> speaking the truth. If the court is satisfied on both these matters then the child's evidence may be received although not on oath, and in that event, in addition to any other cautionary rules relating to corroboration (for instance because the offence charged is a sexual one) there arises the statutory requirement of corroboration contained in the proviso to section 122 (1). But if the court is not satisfied on either of the foregoing matters, the child's evidence may not be received at all".[1]

The procedure set out above has been held to be the proper procedure by the court in several cases, in fact the judge will quash any conviction which does not follow it.[2] In the case of Siakukuyu Julias v R[3] it was stressed that the magistrate must bear in mind the provision of the Act.

Who is a child of tender years

The duty of determining whether the child is of tender years is on the court and it was held

in the case of Chewe v The People [4] that if it is found that the child is not of tender years, then S.122(1) of the Juveniles Act [5] does not apply and the witness's evidence can not be received save on oath. The court may make an inquiry as to the child's age or if necessary assess it itself. [6] It can rely on ocular observation and if it appears that the offender is a juvenile, an inquiry must then be made to ascertain his exact age.

The Juveniles Act, Cap. 217 does not define who a child of tender years is. This issue has been a subject for discussion before the courts in a number of cases. The Juveniles Act defines a child as a person who has not attained the age of sixteen years. The Children and Young Persons Act, 1933, [7] defines a child as a person under the age of 14. So in terms of definition, there is a big disparity between the Zambian and English Acts. The case of R v Campbell's holding on who a child of tender years is stated that:

> "It will be observed that there is no definition in the Act of what is meant by 'a child of tender years'

> though a child is defined as a person under the age of 14. Whether a child is of tender years is a matter for the good sense of the court, and though it may be difficult to decide whether a child understands the obligation of an oath, a court probably would have no difficulty in deciding whether he or she was of tender years". [8]

The case of *R v Campbell* above was followed in the case of *Chewe v The People* [9] and the judge noted that it would have been far more satisfactory if the legislature was to lay down a specific age below which the provision of S.122 was to be applied. It was held that in the absence of such legislation, the decision whether a child is of tender years is for the good sense of the court. Some cases went further and took the age of 14 years as the age of tender years. The case of *Campbell* took the age of 14 and this was followed by the Kenya case of *Kibangeny Arap Kolil v R* [10] which also quoted the Kenya Oaths and Statutory Declarations Ordinance. [11] The Ordinance gave a similar definition to that of the English Children and Young Persons Act, 1933. The Northern Rhodesian Case of *Makhanganya v R* [12]

which has since been cited in the preceding Zambian cases followed the two above cases of Campbell and Kolil and held that as a useful guide for practical purposes, a child under the age of 14 years should be regarded as the age of tender years. This was held to be so despite the fact that the Juveniles Ordinance [13] of Northern Rhodesia defined a child as a person who had not attained the age of 16 years. The Supreme court case of Chisha v The People emphasised that "courts will no doubt be guided by the statutory definition of a child which in Zambia means a person who has not attained the age of sixteen years (See S.122(1) of the Juveniles Act".)[14] The case of Chewe v The People [15] expressed the same view holding that it would be far more satisfactory if the legislature were to lay down a specific age and that in the absence of such legislation, the decision must be made by the Court in each case. The principle of not fixing the age was defended by H.A. Hammelmann in his article on 'Children as Witnesses' and he stated that:

> "It is well known that the attitude of children to reality and truth differs widely from that of adults and that, while some young children will make fairly reliable witnesses, it is absurd to expect true testimony from others, though older. For this reason English law unlike certain continental systems, wisely refuses to be bound by any fixed age limit for competence to testify or for capacity to take the witness oath, and leaves the judge the duty to satisfy himself whether a child of tender age should, having regard to his particular mental development be heard in evidence and whether the oath should or should not be administered".[16]

The failure to fix the age has led the courts to come out with different interpretations which cannot go without comment. The case of Makhanganya v R following the principle in R v Campbell fixed the age of under 14 years as the age for a child of tender years. The Chief Justice recommended in the case of Chisha that the courts should be guided by the statutory definition of child which fixes the age of child at under 16 years. The English Children and Young Persons Act, 1933 stipulates the age of under 14 as the definition of a child and it is therefore justifiable for the English cases to follow the definition. If the Zambian Courts follow the definition under the

Juveniles Act, Cap 217 the child of tender years might even be over 14 since the age in the Act is under 16 years. However Ndulo in his article "The Child as a Witness" [17] observes that the age of 14 years would appear to be on the high side. His reasons are mainly based on the basis of the criminal liability of a child other than the definition given under the statute. He observed that:

> "The Penal Code makes immature age a defence only up to the age of 12 (S.8 of Penal Code, 1972). Thus a child who has reached the age of 12 has the same criminal capacity as an adult, that is, he is fully accountable for his violation of the law unless incapacity is established on some other basis as insanity. It seems odd that the law on the one hand should say a child at 12 is intelligent enough to commit a crime but say on the other that he is not intelligent enough to testify about a crime". [18]

If the capacity to testify is related to the criminal liability then the ages of 16 or 14 would be too high. The age of 12 would seem to be more appropriate for Zambia as it would be illogical to hold a child criminally liable but not intelligent enough to testify. The

Criminal Law Revision Committee (11th Report)[19] proposed that children under 14 years should in all cases give their evidence unsworn and those over that age should give sworn evidence. It would be appropriate to fix the age for Zambia taking into account the views which have been expressed above. It may be argued on the other hand that the purpose of the Juveniles Act is there to protect children and therefore if a low age is stipulated, that objective will not be achieved. It may also be taken into account that children grow up in different environments and their development is dependent on their experience. This is a factor which has to be taken into account when fixing the age.

Voire dire

If the court decides that the child is of tender years, it will conduct a voire dire to determine whether the child understands the nature of an oath. The court determines the child's ability to understand the oath or the duty of speaking the truth by questions and answers which have to be recorded. As regards

the ability to understand the oath, questions on his religious beliefs will be asked and if it is to determine his ability to speak the truth, general questions are asked to determine his intelligence.

In the case of R v Reynolds [20] a school attendance officer was called as a witness because he knew the girl at the school. The court of criminal appeal did not object to this procedure. With the exception of that case, all other cases are determined by the presiding judge's investigation through questions and answers. It was however noted by the court in the case of R v E [21] that a case like this would be the one where a judge or chairman may want to obtain assistance from a witness who would be called to inform the court as to whether a child is fit to give evidence especially in a case where the child attends school.

