion. Baskerville's case does not give any standard and only states

the basic rule that corroborative evidence must tend to show that the story of the witness to be corroborated is true. It does not say that the inference must be inconsistent with any other conclusion. The case of Nsofu v The People whose facts are already stated deals with this point and states as follows:

"If therefore it were necessary to show as a matter of law that the inference that no one but the appellant had the opportunity to commit these offences was the only inference which could reasonably be drawn from the facts it might well be possible to argue that it has not been proved that no one else had such opportunity. As we have said, however, it is not necessary for corroborative evidence to be conclusive in itself, it need only tend to confirm that the witness whose evidence requires to be corroborated is telling the truth when he says that the accused committed the offence". 36

From this case, it would seem that if the courts have to apply the test that the evidence must be inconsistent with any other rational conclusion other than the guilt of the accused, it would be like saying that corroborative evidence must be conclusive in itself and that there should be no other rational conclusion to be drawn

other than the guilt of the accused. This would also depend on the standard of guilt required. But the Baskerville's case and Nsofu's case agree that corroborative evidence need not be conclusive in itself. Wakeling points out and his view seems to support these two cases that;

"All that is really required in terms of probative value of corroborative evidence is that it advances the issues that if accepted by the jury it will tend to show that the testimony which requires corroboration is true". 37

(v) CUMULATIVE EFFECT OF CIRCUMSTANTIAL EVIDENCE

Cumulative evidence is evidence taken from different facts or different aspects in order to arrive at a conclusion. Wakeling on this issue observes that:

"Logic tells us that there must always be some grouping of facts for meaning to exist. It is the accumulation of characteristics which tells us which of the possible answers is the right one. The process of proof and of corroboration involve the same groupings of fact to arrive at a decision as to the truth". 38

The evidence which is accumulated need not be direct evidence and in most cases it is circumstantial

evidence which if put together may help in arriving at a decision. The case of Baskerville ³⁹ stated that corroboration need not be direct evidence, but may be circumstantial evidence tending to connect the accused with the commission of the crime. In other words, corroborative evidence may be arrived at by taking into account all the circumstances of the case. As Cross points out:

"It follows therefore that in the final analysis, the circumstances must be considered cumulatively, and if the totality of the circumstances show or tend to show that the story of the accomplice that the crime charged was committed and that the accused committed it, it should be sufficient". ⁴⁰

It is evident that sometimes a single fact taken by itself may be colourless, but that fact when looked at in connection with other facts in the case may be highly significant and will assist the court in coming to a proper decision. In the case of R v Boucher a rape case, both the act of intercourse and consent were in issue, but there was evidence of a wound to the complainant's genitalia, a bruise over her eye, marks on her

throat, dishevelled appearance as she ran from the accused's automobile and seminal stains on the blanket in the accused's car. The judge on the issue of corroboration said;

"There is nothing here to suggest a departure from the ordinary rules relating to circumstantial evidence, which do not require that each witness's evidence shall prove a crime committed by the accused but only that all the evidence, considered together shall show that a crime has been committed by the accused. In this case, all the circumstantial evidence, taken as a whole, could be and apparently was taken by the jury to afford corroboration. None of the evidence was inadmissible. Taken together, it presents a picture of conforming to the requirement of corroboration". 41

The facts in that case were almost similar to the facts in the case of Zulu v The People. In this case the appellant was convicted of the murder of a woman in the course of a sexual assault. The injuries found on the body suggested that she had struggled with her assailant. The evidence established that the appellant and the deceased had been drinking beer

together and were seen leaving the bar together at about midnight and then the next day the deceased's partially undressed body was found. The appellant was traced and when arrested was found to have scratches on the neck and chest. He explained in evidence that the scratches were caused by flying pieces of iron at his place of work, an explanation which was not rebutted. The trial court without any evidence to support the finding consequently inferred that the scratches on the appellant were sustained during the struggle with the deceased. The court held that:

"(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.

(ii) It is incumbent on a trial judge that he should guard against drawing

wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the ease out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt".⁴²

The judge further held that the explanation given by the appellant was a logical one and had not been rebutted and he therefore found that the inference that the scratches on the appellant's body were caused in the course of committing the offence was unwarranted. It may be concluded therefore that before any inference can be drawn from the circumstantial evidence, the explanation given by whatever party must also be taken into account, otherwise the circumstantial evidence does not succeed in taking the case out of the realm of conjecture, so as to attain a degree of cogency which can permit an inference of guilt to be drawn.

The only time when facts cannot be viewed cumulatively is when they have no independent probative value on the issues in dispute. To determine this requires viewing all the facts in light of all other circumstances. All the facts considered together may produce sufficient corroborative evidence.

2. RATIONALE FOR CORROBORATION

There is no rule of law or practice which requires corroboration of the evidence of a single witness. Courts ordinarily convict on the evidence of one witness. Zambian courts have stated their position that:

"There is no rule in our law that the evidence of more than one witness is required to prove a particular fact. Of course, in any given set of circumstances where there is evidence that more than one person witnessed a particular event, and in particular the finding of an incriminating object in the possession of an accused, if the happening of the event is disputed when first deposed to and the prosecution chooses not to call any of the other persons alleged to have been present, this may be a matter for comment and a circumstance which the court will no doubt take into account on the decision as to whether the onus on the prosecution has been discharged". 43

The need to call additional evidence only arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required for corroboration and thus remove the doubt.⁴⁴ If there is no doubt about a witness, there is no need for supporting evidence nor is there any need for comment by the trial court in the absence of such evidence. The acceptance to rely on the evidence of a single witness is based on the fact that it is the quality of the evidence and not the quantity which matters.