When the court comes to a conclusion that the child although he does not understand the nature of an oath, is possessed of sufficient intelligence and understands the duty of speaking

the truth, the child's evidence will be received though not on oath and this is what is termed the 'unsworn testimony' of a child of tender years as provided for under S.122 of the Juveniles Act, Cap. 217. This evidence is admissible but has to be corroborated by some other material evidence implicating the accused before he can be held liable.

The criticism levelled against child evidence is the distinction drawn between the oath-taking child and a child who knows the difference between truth and falsehood. The section of the Juveniles Act, Cap 217 gives the impression that the oath-taking child is more superior than the child who knows the difference between truth and falsehood. This distinction is a fallacy because the main basis of adducing evidence is to arrive at the truth and a child who is capable of giving truthful evidence will be equal to the one who is sworn. One has also to take into account the fact that a child's spiritual consciousness depends on his training and surroundings other than the conscious will to tell the truth. Many

people do not give their children the necessary religious education which would make them aware of the nature of the oath. It may however be possible to find a mature and truthful child who because of his lack of religious background does not appreciate the nature of an oath. On the other hand it is possible to find a child who understands the nature of the oath but still possesses a phsychopathic addiction to lying. For reasons like these Dean Wigmore in his Article 'Child on Oath' [22] and J.A Andrews on 'The Evidence of Children' [23] call for total abolition of child oath in all cases. Criticism is also levelled against the theological tests administered by laymen in Court.

Another criticism has been the failure of the judges or magistrates to hold a proper Voire dire which goes to show the lack of clarity as regards the procedure. In the case of Phiri v The People [24] the judge urged the courts to study the procedure laid down in various cases since the Voire dire held in that case was defective. In the case of Zulu v The People [25] the Supreme Court went into detail in setting out the proper

procedure to be followed when dealing with S.122(1) of the Juveniles Act but further observed that the subject caused confusion. Although since the case of Zulu the procedure was clarified, there are still cases where the courts have held the voire dire to be defective.

Corroboration of the Unsworn Testimony of a child

The evidence which is required to corroborate the unsworn testimony of a child of tender years under S.122 of the Juveniles Act, Cap. 217 has been a subject for discussion in various cases. Questions have been raised as to whether the unsworn evidence of a child can be corroborated by another child's unsworn evidence or whether it can corroborate another child's sworn evidence.

As regards to whether the unsworn evidence of one child can corroborate the unsworn evidence of another child, the position in Zambia is similar to that of England. The proviso to S.122 (1) of the Juveniles Act, Cap. 217 stipulates

as follows:

> "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". [26]

This proviso which is similar to S.38(i) of the Children and Young Persons Act, 1933 of England was interpreted in the case of DPP v Hester, and it was stated in that case that:

> "On the construction of the proviso to S.38(i) the further question arises whether the unsworn evidence of a child could be corroborated by the unsworn evidence of another child. The evidence of the first child would be evidence admitted by virtue of the section. Would the evidence of the second child (being evidence supporting that of the first and implicating the accused) be 'some other material evidence' within the meaning of the proviso? It would be 'other' evidence in the sense that the evidence of the second child would be other than the evidence of the first child. If the language permits of ambiguity, it would seem to be more in accordance with the intention of the proviso that the words 'some other material evidence should be regarded as denoting evidence other than evidence admitted by virtue of this section. This would conform with the view which has been generally entertained. The decision in R v Coyle (1926) N.I. 208 was to this effect". [27]

The above interpretation was taken up in the case of R v Manser [28] and it was held that where the evidence of a young child requires corroboration as a matter of law or practice, the unsworn testimony of another child, which itself requires to be corroborated cannot be treated as supplying the requisite corroboration. The case of R v Manser was followed in the case of R v Campbell [29] and referring to S.38 of the Children and Young Persons Act, 1933 it was held that a child of tender years may give unsworn evidence in any proceedings against any person for any offence, but the person accused cannot be convicted unless the unsworn evidence is corroborated by other material evidence. The unsworn evidence cannot be corroborated by other unsworn evidence. The same principle was applied in the case of Mwewa v The People [30] where the principle witness for the prosecution, the complainant and another girl aged twelve both gave their evidence unsworn. The Supreme court citing the case of D.P.P. v Hester [31] held that two children of tender years giving their evidence unsworn cannot as a matter of law corro-

borate another child's unsworn testimony, and that the statute, should be interpreted to mean that the corroborative evidence must be other than that admitted under S.122(1) of the Juveniles Act, Cap. 217 or S.38 (1) of the Children and Young Persons Act, 1933 of England.

Can the unsworn evidence of a child corroborate another child's sworn testimony? This again has been an issue for debate and conflicting decisions have been made which have called for comment. In the case of R v Campbell [32] the appellant, a school master, was convicted of seven counts of indecent assaults on boys aged about 10 years. The evidence was all of children. Some of them had no offences committed against them and others were complaining children. The court found that when a child gives unsworn evidence it must be corroborated by some other evidence and there is no reason why the corroboration should not be the evidence of another child, who in the opinion of the court is capable of being sworn. The holding by the court in that case was that:

> "The evidence of an unsworn child can amount to corroboration of sworn evidence, though a particularly careful warning should in that case be given".[33]

The holding in Campbell was followed in the case of Siakukuyu Julias v R. [34] However that principle as laid down in the Campbell's case was a departure from the decision in the case of R v Manser. [35] In the case of Manser the appellant was convicted of carnal knowledge of a girl under 13 years of age. The girl Barbara against whom the offence was alleged to have been committed gave sworn evidence and the only evidence corroborating was that of her sister Doris aged 9 years who gave unsworn evidence. It was held that the sworn evidence of a child could not be corroborated by the unsworn evidence of another child which itself needed corroboration but had none save the sworn evidence of the first child. The decisions in R v Campbell and R v Manser conflict. While one supports the principle that sworn evidence of a child can be corroborated by the unsworn testimony of another child, the other one rejects that principle and holds that where evidence of a young child requires corroboration as a matter of law or practice, the unsworn testimony of another child which itself requires to be corroborated cannot be treated as supplying the

requisite corroboration. The holding in Manser was applied in the cases of The People v Banda [36] and Makhanganya v R. [37] In the case of Makhanganya like in that of Banda's case, two children who gave evidence were of tender years, one gave sworn evidence but the other one was too young to give evidence on oath. It was held that:

> "Corroboration was required as a matter of law of the unsworn evidence of a child, and as a matter of practice of the sworn evidence of a child of tender years. This has not been provided and in view of this and a number of discrepancies in the evidence, a conviction was not justified". [38]

The case of D.P.P. v Hester [39] followed the case of Campbell but analysed and extended the principle on the nature of the corroborative evidence needed. In the Hester case the accused was charged with indecently assaulting a 12 year old girl, who testified against him on oath. Her 9 year old sister gave unsworn evidence to the same effect. The jury were directed that in law the evidence of an unsworn child could corroborate a sworn child. The court of appeal held this to be wrong and the Director of Public Prosecutions

appealed. The case analysed the holdings in the cases of R v Manser [40] and R v Campbell, [41] and made conclusions that the unsworn evidence of a child can corroborate another child's sworn evidence provided that the jury after a suitable adequate guidance and warning had been satisfied that each child was a truthful and satisfactory witness. Secondly that if the witnesses were independent of each other then what each said would be separate from and independent from each other. Any possibility of concoction or collaboration should be ruled out. The warning to the jury should therefore include mention of any circumstances affecting the independence of their testimony. The case however mentioned that, as to this, no general rule could be laid down but that the judge would exercise his judgement as to the style and language of guidance as would be helpful and wise for him to give.

The case of R v E [42] also considered the cases of Manser and Campbell but came to a conflicting decision with that of DPP v Hester. In that case the accused was charged on seven counts of rape. In the magistrates' court, a girl aged 8 years gave sworn testimony and another aged 7

years gave unsworn testimony. Offences against both girls were alleged. Commenting on the two decided cases the judge stated:

> "R v Manser decided that the sworn testimony of a child could not be corroborated by the unsworn evidence of another child, which itself needed corroboration but had none save the sworn evidence of the child. In R v Campbell the children were all sworn and it was held that the evidence of an unsworn child can amount to corroboration of sworn evidence, though a particularly careful warning should be in that case be given. That is very difficult to reconcile with R v Manser if a child's unsworn testimony is insufficient to corroborate another child's unsworn testimony, it must also be insufficient to corroborate the other child's sworn testimony, for the quality of the corroborative testimony is the same in each case".[43]

The court in this case held that the unsworn evidence of the child is not capable of amounting to corroboration. In this case the court considered the fact that there was a possibility of the children having collaborated with each other because the offence was committed to them in succession at the same place during a game. The court however, after finding those two cases irreconcilable laid out four steps which have to be taken into account when considering evidence which might amount to

corroboration. These were:

(1) Whether the evidence is receivable in accordance with S.38 of the Children and Young Persons Act.

(2) To examine the evidence and decide whether in law it is capable of being corroboration.

(3) Whether the evidence does amount to corroboration.

(4) What weight to give to the corroborative evidence.

A commentary made on the R v E's case found that decision more logical than the ones made in the other cases. It was pointed out in that commentary that Lord Goddard's remark in the Campbell's case that the evidence of an unsworn child can amount to corroboration of sworn evidence was obiter. Since all the children in that case were sworn, the case was inconsistent with the decision in Manser's Case which was wrongly treated in Campbell's case as a case where both children were unsworn. The commentary pointed out and rightly too that if two or several accomplices cannot corroborate one another as seems to be well established, because each of them needs corroboration as a matter of

practice why should two children whose evidence requires corroboration as a matter of practice do so. However J.A. Andrews in his article on The Evidence of Children [44] points out the crucial problem that if the law is against conviction in any case where reliance has to be placed wholly or substantially on children's evidence, very many cases against children will go unpunished. He noted that in practice these offences of interference with children are often among the most serious crimes and it is important to convict the offender before he takes advantage of further opportunities. One should not, however, overlook the problems of relying on child evidence. The courts should be wary of the unreliability of child evidence and then the need to punish the offenders or ensuring that they do not go unpunished should also be taken into account.

Most of the cases which have held that the child's unsworn testimony cannot corroborate another child's sworn testimony have not addressed themselves to the issue of mutual corroboration. However the case of D.P.P. v Kilbourne commented on the observations in the case of R v Manser. It

stated that the evidence of one witness which requires corroboration cannot be used as corroboration of that of another witness which also requires corroboration. The holding was as follows:

> "For some unexplained reason it was held that there can be no mutual corroboration in such a case.
>
> I do not see why that should be so. There is nothing technical in the idea of corroboration, when in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter, the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in".[45]

The case supports mutual collaboration provided that there has been no collaboration in concocting a story or tell similar stories. It criticized cases which compare child evidence to that of accomplice evidence and which have held that if two accomplices cannot mutually corroborate each other, then two children whose evidence needed corroboration could not also corroborate each other. On this the case stated:

> "In most of the authorities the accomplices were accomplices to a single crime, so the danger that they collaborated in concocting their story is obvious, and it is therefore quite right that there should be a general rule that accomplices cannot corroborate each other. Whether that should be a universal rule, I greatly doubt, but I need not pursue that matter in this case".[46]

It can be pointed out that the danger of an accomplice is not the same as of a child. The author's contention is that mutual corroboration is a subject the court should take seriously especially in circumstances where the courts have ruled out the possibility of collaboration. If the offences were committed to the children on different occasions and the children did not known each other, there is no reason why the court should not find corroboration from each child. Evidence which as Hester's case puts it, would establish a "system". A system which would be consistent with the accused's behaviour. The Criminal Law Revision Committee proposing fairly drastic changes in the law of corroboration, recommended that the rule against mutual corroboration so far as it exists should be abolished and the author supports the proposal.

From the Zambian decided cases, it is clear that the child's unsworn testimony can not corroborate another child's unsworn testimony.[47] However, the issue whether the child's unsworn testimony can corroborate another child's sworn testimony has not been well resolved. The English cases have given conflicting decisions. The Zambian cases which have discussed the issue have not cited the English cases on the issue and it is still not clear what view they hold. However, the cases of The People v Banda[48] and Makhanganya v R[49] seem to imply that such evidence cannot amount to corroboration. The Makhanganya case was a Southern Rhodesia case decided by the Federal court and would therefore be of persuasive value.

The criticism which has been discussed already in this Chapter is the conflicting decisions as to what evidence would be or would not be corroborative. The Criminal Law Revision Committee to solve this issue made the following proposal:

> "Any rule of law or practice whereby in criminal proceedings the evidence of one witness is incapable of corroborating the evidence of another witness is hereby abrogated".[50]

This proposal would solve the issue of whether the unsworn child's evidence would corroborate another child's sworn evidence, but would apparently abolish the rule that the unsworn child is incapable of corroborating another unsworn child. For what ever revision may be made there is no doubt that there is a need for serious consideration to be given to this provision of the Act.