In the common law, corroboration is not required in every case, however, for historical and practical reasons, a number of exceptions to the single witness rule have developed over the years. The legislature and the courts have stipulated areas where corroboration has to be found before a conviction can stand. Corroboration may be required either as a statutory requirement or as a rule of practice. Different reasons have been advanced for requiring corroboration of various witnesses or for particular

cases. The case of Director of Public Prosecutions v Hester gave some of these reasons as follows:

"The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can readily be made but which are only with more difficulty rebutted. There may in some cases be motives of self-interest or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotions or of hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood. It must therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based. So it has come about that certain statutory enactments impose the necessity in some instances of having more than one witness before there can be a conviction. So also has it come about that in other instances the courts have given guidance in terms which become rules". 45

In Zambia, corroboration is a mandatory requirement in cases where a child of tender years gives unsworn evidence, in cases of perjury, procurement, seduction,

affiliation and speeding. As a rule of practice corroboration is required in cases of accomplice evidence, sexual cases, child's sworn testimony, confessions, single identifying witnesses and recently added to this list are witnesses with interest of their own to serve. The courts, scholars and many writers have advanced various reasons and justifications for requiring corroboration for different categories of witnesses. I shall now proceed to examine some of these reasons.

J.D. Heydon in his book entitled Evidence, Cases and Materials gives a detailed analysis as to why a child's evidence should be corroborated. Some of these reasons are further examined below:

"The child's power of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced both by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill-

will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally children sometimes believe in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusation". 46

The danger posed by child evidence was appraised by Silungwe, C.J. in the case of Chisha v The People ⁴⁷ and he noted that although children may be less likely to be fraudulent or acting from improper motives than adults, they are more under the influence of third persons than adults and they are apt to allow their imaginations to run away with them and to invent untrue stories. He categorizes children as 'suspect witnesses' whose evidence must of necessity be treated as suspect. Corroboration is therefore required to exclude the danger inherent in placing reliance upon suspect evidence. The case of Zulu v The

People ⁴⁸ illustrated how children could be influenced by adults. In this case, the accused was charged with the murder of her husband. It was established through evidence that the deceased had used extreme violence against the accused on many occasions and had threatened to kill her with a gun on the day the killing took place. When the accused was arrested, the children were left in the custody of the deceased's relatives. During the trial it was evident from the way they gave evidence that they had been coached to give evidence incriminating the mother.

It can be argued on the other hand that corroboration as such may not be an adequate safeguard against the inherent dangers posed by the evidence of a child. This is one instance where the court will have to determine the credibility of the child evidence before determining whether her evidence has been corroborated. If it appears that the child has been influenced by a third person or that she may not be telling the truth, that evidence should be disallowed.

The need to corroborate evidence of an accomplice has been emphasised in many cases. In the leading case of Phiri (E) and Ors. v The People, Baron D.C.J. pointed out that:

"The reason why it is dangerous to convict on the uncorroborated evidence of a true accomplice is that because of his familiarity with the circumstances of the offence, he is in a position to put forward a very plausible story which in the nature of things it will be difficult if not impossible to shake in cross-examination, because in many cases the only point on which he is not telling the truth is as to the identity of one or more of his companions." 49

An accomplice may be a person who has partly participated in the commission of the offence, he may be an indemnified accomplice. He therefore knows all the circumstances of the crime and would be in a position to conceal any part of the evidence which he thinks would not fit his story. On the dangers of an accomplice's evidence the case of Phiri (E) and Ors. further stressed that:

"The desire to exculpate himself is not the normal basis for the cautionary rule in the case of a true

accomplice; the danger here will usually be that he may have a motive to protect the real culprit. There may be several possible reasons; for instance, it may be based simply on relationship or friendship with the real culprit or culprits; or it may be based on a promise or hope that if he protects the real culprits the accomplice will receive a share in the proceeds of the crime, which may be traced if the real culprits are disclosed; or the witness may have received threats of personal violence if he discloses the identity of the real culprits. The danger of which the jury must be warned is that the **accomplice** is falsely implicating the accused; the reasons for the danger - the possible motives of the accomplice - may be various, and may vary from case to case, and this is why the direction to the jury should be tailor-made to suit the circumstances of the particular case", 50

The courts in dealing with the issues of accomplice evidence have added to the list of people requiring corroboration a witness with an interest of his own to serve. This as will be discussed later includes all categories of witnesses who may not be classified as accomplices per se. This category takes care of any type of witness who may have an interest to give false evidence and the court has to explore what particular dangers are raised by the nature and the facts of the particular case before the judge. The inclusion of this category

of witness has helped to make the law of corroboration more flexible and this will be demonstrated later in this study. ⁵¹

In sexual cases courts have advanced various reasons for requiring corroboration. In the case of R v Manning, ⁵² the court stated that the jury should be directed in clear and simple language that it is dangerous to convict on the uncorroborated evidence of the complainant because human experience has shown that women and girls for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate, but extremely difficult to refute. The case of Tembo v The People ⁵³ stressed the need for caution in charges involving sexual offences because of the danger of concoction. Katebe v The People ⁵⁴ illustrated that sometimes a woman will make false allegations in order to protect a boy-friend, or in circumstances where she may fear the anger of a husband or a father. In Kell v U.S. ⁵⁵ it was observed that a threatened accusation of rape is the easiest of the blackmail methods and that since the offence attracts a lot of sympathy for the female it is easy to give credit to a plausible

tale. Glanville Williams in his article on "Corroboration in sexual cases" observes that "sexual cases are particularly subject to the danger of deliberate false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed".⁵⁶ In another article on "corroborating charges of rape"⁵⁷ the writer claims that sexual accusations which are false are more frequent than untrue charges of other crimes. Among the various reasons advanced by Heydon in his book,⁵⁸ is the fact that in a violent sexual attack, the victim may be so overwhelmed by confusion and hysteria as to increase the chance of wrong identification. This, of course, may only apply where the attacker is a stranger.

The reasons advanced for requiring corroboration in sexual cases seem to over emphasise the fact that the complainant can not be trusted. The courts are more concerned with protecting the innocent than the protection of the victim. More effort is made in devising ways and means of

detecting false accusations other than finding ways of proving this type of crime which is so difficult to prove. In some countries courts require the complainant's social history and mental make-up to be examined, they order the physical examination of the complainant and detectors are used to reveal fabricated accusation.

On the other hand the victim of the crime does not seem to have been treated with compassion and respect for her dignity. Her evidence is subject to doubt and in many cases she is subjected to rigorous criminal proceedings where her social life and mental state is questioned. In addition to that there is this rule requiring her evidence to be corroborated. This requirement is discriminatory and sexist since rape is committed on women. The law should therefore be abolished on this ground among many other grounds against it. In New York State⁵⁹ there was a call for total abolition of the rule from feminists and prosecutors and as a result a legislation was adopted modifying the requirement. In Europe it has been greatly criticized. Although there has

not been any specific research to find out the effect of requiring corroboration in rape cases in Zambia, it is necessary to carry out such research and if it is found that the result is that the rapist is treated with undue favour and the rule is harder on the victim than on the rapist, then it should be abolished. The effect of putting such a rigid requirement may result in the increase of sex crimes and the likelihood that the victims may not report such attacks.

Evidence of a single identifying witness is taken with caution by the courts because of the possibility of an honest mistake where conditions favouring a correct identification may be difficult or traumatic.⁶⁰ It has been found that even where there is more than one identifying witness, an honest mistake can be made. Although correct identification is very important, it may be noted that the criminals have also become more sophisticated in organizing crimes and many times a correct identification is difficult if not impossible. Criminals on many occasions use masks,

use violence or firearms. For fear of being identified, they, sometimes kill the victim or any person who may be in a position to identify them. It may be proposed that other means of detecting crime ought to be devised other than relying on identification.

The reason behind the requirement of corroboration in cases of confession is because most confessions are involuntary. Confessions are in many cases extracted from accused persons who have been in police custody and who may have been tortured or induced to confess. A confession has been described as the worst sort of evidence. ⁶¹ Clark writing on Crime in America states that the history of confessions is full of torture, treachery and lies and Ndulo states that:

"From biblical times to the present, we read of the morally weak, emotionally disturbed, often innocent people cruelly used, made to contradict themselves by words forced from their mouth. We also read of those, guilty or innocent, who refuse to bend to their knees and know too well their fate". ⁶²

The purpose for **requiring** corroboration is to prevent convictions based on any false confession, whether obtained through mistake, illegal inducement, coercion or mental incompetence of the accused. ⁶³

The rule protects the accused against abuse of power by those in authority and discourages future official misconduct. Despite the increase in contested confessions, allegations of torture and duress on the part of the police still come before the courts. This may be due to the failure to take disciplinary measures against the police. The increase in criminal offences sometimes makes the government reluctant to discipline the already heavily loaded police force. There is evidence of an increase in the unabated and unwarranted police use of firearms. Extraction of confession statements is also included **in that category.**

3. NATURE OF CORROBORATION

(i) LIES BY THE ACCUSED

A number of things may amount to lies. An accused person can lie with regard to his involvement in the crime, he may give a false alibi, deny knowing the co-accused or having associated with them when he actually has been seen in their company.

There have been contradictory views regarding the issue of corroboration by lies told by the

accused. One view is that only lies told out of court amount to corroboration and the other is that both in and out of court lies can constitute corroboration. The case of R v Lucas ⁶⁴ held that out of court lies may under certain circumstances amount to corroboration. This case was followed in the case of The People v Shamwana ⁶⁵ which also only discussed lies told out of court. The two cases did not consider whether lies told in court can corroborate and the issue does not seem to have been decided upon in Zambia.

In his article "Can lies corroborate" ⁶⁶ Heydon states that it is well established in common law jurisdiction outside England that lies told in court and those told outside court can corroborate. This view however is contrary to the decision given in the case of R v Chapman which stated that:

"There is no doubt that a lie told out of court is capable in some circumstances of constituting corroboration though it may not necessarily do so. There may be an explanation of the lie which will clearly prevent it from being corroboration. But in the view of this court, there is

a clear distinction in principle between a lie told out of court and evidence given in the witness box which the jury rejects as incapable of belief or as otherwise unreliable. Proof of a lie out of court is capable of being direct evidence admissible at the trial amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged. But a denial in the witness box which is untruthful or otherwise incapable of belief is not positive proof of anything. It leads only to the rejection of the evidence given, which then has to be treated as if it has not been given. Mere rejection of evidence is not of itself affirmative or confirmatory proof of the truth of other evidence to the contrary". 67

The distinction made by the Chapman's case was supported in the case of Turnahole Bereng v R 68 which further stressed that a false statement made by an accused person in court cannot be regarded as corroboration. Heydon criticizes the distinction stating that it may be easier on the whole to prove an out of court statement, clearly as a lie, but if it can have probative value, so would in court statements which are clearly proved to be untrue.

The whole issue of drawing a distinction between lies told in court and those told out of court goes to show the technicalities brought into the law. A lie is a lie, whether told in court or out of court. It would be more serious for a man who comes to court, takes an oath and

then tells lies to a judge or a jury. This may be more calculated to mislead the court and conceal his guilt. A man who lies to the court could be liable for perjury and if found guilty this should be an issue to be taken into account when deciding the case against him. What needs to be taken into account therefore is whether the evidence is capable of assisting the judge in arriving at a decision, that is, if the evidence is relevant to the facts in issue, then it should be accepted. It should not matter whether a lie has been told in court or out of court. On this basis some cases have treated lies told in court as corroboration.⁶⁹ This should be the law and the distinction should not be made, it is irrational and merely technical.