(ii) SPEED (ROADS AND ROAD TRAFFIC ACT, CAP. 766)

Under S.192 (3) of the Roads and Road Traffic Act, Cap. 766 any person who drives a vehicle of any class or description on the road at a speed greater than the prescribed maximum speed is guilty of an offence. However S. 192(4) provides that:-

> "No person shall be convicted of an offence under the provisions of sub-section (3) merely on the evidence of one witness solely to the effect that, in the opinion of the witness, he was driving a vehicle at a speed greater than the maximum speed prescribed or specified in respect of a vehicle of the class or description to which such vehicle belongs". [51]

It is necessary whenever a person is charged with having exceeded the prescribed

speed limit to find corroborative evidence of the witness who gives his opinion that the speed exceeded the one prescribed by law. The corroborative evidence must be from someone who observed the driver at the same moment of time as the witness.

In the case of <u>Birghtly v Pearson</u>,[52] the appellant was charged with having unlawfully driven a motor lorry at a speed greater than the maximum speed specified for that vehicle. Evidence was given by one police officer of the excessive speed, estimated by him at a place on the particular road, and by a second police officer to the same effect, estimated by him at a different place on the same road. Neither of the police officers had relied on a stop - watch or speedometer nor was there any reference to any specified and measured distance for the purpose of calculating the speed of the vehicle. The appellant contended that in as much as the opinion of each police officer related to a different place on the road, and to a different time in each case, and in as much as the evidence of excessive speed at each place thereof consisted solely of the opinion of

one police officer, there could not be a conviction by virtue of the Act which required evidence of more than one person to the fact of exceeding the speed. The court on appeal found that the vehicle had not been observed by the two police officers at the same moment and therefore the evidence did not comply with the requirement of the Act.

It has been established that the person can be convicted on the evidence of one police officer supported by the reading of a speedometer or some other mechanical means by which the officer's evidence becomes evidence of fact and not opinion. This was set out in the case of Penny v Nicholas [53] where the appellant was convicted by exceeding the prescribed speed limit and the only witness was a police constable who stated that he followed the appellant's car over a measured distance using a speedometer in the police car. The court found the reading of the speedometer sufficient corroborative evidence. In the case of Plancq v Marks, [54] the evidence of a police sergeant who used a stop - watch to calculate the speed covered over a calculated

distance was also held to be corroboration not 'merely of the opinion of one witness as to the rate of speed' but was evidence of the fact recorded by his stop-watch as to the time taken in travelling over the distance.

The accuracy of the speedometer has been an issue in some of the cases and over which the case of Nicholas v Penny has been criticized. The case of Melhuish v Morris [55], held that evidence based on the reading of the speedometer without proof of its accuracy and without evidence of the opinion of an experienced person as to the speed at which the appellant was travelling was not sufficient to convict him. The same view was held in the case of Hickey v R [56] which rejected the holding in Nicholas v Penny calling the reasoning in that case fallacious. The case held that the reading of an untested speedometer was completely unreliable when attempting to form an accurate estimate of the appellant's speed.

The principle in Nicholas v Penny was however supported by the case of Mhango v R [57] holding that such evidence was in the circumstances, *prima facie* sufficient as to the appellant's speed.

Cross and Wilkins in the book entitled "An Outline of the Law of Evidence stated that:

> "What is prohibited is a conviction on one witness's opinion of the speed at which the accused was driving. A witness's view based solely on his personal observation, concerning the speed at which a vehicle was travelling is nothing more than his opinion.
>
> A police statement that he drove behind the accused reading a speedometer of a police car constitutes _prima facie_ evidence against the accused. It will be sufficient to support a conviction if the accuracy of the speedometer is not successfully challenged". 58

In view of the rapid development in technology, it would be unreasonable to wholly dismiss evidence adduced through technological means. Evidence adduced by means of mechanical devices should be taken as _prima facie_ evidence of the speed used until evidence rebutting it is obtained. The problem of course will then be as on whom the burden of proof lies to rebut such evidence.

(iii) PERJURY:

The offence of perjury is created under S.104 of the Penal Code and under S.107 of the same Act. "A person cannot be convicted of committing perjury or of subornation of perjury solely upon the evidence of one witness as to the falsity of any

statement alleged to be false". The case of R v Shaw [59] held that upon an indictment for perjury, it is necessary to have more than the evidence of one witness and that the degree of corroboration although not definable must be something which in the opinion of the tribunal before which it is brought is deserving the name of corroboration.

A number of cases have come out to show that it is not the evidence of a second witness only which can be corroborative but any other material evidence which can corroborate the falsity of the oath or statement of which the accused is charged. In the case of R v Threlfall [60] it was held that the jury was entitled to treat a document consistent with the guilt or innocence of the accused as corroboration of the evidence against him. Supporting the principle in that case R v Mathew [61] held that to prove perjury, it would be sufficient if in addition to the evidence of the witness, there be proof of an account or a letter written by the defendant contradicting his statement on oath. In Jeffery v Johnson [62]

a man denied paternity of a bastard child and during the proceedings a letter in his handwriting was produced and the court found a statement contained in that letter corroborative evidence of the complainant's claim.

Admissions by the accused himself or statements made by him may be corroborative. In the East African case of Barney Confait V R, [63] a man who was charged with rape called at the police station and volunteered a statement which was recorded, read over to him and later signed by him. At the trial the court held that the statement was sufficient evidence to prove the falsity of his evidence. The case of R v Yates [64] warns that the rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule but a rule founded on substantial justice and that evidence conformatory of that one witness, in some slight particulars only is not sufficient to warrant a conviction. Whether the corroborative evidence is sufficient always depends on each particular case and in perjury it must be sufficient on the issue of the falsity of the statement.

R v McKenzie [65] requires corroboration of the perjured fact as a whole and not every detail or constituent part of it.

Heydon [66] states that there is restriction on the application of perjury mainly for purposes of protecting witnesses who come forward to give evidence from oppression or annoyance by charges or threats of charges of having given false testimony. More people are needed to come forward and give evidence and a threat of perjury would limit the number. This is what Cross [67] calls 'Oath against Oath'. The law of perjury requires corroboration as it would be dangerous and even unsatisfactory to convict the defendant when there is but the oath of one man.

Many of the decided cases have held that corroboration for perjury may be found from another witness, documents, letters or admissions by the accused. It is therefore possible to interpret the section requiring corroboration for perjury by the fact that corroborative evidence may be from any other material evidence implicating the accused. However the 11th Report of the Criminal Law Revision,

in para. 192 interprets S.13 of the Perjury Act which is similar to the Zambian Penal Code, S.107 as requiring that a second witness should give evidence from his own knowledge of the falsity of the statement in question, at any rate where the falsity is not proved by the production of letters or repeated contradiction. [68] The committee's recommendation was an amendment of S.13. It recommended under para. 192 that "*the requirement that corroboration by perjury* be found in a second witness, so far as it exists should be abolished" and in substitution put that the evidence must be corroborated in 'some material respect by other evidence'. This seems to be more appropriate because of the nature of evidence which the courts have held is capable of being corroborative in cases of perjury. Again from the decided cases corroborative evidence has been held to be evidence which will implicate the accused in a material particular. [69]

Zambia does not have cases decided on this issue but since its provisions are similar to the English Act, the proposed amendment may be worth considering.