A lie could be told with a particular motive and this is what the court should look for as it has been realized that persons tell lies for various reasons. Sometimes the accused may be innocent but his motive for telling a lie may be to conceal other facts. The case of R v Turnbull dealt with an accused who gave a false alibi and on this issue

it held that:

"False alibis might be put forward for many reasons, an accused for example, who had only his own truthful evidence to rely on might stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence would not be enough. Alibi witnesses could make genuine mistakes about dates and occasions as could any other witnesses. It was only when the jury was satisfied that the **sole** reason for fabrication was to deceive them and there was no other explanation for its being put forward could fabrication provide any support for identification evidence".⁷⁰

The decision in Turnbull has been followed in the Zambian cases, with the concept that lies told by the accused are not conclusive against him. In the case of Kape v The People,⁷¹ the appellant gave evidence in which he denied the offence and also denied having sold a record player. He retracted a statement he had made earlier to the police in which he had admitted that he was sent to sell the record player to someone else. The court found that the lie told by the accused where it was reasonably possible that he was lying for a motive which would be consistent with his innocence, did not lead inevitably to an inference of guilt and did not

remove the necessity to consider whether the explanation he gave to the police could reasonably be true. Both the cases of Bwalya v The People⁷² and The People v Swillah⁷³ held that a man charged with an offence may well seek to exculpate himself on a dishonest basis even when he was not involved in the offence, but an inference cannot be drawn that he told a lie because he had been involved in the offence.

Sometimes lies are told due to an accidental error resulting from confusion and defects of memory or through an attempt to disarm suspicion and terminate inquiries quickly. The case of R v Clynes⁷⁴ held that sometimes a lie may come from a man acting in pure panic, in which case it would not be corroborative although on the other hand this may be indicative of a man's sense of guilt in which case it may be corroborative. In one case, a false denial of being near the scene of a murder was held not to be corroboration because it was given to avoid being arrested for thefts the accused had been committing.⁷⁵

There are instances when the accused's lies would be told for a motive from which the court can draw an inference that he intended to conceal his involvement in the crime. In the case of Thomas v Jones the court held that;

"When an inference can be drawn that the defendant is falsely denying the circumstances because he fears that to admit them would appear inconsistent with his innocence or throw suspicion upon himself, corroboration may be found. This is a kind of admission by conduct. That is to say, matters which otherwise might be ambiguous or colourless are rendered suspicious and corroborative by reason of the defendant's false denial. The inference open to the tribunal of fact being that to him the matter denied suggests guilt, so that therefore he is prepared falsely to deny it". 76

The case of Cortifield v Hodgson, illustrated evidence which will disclose a guilty mind. The respondent preferred a complaint alleging that the appellant was the putative father of her bastard child. The appellant denied having taken the respondent home from a dance as alleged by the respondent. However, on cross-examination he admitted that he had done so on two occasions adding after a pause that on each occasion, they

had been accompanied by his sister. The court did not believe that his sister had been with him and found that he was the father of the appellant's child being of the opinion that the respondent's evidence was corroborated in a material particular by the appellant's own evidence. The court on finding the evidence corroborative held as follows:

"It seems to me that a lie told in those circumstances may be of a character which is capable of being corroboration in the sense that it discloses a guilty mind. In those circumstances, though the evidence of corroboration was not strong, I am quite satisfied that the justices were justified in coming to the conclusion which they reached".⁷⁷

The Australian case of Pitman v Byrne laid down a good guideline for the court to follow where it finds that the accused has told a lie and when such a lie would amount to corroboration. This was an affiliation case and the putative father falsely denied certain meetings with the mother. The court in holding that this amounted to corroboration held that:

"If a party to litigation is shown to have attempted to subvert the course of justice, this is a fact which may be used as circum-

stantial evidence tending to a conclusion adverse to his case. The subornation of false testimony or the setting up of a false alibi as distinct from the failure to establish it, are familiar instances, and giving of willfully false testimony stands on no other footing. The court must be able to infer not merely that the testimony is false, but that it is deliberately false, and further that the motive which prompts the falsehood is not merely, the fear of an unjust judgment, but a fear of the truth. If this inference is reached, the result is in the nature of an admission by conduct".⁷⁸

There are certain instances which are now clearly established when the courts may make an inference of guilt from the lie told by the accused. In affiliation cases, denial of close association, meetings between the defendant and complainant, acts of sexual intercourse, flight after an accusation of paternity, payment of confinement expenses and maintenance for an illegitimate child would amount to an inference of guilt. In criminal cases, the denial of presence at the **scene** of the crime, potency in the case of unlawful sexual intercourse, and possession of a revolver, may amount to an inference of guilt.

The rules for admissibility of lies were listed out by Heydon in his article "Can lies corroborate".⁷⁹ First Heydon states that in

order for the lie to be admissible, it must be deliberate. That is, as already discussed that there must not be any motive on the part of the accused for telling the lie. Second, the lie told must be a material one, therefore lies told on trivial matters are not evidence of accused's guilt unless they raise an inference of the liar's awareness that he will not win without lying because the truth is against him. In the case of R v Lucas, it was held that "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".⁸⁰ The materiality of a lie is a question of degree, depending on the strength and nature of the evidence, the degree of deliberation involved and the extent of falsity. In this respect therefore the number of lies on a given point may be relevant. It is not necessary that the lie relates to the whole issue in dispute. Third the requirement is that the statement alleged to be false must be proved to be a lie by evidence other than that of the person to

be corroborated. That is to say, it must be proved by an independent witness. In the case of The People v Shamwana and Ors.⁸¹ the accused claimed that he had gone to the house where he was arrested to see a sick relative, but the evidence which came up showed that there was no sick relative at that house. The court found that the lies told by the accused were proved by the evidence of two prosecution witnesses who were in this case held to be independent witnesses. On the other hand, however, the case of King⁸² held that the conclusion that a statement is false can be drawn from its inherent improbability in which case direct testimony to this effect may not be necessary.

It can be concluded that a lie by the accused may amount to corroboration depending on the motive for which it is told. The court should examine the motive for the accused to lie and draw an inference from that **finding**. If the lie told discloses a guilty mind, then corroboration may be found from the lie itself.