(IV) PROCURATION:

The offences of procuration and procuring defilement of women are created under sections 140 and 141 of the Penal Code, Cap. 146 and the provisos to those sections state that no person shall be convicted of any offence under those sections upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused. The case of Sichimba v The People [70] defines the word procure in S.141 (a) of the Penal Code, Cap. 146 as not confined to acting as a pimp or pander to induce a woman or girl to have connection with another but includes an attempt to obtain, cause or bring about a connection with the offender himself. The corroborative evidence therefore must connect the accused with trying to induce a girl to have connection with another man or with the offender himself.

Cross on Evidence states that procuration belongs to the class of charges which are easy to make and difficult to rebut. He states that:-

"Moreover, the chief witness for the prosecution is usually the girl procured who cannot be numbered

> among the most reliable accusers, so the requirement of corroboration in this instance may be thought to be justified on the score of public policy". 71

Cross's view is supported by the case of Kelly v U.S. 72 where the United States court of Appeal, District of Columbia circuit considered an invitation to sodomy testified to by only a single witness and considering this allegation the court stated that:-

> "There is virtually no protection, except one's reputation and appearance of credibility, against an uncorroborated charge of this sort. At the same time, the results of the accusation itself are devastating to the accused. It follows that threatened accusations of this offence is the easiest of blackmail methods. The testimony of a single witness to a verbal invitation to sodomy should be received and considered with great caution". 73

On a charge for procuration the requirement is for corroboration in a material particular by evidence that implicates the accused. This is a general characteristic of several provisions as well as the common law rules of practice on the subject. In the case of R v Coldstin 74 the appellant was convicted of attempted procuration

and sentenced to two years imprisonment with hard labour. On the conviction for the offence, there was no corroboration whatsoever of the evidence of the prosecutrix. There was a charge of rape made against him by the prosecutrix of which there was corroboration of several of the allegations made by the prosecutrix but the evidence was not sufficient to afford material corroboration in support of the charge that the appellant tried to make her a prostitute. It was held that in order that a man may be protected from a charge of this character being made against him by a woman without corroboration of some material particular implicating the accused and that since the evidence rested on the girl's evidence alone, there was no corroboration provided. It was further observed that statutory corroboration under the Act must be of the offence charged and is not afforded by evidence of another crime committed by the defendant. In the case of <u>R v Cohen</u> [75] the appellant was found guilty of procuring a girl to become a common prostitute after the prosecutrix's evidence was found to have been corroborated by three witnesses. Cases of procuration are not very common in Zambia.

(v) SEDITION:

At common law sedition is a misdemeanour and there is no corroboration required before a person can be convicted of the offence. In Zambia Section 59 of the Penal Code, Cap 146 provides that no person shall be convicted of an offence of sedition on the uncorroborated testimony of one witness (sedition is an offence under S.57 of the Penal Code). In the case of Chitambala and Ors v R,[76] the four accused were charges with contravention of the Penal Code S.53 D(1)(a) of Northern Rhodesia, with conspiracy to publish a document with a seditious intention. The case was dismissed for lack of corroborative evidence. Corroboration must always be in a material particular and in this case it could be another witness or any other document or statement which may implicate the accused with the commission of the offence. In cases of this nature if the words are written, the offence of publication of seditious libel will be established if the written document is produced and is proved to be in the handwriting of or to have been published by the accused.

(VI) AFFILIATION:

In Zambia affiliation proceedings are brought before the subordinate court of the first class pursuant to S.20 (f) to (i) of the Subordinate Courts Act, Cap. 45. The law applicable is the Bastardy Laws Amendment Act, 1872 of the United Kingdom. Under S.4 of that Act, it is provided that after the birth of a bastard child, the court will hear the evidence of the woman and also hear the evidence tendered by the alleged father and if the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the court, the court may adjudge the man to be the putative father of the bastard child. Section 4 therefore requires the evidence of the mother as to the paternity to be corroborated in some material particular by independent testimony which may be direct or circumstantial, confirming that part of the evidence which implicates the defendant.

A number of cases have laid down the type of evidence which is capable of being corroborative. In the case of Reffel v Morton [77] it was held that

the corroborative evidence within S.4 of the Act must be evidence having some relation to the conduct of the putative father or at least have some relation to the probability of the person summoned, being the father. Some of the cases where the alleged person has been held to be the putative father are where he pays maintenance money for the bastard child or where he writes a letter or has close association with the mother. In the case of Hodges v. Bennett [78] the payment of money for the maintenance of the child was held to be corroborative evidence of paternity. In Cole v Manning [79] statements of the mother as to the paternity of the child were held to have been sufficiently corroborated by the evidence of acts of familiarity between her and the defendant although those acts had taken place at a time before the child could have been born. In Johnson v Pritchard [80] evidence of close association of the putative father with the complainant on terms of close affection and there being no evidence that she was associating with other men was held to be corroboration of the complainant's evidence in a material

particular. Moore v Hewitt [81] states that a period of exclusive association can be corroboration. If the complainant produced a letter which corroborated her story in a material particular and she proved that it was in the handwriting of the putative father, it might be admitted as corroboration. On this Jeffery v Johnson stated as follows:

> "The evidence of the mother can be divided into two parts. First the part in which she proves orally that the man was the father. Secondly, the part in which she proves the handwriting of the letter. It is the first part, her evidence as to paternity which needs corroboration. The corroboration is afforded by the contents of the letter. She does not prove the contents of the letter. She only proves the handwriting to be of that man. Once the handwriting is proved, the contents prove themselves, rather in the nature of evidence like an exhibit which once it is properly identified proves itself".[82]

Admission of paternity would amount to corroboration, [83] but mere opportunity was held not to amount to corroboration of the evidence of the mother.[84] Lies told by the putative father in court may amount to corroboration. In the case of Corfield v Hodgson [85] the respondent preferred a complaint alleging that the appellant was the putative father of her bastard child. In examination in chief the appellant denied the allegation that he had ever taken her home from a dance but in 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 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 denials. It added that a lie on those circumstances would be capable of amounting to corroboration. The same view was held in the case of Pitman v Byrne [86] a South Australian case when it was 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 circumstantial evidence tending to a conclusion adverse to his case.

Since the Zambian courts apply the Bastardy Laws Amendment Act, 1872, the English cases interpreting this Act apply to Zambia and corroboration has to be looked for in the manner explained by the cases above. The cases are tried in subordinate courts and have therefore limited publication as subordinate court cases are not reported in the

reports. It can be noted that paternity suits are not very many in Africa and particularly in Zambia. This may be due to ignorance of the law on the part of the women or it may be the fear to take a father of one's child to court.

CHAPTER FOUR

WHEN CORROBORATION IS REQUIRED
2 RULES OF PRACTICE

(1) Accomplice

(a) Who is an accomplice

There is no specific definition given as to who an accomplice is but Archbold [1] citing the holding in the case of Davies v Director of Public Prosecution [2] gives the following persons, if called as witnesses for the prosecution as falling within the category of accomplices:

(i) persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanors).

(ii) Receivers are accomplices of the thieves from whom they receive goods in a trial of the latter for stealing.

(iii) Where a person is charged with a specific offence on a particular occasion, and evidence is admissible and has been admitted of having committed crimes of the identical type on other occasions as proving system and intent and negativing accident, the parties to such other similar offences are accomplices.

A person is said to be an accomplice if he actually participated in the commission of the crime for which the accused against whom he is called to give evidence is charged. Participation is determined by the witness confessing to the crime by pleading guilty or by being convicted of it. Baron, D.C.J. termed this type of witness as a true accomplice and in the case of Phiri (E) and Ors. v The People he stated as follows:

> "We are dealing with what may be termed a true accomplice case, which we use as a short hand term for a case where the suspect witnesses were either full participants in the perpetration of an offence, or were deeply involved as accessories, as distinguished from the doctor and patient situation in abortion cases, or the payer and receiver of bribes in corruption cases, or the cases of witnesses who for one reason or another may have a purpose of their own to serve".[3]

In the above case the two witnesses called by the state were self-confessed accessories before and after the commission of the offence.

It was held in the case of Davies that for a person to be treated as an accomplice he must have participated in the actual crime charged in the case of a felony or he must be in the category as given above. The appellant attacked four other youths includi

B. During the attack a knife was used and subsequently B died of wounds. The appellant and five others were indicted for murder of B. Lawson one of the youths who attacked was called as a witness at the trial of the appellant as a prosecution witness. In his summing - up, the trial judge did not warn the jury that Lawson's evidence was or should be treated as, the evidence of an accomplice. The court of appeal agreed with the trial judge's decision that Lawson was not a participant in the case of murder since he did not know that any of his companions had a knife, and could therefore not be an accomplice in a crime which consisted of its felonious use. The court found that it was therefore not necessary to warn the jury since Lawson was not an accomplice. This witness could be put in the category of witness with interest to serve.

The holding in Davies restricted the warning to only those persons who actually participated in the commission of the crime with which the accused against whom evidence was to be given was charged. This decision would be tenable if it was only restricted to defining who an accomplice is, but when it

stretches to when a corroboration warning could be given then it becomes difficult to concede. The purposes of giving a corroboration warning have already been discussed in Chapter Two [4] but one of them has been given as to exclude the dangers of false implication or the danger for the witness to try to exculpate himself. Looking at the Davies's case if Lawson was present at the scene of the crime and was in fact involved in attacking B there was more possibility for him to try to falsely implicate the appellant so as to lessen the suspicion which would be placed against him. Lawson would have strong motives to try to exculpate himself because he was a party to a common purpose to go and carry out the attack which resulted in the murder of B. There were strong reasons why he would do whatever possible to try and clear himself either by suggesting his innocence or minor participation in the crime. His evidence could be motivated by self interest.

The Davies's case was criticised as being too restrictive and too technical. Granville Williams in his comment "Corroboration of accomplice" observed:

"Lawson was present and knew what was going on yet he was not held to be an accomplice. However if the charge was assault, he would have been an accomplice ---- There was no reason if one thought in terms of a technical rule and a technical defination of the term, but it is regrettable if the supreme tribunal should so restrict its horizon".5

The same sentiments were expressed by A. H. Armitage in the case comment on "Evidence of accomplice and corroboration". He held the view that Lawson should have been treated as an accomplice and his evidence should have been considered 'suspect' or 'tainted' because he was involved in a criminal transaction or he would have been treated as an accomplice who as a co-defendant gives evidence in his own defence. All these criticisms stem from the fact that Lawson actually was a participant in a criminal transaction and therefore his evidence can not be trusted and as pointed out above there is a strong possibility that it could be tainted. Such dangers ought to be guarded against by looking for other evidence which would corroborate Lawson's story.

There are no Zambian cases which interpret the holding in Davies but a look at the cases on the issue of accomplice or the need for corroboration in general can make it possible to interpret what would be the Zambian view.

In the case of Musupi v The People,[7] the appellant was convicted of murder. The principal witnesses for the prosecution were two alleged eye-witnesses who alleged that they and a third man watched the appellant beating the deceased. They said that the appellant who was well-known to them was wearing an army combat uniform belonging to the third man. At the trial it was urged that the behaviour of the witnesses was highly suspicious and that their evidence should not be relied on, however the trial judge accepted the evidence of these witnesses and convicted on its strength. On appeal the court found that the possibility that the witnesses may have been implicated in some way in the offence was self-evident. It was held that once in the circumstances of the case, it is reasonably possible that the witness has a **motive** to give false evidence, the danger of false implication

is present and must be excluded before a conviction can be held to be safe. In this case the fact that the witnesses were present and behaved suspiciously and failed to report the crime to the police led the court to hold that their evidence could not be relied on without corroboration. Comparing this case to that of <u>Davies</u> where Lawson actually participated in the attack, it would be argued that if the case was decided by a Zambian court, the view taken in the case of <u>Musupi</u> would have been adopted. That is, Lawson 's evidence would be treated as a witness who had a motive to give false evidence and this danger would have to be corroborated.