(ii) SILENCE OR NON-DENIAL OF THE OFFENCE

An issue which is normally raised during the evaluation of corroborative evidence is

whether silence in face of a charge or non-denial of a statement accusing one of a crime would give rise to an inference that the accused accepts the truth of the charge. Would silence or non-denial of a charge be sufficient corroboration against the accused?

When an accused person is arrested by the police, he is informed of the charge against him as soon as possible. He is informed of his rights either to remain silent or make a statement. He may decide to remain silent or he may make a statement, in which case the police will record a warn and caution statement with strict compliance to the Judges' Rules. Another instance when the accused may choose to remain silent is pursuant to Sections 207 and 212 of the Criminal Procedure Code.⁸³ After the court finds that a prima facie case is made out against the accused, it will put him on his defence and will explain his rights either to give evidence on oath, make an unsworn statement from the dock or to remain silent.

In all these instances, the accused's silence is a right guaranteed by the law. It should be

noted, however, that people react differently to accusations. Some people when accused decide to remain silent, while others would just deny but say nothing more. The silence could be either because of contempt, shock or sometimes because of ignorance of what course to take. The issue however is whether the court can take this silence as an admission of guilt and treat it as corroboration. Courts seem to give different interpretation to silence in different circumstances as the following cases will illustrate.

In the case of R v Davis the appellant was convicted of storebreaking and larceny and was sentenced. In the course of his summing up the trial court said to the jury:

"Let us see for a moment what Davis said when he was arrested. He was told that the police had reason to believe he was concerned in stealing. He was then cautioned that he was not obliged to say anything unless he wanted to, but that anything he did say would be taken down and might be given in evidence and he said "I am saying nothing'". Members of the jury, a man is not obliged to say anything, but you are entitled to use your common sense. If Davis was in the position that he now would have you believe he was in ----- would he say to the police

"I am saying nothing?". Can you imagine an innocent man who had behaved like that not saying something to the police in the course of the evening or the next day of even a little time afterwards? He said nothing".⁸⁴

The appellate court criticized those comments and held that they were most unfortunate and misleading. Those words imply that if an accused remained silent after being cautioned, he did so at his peril. It would be a strong point against him at his trial if he said nothing after being told that he was not obliged to say anything. In the case of R v Sullivan⁸⁵ similar comments were made by the judge as those made in the Davis case. The appellant refused to answer any questions and the judge observed that if a man was innocent, he would be anxious to answer questions. He then asked the jury to consider what failure to answer questions would amount to. The appellate court held the judge's comments a misdirection and upheld the accused's right to remain silent. The court noted that a judge should not make any adverse suggestions to the jury implying that an inference of guilt can be drawn from the accused's silent.

Since an inference of guilt cannot be drawn merely from the fact that the accused decided to remain silent when charged, his silence cannot therefore be held to be corroborative evidence. The case of The King v Whitehead⁸⁶ confirmed this view. This was a case where Whitehead was charged of having had unlawful carnal knowledge of a girl of 15 years whilst she was in service. When the accused was told exactly what he was accused of and after a warn and caution, his answer was "I do not wish to say anything now". The court considered this as a non-denial of the offence and held it to be corroborative of the girl's testimony together with that of the mother. On appeal the court held that to treat silence after such a warning as corroboration of the evidence of the prosecutrix was a misdirection. It further held that the non-denial of the offence by the prisoner when formally charged by the police was not corroboration and neither would the failure of the man to get into the witness box to give evidence amount to corroboration.

The principle enunciated in the case of Whitehead was followed in the Zambian case of Ali and Anor v The People. In that case the appellant remained silent in the face of a statement implicating him, alleged to have been made in his presence by another accused. The judge supporting the principle which has been established both in England and Jamaica stated:

"It is a clear and widely-known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation. This is well established by many authorities such as R v Whitehead and R v Keeling"⁸⁷

The judge stated that those principles applied with equal force to the case put before him and that the learned judge erred in drawing an adverse

inference from the appellant's silence. Silence alone cannot amount to an inference of guilt.

The right to remain silent has never been challenged, however there have been a number of cases which have held that a man's silence in the face of a charge out of court can be corroboration if it operates as an admission by conduct, or where the statement might reasonably have been expected to call for a reply from an innocent person. In the case of R v Mitchell⁸⁸ it was stated that when persons are speaking on even terms and a charge is made and the person charged says nothing, and expresses no indignation and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true. This principle was acted on in the case of R v Cramp.⁸⁹ In that case the prosecution relied on the evidence of a father who alleged that the accused gave his daughter pills. The court found that the unchallenged statement of the father corroborated the girl's evidence that the accused had attempted to procure her miscarriage. Commenting on that case, the judge in R v Tate⁹⁰ stated that the statement might reasonably have been

expected to call for a reply from an innocent person. The statement made by the father should have been challenged by an innocent person, since the father and the accused were capable of speaking on even terms. The case of Wiedmann v Walpole⁹¹ confirmed the principles laid down in all those cases by holding that silence of a party will render statements made in his presence evidence against him if the circumstances be such that he could reasonably have been expected to have replied to them. In this respect, non-denial of an incriminating statement will be considered as an admission by conduct. This means that the court would look at the circumstances within which the charge was made, and decide whether the accused would have denied the charge or not. In doing this the court would take into account:

- (1) the relationship between the accused and the person who made the statement
- (2) whether they speak on even terms and
- (3) whether under those circumstances the accused would be expected to answer or challenge the charge.

The Zambian case of Malimawa v The People took the same view but without elaborating on how the court would arrive at the conclusion that the accused has accepted or denied the statement made against him. That case held that:

"A statement made in the presence of an accused person accusing him of a crime upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save in so far as he accepts the statement so as to make it in effect his own". 92

This court held that if the accused did not acknowledge the truth of the statement, then it must be disregarded altogether. As already mentioned, no formula is given as to how the court would determine the accused's acceptance or acknowledgement and whether it has to be express or implied. The case of Ali and Anor v The People, however, clarified this issue by going further and detailing the way the courts would determine this acceptance or acknowledgement. The court stated that the accused:

"May accept the statement by word or conduct, action or demeanour and it is the function of the jury which

tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part". 93

Mere silence would not assist the court in arriving at a proper conclusion, but the acceptance must be shown as already stated either by word or by any positive conduct, action or demeanour.