On the other hand if people set out together to commit a felony they are normally treated as co-accused and therefore accomplice to an offence which arises out of the same transaction although as held in the case of <u>Haonga and Ors. v The People</u> [8] the onus lies on the prosecution to prove common design. In the terms of the <u>Haonga's case</u> Lawson would be a co-defendant to the charge of murder and would thereafter be acquitted if the prosecution failed to prove common design. There

are exceptions when the prosecution does not have to prove common design and when the onus shifts to the accused. One of these exceptions is in the case of aggravated robbery. The Penal Code, S.294(2)[9] came as an addition to S.294 providing that a death sentence will be imposed in case of an aggravated robbery where the offensive weapon or instrument used is a firearm unless the court is satisfied by the evidence in the case that the person was not armed with a firearm and

(i) that he was not aware that any of the other persons involved in committing the offence was so armed or

(ii) that he disassociate himself from the offence immediately on becoming so aware

(iii) where the offensive weapon or instrument is not a firearm and grievous harm is done to any person in the course of the offence, unless the court is satisfied by the evidence in

> the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offence. [10]

This addition which also introduced a death penalty for aggravated robbery was brought in 1974. The courts were faced with the dilemma where when two or more people set out together with a common design to commit a robbery, if in the process a firearm was used or any other offensive weapon, whether all the persons involved would be charged and convicted of aggravated robbery. The legislation then introduced the element of the onus shifting to the accused to show that he was not aware that the persons involved or any of them was armed.

The above Penal Code section was illustrated in Banda (N) v The People [11] although dealing with the offence of aggravated robbery had facts almost similar to those in Davies's case. In that case the appellant was convicted of aggravated robbery involving the carrying of a firearm and was sentenced

to death. It was alleged that he and four other men had robbed a house and stole property and had in the process used violence against the servant of the occupier. A firearm was discovered during the course of investigation but on appeal the defence argued that a death penalty should not have been imposed because there was no evidence that the appellant knew that one of his companions was carrying a fire-arm. It was held on appeal that where an aggravated robbery is committed by a number of persons, one of whom is proved to have carried a firearm, that one must be sentenced to death and the others must also be sentenced to death unless they can prove that they were not aware that any of the other persons involved in committing the offence was so armed or that they dissociated themselves from the offence immediately on becoming so aware. The court further held that before this position arises, all the people involved must of course be guilty of aggravated robbery; The onus in this case lies on the appellant to satisfy the court that he was not aware that a firearm was carried or that he dissociated himself from the offence immediately on becoming so aware.

From the above cases, it is evident that in Zambia, people who set out with a common purpose to commit a felony, whether in cases of aggravated robbery or any other offences would be co-defendant to that offence until the contrary is proved. Applying this reasoning to the Davies's case, there is no doubt that Lawson would have been a co-defendant and therefore his evidence would be highly dangerous to rely on without corroboration. The position should be as Cross stated it in the book Cross on Evidence at page 176 that:

> "A person is an accomplice within the common law rule who is charged in relation to the same events as those founding the charge against the accused with an offence (whether the same offence or not) of such a character, that he would be, if convicted thereof, liable to such punishment, as might possibly tempt that person to exaggerate or fabricate evidence as to the guilt of the accused". 12

If Lawson was charged with assault, the offence would be founded on the same events or same facts leading to the murder for which the appellant was charged. He would therefore be

an accomplice by Cross's definition. In the case of Phiri (E) and Ors. v The People, [13] Baron D.C.J observed that a true accomplice, is so familiar with the circumstances of the offence, that he is in a position to put forward a very plausible story which in the nature of things 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 companion. I find this observation correct and looking at the facts in Davies, Lawson was very familiar with the circumstances of the case that he was capable of putting up an unshakeable story and was also in a position to conceal the identity of the true culprit. On the whole, Davies's case was decided wrongly and the principle enunciated in it would not be followed in Zambia because of the already existing cases which seem to take the opposite view.

(i) RECEIVERS

Another category of accomplices of stolen goods are receivers of stolen property. It was held

in the case of <u>Tembo (C) v The People</u> [14] that where a person is found in possession of stolen property he must be regarded as an accomplice unless, on the whole of the evidence the court finds that he is not an accomplice. It is, however, necessary for the court to be put on enquiry, because everyone who has possession of stolen property does not have to be an accomplice. He might be an innocent purchaser. It was therefore decided in the case of <u>Kilundo v The People</u> [15] that the court must decide whether the part played by the witness makes him an accomplice. It was found that while in many cases the circumstances are such that the mere possession of stolen property should put the court on its enquiry, there are others in which it would be absurd to regard a witness with suspicion simply because of the fact of possession. Under the Penal Code of Zambia [16] persons found with stolen property are charged with the offence of receiving stolen property knowing or having reason to believe the same to have been feloniously stolen. The element of knowledge is essential in determining whether

the person involved is an accomplice, that is, that he knew or would have known or suspected that the property was stolen. This issue can be determined by examining the circumstances in which the property was received, if bought, the value given for it and the person conducting the sale or transfer, whether the person had notice that the property was illegally obtained from the surrounding circumstances.

(ii) PATIENT IN ABORTION CASE

A patient in an abortion case may be an accomplice in a case where the doctor is charged with unlawful abortion. In the case of The People v Gulshan and Ors. [17] a doctor was charged of attempting to procure abortion contrary to S.152 of the Penal Code. The female involved as a patient was held to be an accomplice and the court stated that her evidence must be treated with caution. In cases of this nature the patient is an active participant in securing the abortion and would sometimes be a co-defendant if not charged separately.

(iii) <u>INDEMNIFIED ACCOMPLICE</u>

An indemnified accomplice is one who has been granted a pardon from prosecution and is in turn called as a state witness. This issue came out strongly in the case of <u>Shamwana and Ors. v The People</u> when PW 5 was granted an indemnity from prosecution for his complicity in the coup plot. He was thereafter called as a state witness. At the trial the judge found that PW 5 was an accomplice but that he was a competent witness to give evidence. This raised a point for contention on appeal and the defence submitted that PW5's evidence should have been excluded on legal or ethical grounds since he gave evidence after bargaining with the prosecution about his release and indemnity. They contended that he was not a free agent as failure to give evidence would relegate him to his former position which would have meant his being redetained and prosecuted. In its judgment, the Supreme Court observed that the practice of granting immunity from prosecution or further prosecution has received condemnation

on ethical grounds. It stated that such a witness should not be called by the prosecution except in certain limited circumstances. The court proceeded to enumerate circumstances in which such witness may be called stating that:

> "Those limited circumstances are that, where the prosecution are minded to call such accomplice as a witness, it is settled practice (a) to omit him from the indictment or (b) to take his plea of guilty on arraignment, or during the trial, if he withdraws his pleas of Not Guilty, or before calling him either (c) to offer no evidence and permit his acquittal; or (d) to enter a nolle prosequi.
>
> ---
>
> Further an accomplice who is granted immunity from prosecution, or further prosecution, by way of a pardon or an indemnity, remains a competent witness for the prosecution---------
>
> ---
>
> The critical issue is whether a trial judge should as a matter of discretion, exclude the evidence of such witness. If and only if the inducement is very powerful, the judge may decide to exercise his discretion, but when doing so, he must take into account all the factors, including those affecting the public. It is in the interest of the public that criminals should be brought to justice, and the more serious the crime, the greater the need for justice to be done. In view of the potent factor as to public interest, it will but rarely happen that a trial judge will decide to exercise his discretion against admission of such evidence".[18]