Some cases have taken a more conclusive approach as regards the accused's silence. In the case of R v Ryan 94 the court held that the accused's silence may be a matter to take into account when assessing the weight to be attributed to his evidence. The case of Chimbini v The People took a similar view when it held that:-

"Where, however, as in the present case, there is direct evidence by a complainant that she identified as her assailant a man whom she had known before, and this evidence if accepted, establishes the guilt of the accused, the fact, that he chooses to remain silent may properly be taken into account. The fact is part of the totality of the evidence which the court must consider in coming to the conclusion that it is satisfied beyond reasonable doubt as to the guilt of the accused. The Magistrate on the whole of the evidence in this case, including the

fact that the appellant elected to remain silent was entitled to accept the complainant's identification and was entitled to convict. He did not misdirect himself and there is no basis on which this court can interfere". 95

The court will look at the totality of the evidence and decide whether from such evidence the only inference which could be properly drawn was that the accused was guilty. The same principle was applied in the case of Simutenda v The People⁹⁶ when the court found that there is no obligation on an accused person to give evidence and where he does not give evidence, the court will not speculate as to the possible explanation for the event in question. The court's duty is to draw the proper inference from the evidence it has before it. In this case the court was satisfied that on a proper evaluation of the whole of the evidence, the trial judge was entitled to conclude that the appellant had the necessary intent. Silence can therefore be one of the factors to take into account when evaluating the whole evidence. This was specifically **implied** after hearing all the evidence, the court stated:

"Upon the whole of the evidence, the inescapable and only reasonable inference which can be drawn from all the proved facts is that it was the accused who unlawfully and fatally shot the deceased, and so I find. His silence in this court strengthens this inference of guilt".⁹⁷

The course of taking into account the silence of the accused in order to draw a proper inference does not mean that silence is taken as corroborative evidence against him. It is only used to strengthen the inference of guilt if that is the one drawn from the totality of the evidence. It may also be used to add weight to the evidence given by the witnesses. In propounding this principle, the judge in the case of R v Hangumba stated as follows:

"In weighing the credibility of the two principal witnesses for the crown, I am entitled to take into account that the accused has elected not to give evidence before this court and has thereby rendered himself immune from cross-examination. The adoption of that course is not evidence against the accused but it does add weight to the evidence of the two principal crown witnesses by adding to the probability of its truth if that evidence is apparently credible".⁹⁸

If the accused is expected to say something, this would be a violation of his constitutional rights and would make his rights meaningless. It would also imply conducting trials in police cells. However, the course taken by the courts in taking into account the accused's silence when assessing the weight of the evidence is another indirect way of violating his right to silence. If a right is given under the constitution then all protection should also be given to the accused to ensure that, that right is not taken away whether directly or indirectly.

(iii) ACCUSED'S PREVIOUS CONDUCT AND STATEMENTS

Conduct on previous occasions could either be the accused's previous convictions or his previous conduct or habits which may not necessarily amount to any criminal offence. The accused's previous conduct or statements made by him can amount to corroboration if found to have probative value to the facts of the case

and once found to be admissible into evidence. The first issue for determination therefore is that of admissibility before considering whether such evidence can amount to corroboration.

Under S.157(vi) of the Criminal Procedure Code ⁹⁹ an accused person cannot be compelled to answer questions tending to show that he has been convicted of any other offence other than, that for which he is charged except:

- "(i) Where it can be proved that his guilt in those offences show that he is guilty of the present offences.
- (ii) Where the good character of the prosecution witness has been put in issue; and
- (iii) where the accused wants to establish his good character". ¹⁰⁰

Further to that section, the case of Makin v Attorney-General ¹⁰¹ stated that evidence to show that the accused has been guilty of criminal acts

other than those covered by the indictment is not admissible except upon the issue that the acts charged against the accused were designed or accidental or in order to rebut a defence open to him. Selvey v D.P.P.¹⁰² held that the judge has unfettered discretion to admit or exclude the previous record or character of an accused and to allow cross-examination on it and that there was no general rule that the discretion should be exercised in favour of the accused even where the nature of his defence involved his making imputations on a prosecution witness.

These two cases have laid down principles which have been followed in a number of cases. In D.P.P. v Kilbourne,¹⁰³ the appellant was convicted on an indictment charging him with homosexual offences in respect of a number of boys. All the offences were alleged to have been committed in the appellant's house and with the exception of one offence which bore a close similarity in the manner of their commission. It was held that the evidence of any offence was admissible in respect of any other offences

charged, as there was a nexus between all the offences, not by the reason of the fact that the defendant was a homosexual, which would not itself have been sufficient, but by reason of the similarity of his homosexual conduct in relation to the commission of these offences. This case established the principle that one has to look for a connecting link or what is termed a nexus which binds the alleged crimes together. The case further stated that "when you find a man doing the same kind of criminal thing in the same kind of way towards two or more people, you may be entitled to say that the man is pursuing a course of criminal conduct, and you may take the evidence on one charge as evidence on another".¹⁰⁴ The courts have to safeguard against the danger of falsely implicating the accused when considering similarity in the commission of the offences. There must be a nexus between the offences as has already been discussed.

One of the safeguards courts take into account is not to rely on propensity towards wrongdoing in general as pointing to the accused's guilt. On this issue, the court in Kilbourne's

case stated as follows:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried ————— The reason why the type of evidence referred to by Lord Herschell L.C. in the first sentence of the passage is inadmissible is, not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted; the law therefore exceptionally excludes this relevant evidence".¹⁰⁵

The view expressed above was supported in the case of Sims¹⁰⁶ and it was stated that the evidence which tends to show that the prisoner is of bad disposition is admissible only if there is some specific feature distinct from mere tendency to prove bad disposition which connects the evidence with the crime charged.

Once the issue of admissibility has been resolved, the aspect of corroboration is considered depending on the nature of the case. In the case

of R v Hartley,¹⁰⁷ the accused was convicted of buggery with H on a particular day. He gave evidence of the commission of the offence on the day in question and also deposed to the fact that the accused had done the same thing to him on a previous occasion. There was no corroboration of H's evidence so far as the offence mentioned in the indictment was concerned but his evidence with regard to the previous occasion had been corroborated. It was held that H's evidence with regard to the previous occasion was admissible and corroborated. Admitting previous conduct helps in the prosecution of such type of cases. It is a sound rule without which many criminals would go free.

The accused's previous statements which may tend to show that he incited a course of conduct resulting in the commission of the crime charged will be admissible. If the accused had made reference to his previous conduct or previous associations, these statements will be admissible as corroborative evidence. In the case of The People v Shamwana and Ors.¹⁰⁹ the accused was

charged together with five others with the offence of treason. On arrest, he was asked to accompany the police to Force Headquarters. While on his way, he told one of the witnesses that "he was stupid to have been involved in this thing". On being asked why, he answered, that he was the lawyer for the man the police were looking for and further explained that he was stupid because he was to be Chief Justice the following week as the substantive holder of the post had gone abroad. The trial judge found that the accused's remorse for being involved in the "thing" when he was to be Chief Justice the following week was clearly a testimony of guilt and regret. On appeal, the supreme court held that the lie told by the accused and the remorse at having been involved in that "thing" although not sufficient corroboration by themselves, yet considered together with other matters did constitute corroborative evidence.

In the case of Chibinga and Anor v The People,¹¹⁰ the appellants were charged with murder before the High Court. The prosecution's evidence was that the appellants cut the deceased's

body into several pieces and threw them on the railway line. The only prosecution witness was a lady who was in the deceased's company before the murder occurred. The court found that this lady was a suspect and therefore her evidence needed corroboration. The court acquitted the second appellant for lack of corroboration but as far as the first appellant was concerned there was evidence of P.W.3 a business man who stated that some weeks after the incident, he was at a tavern when he saw the first appellant brandishing a knife against another man's neck. He remonstrated with the first appellant who then said to him "I can cut you into pieces as I do people at the railway line". This witness said that he then realised that the first appellant must have been connected with the death of the man at the railway line and he consequently called the policeman to arrest this man. On the issue of corroboration, the Supreme court took into account this statement and said:

"We are quite satisfied that the evidence of PW3 as to the statement

made by the first appellant in the tavern three weeks after the murder was completely corroborative, that he was involved in the murder at the railway line. In this case we consider that the evidence completely supports a conviction and we accordingly apply the proviso".¹¹¹

The accused's previous statement when it refers to his involvement in the commission of the offence is taken as an admission of guilt and as shown in this case can be used to corroborate other evidence. The statement itself must therefore be examined to ensure that it amounts to an admission of guilt or if not that it connects the accused with the offence of which he is charged. In the Shamwana's case the court analysed the statement and said:

"There was no need for an accused to regret being involved with the 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 offences his client might have been facing".¹¹²

In the Chibinga's case, the accused categorically admitted cutting people at the railway line in his statement, which then was used as corroboration.

(iv) DISTRESSED CONDITION OF THE COMPLAINANT

A person can be in a distressed condition when he is in a state of terror, grief, rage or exultation. Such distressed condition normally occurs in response to objects or situations that cause occasions for emotion. People react differently to emotional situations and show response in various ways; for instance a person in terror can express his emotion by crying, having a pounding heart and rapid pulse or by nervous perspiration or inability to remember details of what happened. Interpretation of emotional expression or distress could be made from the victim's face, gesture and voice or from the state of physiological arousal. The distressed condition could easily be identified by ordinary observation. One can easily detect a distressed condition by experience of how people normally react to pleasant

and unpleasant situations.¹¹³ There are sometimes some culturally established reactions *to certain situations; for instance, crying on loss of a relative is very common in most societies.* It can sometimes be easy to detect a distressed condition which is simulated but in some instances it might not be possible.

The issue which is normally raised is whether the complainant's or prosecutrix's distressed condition can amount to corroboration. This issue is normally raised in sexual offences and the courts would consider whether in a sexual case, the prosecutrix's distressed condition can amount to corroborative evidence of her evidence that she has been raped or that violence was used on her. Most cases agree that the distressed condition of the complainant is capable of amounting to corroboration of her evidence but that the weight to be attached to it will vary according to the circumstances of the case. The requirement is that the court must warn itself of the possibility of the distressed condition being simulated. In the cases of R v Redpath¹¹⁴ and R v Knight¹¹⁵ the courts held that in a case of sexual offence,

where there has been evidence of the distressed condition of the complainant, a jury should be warned that before they regard it as corroboration of the complainant's evidence, they should be satisfied that the distress was real and not simulated and that little weight ought to be attached to it, if it is the only evidence capable of amounting to corroboration.

The position taken by the two English cases was adopted in the Zambian cases of Kalimukwa v The People¹¹⁶ and Zimba v The People.¹¹⁷ In the Kalimukwa case the charge against the appellant was of attempted rape. The complainant alleged that the appellant locked the door of his office and got hold of her, twisted her arms backwards and pressed her against the wall whilst standing up. He attempted to rape her. The complainant reported the matter immediately to the officer-in-charge who confirmed in his evidence having found the complainant weeping. The court held that independent evidence of the distressed condition of the complainant soon after the alleged offence may amount to corroboration but that such distressed condition must not be over-emphasised. In this

case the court was satisfied that the incident complained of by the complainant took place.

In the case of Zimba v The People, the evidence against the appellant was that he seized a woman in the bush, raped her and the woman was thereafter seen crying by an independent witness. The court when considering whether the fact that the woman was crying, when she was seen by the independent witness amounted to corroboration held that:

"Although the distress of the complainant could have been regarded as corroboration, on the authority of Knight v R it is necessary for the trial court to warn itself that the evidence of distress at the time of making of the complaint may not be enough to amount to corroboration as it may well be simulated. No such warning was given to himself by the magistrate in this case, and we agree with the learned state Advocate that this conviction cannot be supported. The appeal is allowed, the conviction is quashed and the sentence is set aside". 118

The court as stated above must warn itself of the danger of the distressed condition being simulated. The difference between the two cases above was that whereas in the Kalimukwa case, the distressed condition was observed at the time of making the

complaint, in the Zimba case, the woman was seen crying immediately after the incident. The complainant might have not known that there was someone within the vicinity. The Supreme court therefore erred in holding that there was a need for the court to warn itself of the danger of the distressed condition being simulated. The distressed condition can be simulated only where the complainant wants to mislead or misrepresent the facts surrounding his case. The facts in Zimba do not present a situation where the complainant would have intended to misrepresent the facts to this independent witness.

The case of R v Boyd¹¹⁹ laid down guidelines when evidence of distressed condition is capable of amounting to corroboration. It listed out factors as the age of the prosecutrix, the time interval between the alleged assault and when she was observed in distress and the conduct and appearance in the interim, and the circumstances existing when she was observed in the distressed condition. Taking into account the age may depend

on the circumstances of the case, for instance in a sexual assault a young child may not cry not knowing what has happened to her whereas a woman may cry attaching a lot of significance to being noticed. However the Boyd case states that if those factors are taken into account, then if there is any connection between the alleged assault and the distressed condition, then the evidence of the distressed condition will be capable of constituting corroboration.

There are factors which tend to suggest that there was a struggle or a sexual offence. Wakeling states that if the condition is severe, the unlikelihood of fabrication should be apparent especially with respect to physical injuries. He further states that:

"One might scratch herself to support a falsehood but it would be a rare person indeed who would consent to intercourse and then severely batter herself to support an allegation that she had been raped".120

A complainant who would appear in a distressed condition but in addition would have injuries on her, which could not possibly have been self

inflicted would afford enough corroborative evidence. In addition to injuries one can add factors like the complainant's state of appearance, her mood, her clothes; they may be badly torn and any other factors which could suggest a struggle, or lack of consent. These other factors can assist the court in determining whether distress has been simulated or not.

(v) EVIDENCE OF OPPORTUNITY

The presence of the accused at the scene of the crime at the time the offence is committed can be evidence of opportunity. This can be negatived by establishment of an alibi which the prosecution ought to investigate.

Whether mere opportunity to commit the offence would amount to corroboration will depend upon the circumstances of the particular case. It was held in the case of Dawson v M'kenzie¹²¹ that mere opportunity alone does not amount to corroboration but that it must be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration.

The case of Nsofu v The People whose facts have already been stated found corroboration on the basis of the opportunity to commit the offence.¹²² Opportunity to commit the offence will amount to corroboration once the accused has been connected with the offence and where it is the only reasonable inference which could be drawn from the circumstances.

(vi) MEDICAL EVIDENCE

In most cases corroboration may not be found from medical evidence, as this only confirms the fact of the commission of the offence but would not connect the accused with the offence. In the case of Machilika V The People¹²³ the appellant was convicted of rape. The trial magistrate regarded it as corroboration of the evidence of the complainant that a medical examination revealed the presence of spermatozoa. On appeal the court found that this evidence was not corroboration of the fact that the complainant had had sexual intercourse with the accused, but was simply evidence that she had had sexual intercourse with someone within a period of days prior to the medical examination. The same view was brought out in the case of Nsofu V The People. The trial magistrate on the issue of corroboration said that:

"In the result, I find that on the afternoon of the 8th February, the accused had sexual intercourse with these three girls. This evidence is corroborated by the medical evidence of Doctor Izmerth, who confirmed that the three girls had that day been defiled". 124

On this holding by the magistrate, the judge on appeal observed:

"The magistrate was quite correct in regarding the medical evidence as corroboration of the commission of the offence, but if he regarded it as corroboration also that it was the appellant who committed it then he was clearly in error; and if he failed to direct his mind to the necessity for corroboration of the identity of the alleged culprit he was equally in error". 125

In this case the medical evidence was held to be corroboration of the offence because of the nature of the defilement. It would not be corroboration if for instance the offence was rape.

On the whole therefore, medical evidence may not be corroborative, but only confirms the commission of the offence, the fact that sexual intercourse took place, or that there were injuries found on the accused. There is need to connect the accused to the offence. It has been observed that if for instance a small child is found to be

suffering from the same venereal disease as that of the accused, that may be corroboration. The only problem with this type of evidence is the fact that the accused may refuse to submit to medical examination and so such evidence may be difficult to get.

CHAPTER THREE

WHEN CORROBORATION IS REQUIRED

I. The Mandatory Provisions

(i) Child of tender years

The Juveniles Act, Cap. 217 of the laws of Zambia stipulates under S.122 the requirement to corroborate the evidence of a child of tender years as follows:

"Where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not on oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force:

Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him".

The Zambian courts **have laid down strict procedures** which were clarified in the case of Zulu v. The People as follows:

- (a) "The court must first decide that the **proposed** witness is a child of tender years, if he is not, the section does not apply and the only manner in which the witness's evidence can be received is on oath.
- (b) If the court decides that the witness is a child of tender years, it must then inquire whether the child understands the nature of an oath, if he does, he is sworn in the ordinary way and his evidence is received on the same basis as that of an adult witness.
- (c) If, having decided that the proposing witness is a child of tender years, the court is not satisfied that the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify the reception of his evidence and that he understands the duty of