The case above gives a clear guide line as to when an indemnified accomplice may be called to give evidence. It was however held in the case of Chipango and Ors. v The People [19] that the court must approach such evidence with caution and look for corroboration. There are many dangers that may be posed by a witness of this nature. After being granted indemnity he might feel obliged to give favourable evidence for the prosecutions so as to assist it in securing a conviction. The dangers which have to be guarded against in case of a witness of this nature may be the same as those of a true accomplice which are discussed earlier in the Chapter. An indemnified accomplice may be so familiar with the circumstances of the case and as stated in the case of Phiri (E) and Ors. v The People he will be capable of giving a very plausible story, after all the prosecution would only grant an indemnity to a person whose evidence is very vital to the case and in some cases where without such evidence the prosecution of the case may be impossible.

It was held in the case of <u>Shamvana</u> that an indemnity has the same effect as and is to all intents and purposes a pardon. This may on the other hand lead to an accomplice being truthful, after all he has nothing to lose by telling the truth. He would not be prosecuted even if he gives evidence which turns out to be unfavourable to the prosecution. The argument was put up by the defence in the <u>Shamvana case</u> that an indemnified accomplice is not a free agent, as failure to give evidence would mean his being re-detained and prosecuted. This was held to be misconceived because of the above given factor that indemnity has the same effect as a pardon.

What is important in cases of this nature is for the prosecution to disclose to the court that the witness has been granted an indemnity and this will assist the judge in assessing his evidence and deciding what weight to attach to it. If the prosecution fails to disclose this it may be a factor which may be considered to be prejudicial to the

case as the magistrate may fail to address himself to the real dangers that the witness may pose.

(vi) <u>POLICE SPY</u>

A police spy has been held not to fall under the category of an accomplice and as the law stands at present, it seems established that a police spy does not need corroboration. This principle was enunciated in the cases of <u>R v Bickley</u> [20] and <u>R v Mullins.</u> [21] In the <u>Mullins</u> case it was stated that a woman who visits a suspected abortionist and pretends that she wishes him to procure her abortion is not an accomplice.

On the other hand if the police were to entice a person to commit a crime and then turned around and prosecuted him for the offence, this would constitute a grave injustice. Entrapment is not a defence in law, it goes to mitigate sentence. Taking the above case for example, if the police spy went to a suspected abortionist and begged him to procure her abortion, if he accepted after persistent importunity or undue insistence or pressure that overbears his will, it will not be fair to prosecute the accused.

This acceptance would have been obtained through incitement and persuasion. However, a police spy seems to have gained all the protection and although the courts have frowned upon the police obtaining evidence of the offence by pretending to take part in it, this has so far not been held improper. It was stated in the case of Chizoka v Attorney General [22] that sources of police information are a judicially recognized class of evidence on the ground of public policy, unless the production is required to establish innocence in a criminal trial. It would seem therefore that the police are not even expected to disclose the mode of their investigation and the courts would not therefore query the way it was obtained. This also ties in with the State which acknowledges protection of sources of information on the ground of public interest.

The attitude taken by the courts could be deducted from the following cases. In the case of Sheddon v Stevenson [23] the appellant, a known prostitute was loitering in the street when a police officer in a civilian car stopped

near her at the edge of the pavement. She opened the car door and said to him "Do you want business?". After some bargaining she got in the front passenger seat and they drove a short distance. When she became suspicious, he told her who he was, cautioned her and told her she was being arrested for soliciting. She was convicted of the offence. She appealed on the ground that the police officer had by his action incited or encouraged her to commit an offence. It was held that the procedure used by the police-officer was not improper. A similar problem arose in the case of R v Murphy [24] when a police officer, to obtain evidence from a man suspected of disclosing information useful to an enemy, pretended to be a member of a subversive organisation. It was held that evidence produced by police participation in an offence need not, because of its nature be ruled out of account, and that it depended on the circumstances whether or not it was justified. The case laid down the principle by stating that:

> "It does seem to me that provided a police-officer is acting under the orders of his superior and the superior officer genuinely thinks

> that the circumstances in the locality necessitate action of this sort, then in my judgment there is nothing wrong in that practice being employed".25

It was therefore held that the police officer's participation in the offence did not make him an accomplice and his evidence did not require corroboration.

What actually needs to be guarded against, is the police officer being involved in the offence. That is being an actual participant and thereafter pretending to be on police duty, for instance where he solicits for bribes and after he realises that he may be discovered he pretends to be on police duties. This problem would be solved by compliance to the holding in the above case that he must be acting under orders from his superior and so his mission to investigate the offence would be known by the proper authorities. It could be argued that investigation can reach a stage when the police are the ones creating the offence.

On the other hand although the courts have taken the above view, excluding a police spy from the category of accomplice I would still think that depending on the circumstances of the case, the courts should sometimes take this type of evidence with caution. It was held in the case of the People v Mvchona[26] that the duty of the police is not to secure conviction but to investigate the case and lay all the evidence before the court. This is the duty as required by the courts, however when one looks at the general trend of prosecution, it would seem that the police are normally out to secure a conviction, more so of informers who may sometimes give information which is likely to please their masters. This may be more common in political cases where the informers are part of the political system and are mainly interested in victimising or persecuting non-party members or those who may be regarded as political dissidents. One therefore has to draw a distinction between a professional police spy or investigator and the informers who are normally recruited through the political machinery.

I would say that the courts should examine the circumstances through which the information was obtained to determine whether that witness would be treated as an accomplice or not.

(v) WITNESS FOR DEFENCE

It has been held in some cases that the accomplice witness rule does not apply to witnesses called by the defence. The defence does not bear the onus of proof, all it does is to raise the issue. In the Australian case of Philemon Mdhluli and Others v R [27] it was held that the accomplice rule does no apply to witnesses called by the defence. The same view was held in the cases of R v Barnes and R v Richards [28] where the evidence adduced was that of a woman prisoner and it was held that there was no necessity for a warning since it was not evidence called by the prosecution to act upon, and therefore the issue of accomplice evidence did not arise.

The case of R v Prater [29] did not follow the principle and reasoning in the above cases.

In Prater's case the appellant was convicted on the evidence given by a co-accused who was considered to be an accomplice and another accomplice. The court found that whether a witness is called by the defence or by the prosecution, he may be a witness with a purpose of his own to serve and therefore the court should give the warning of the danger of acting on that witness's evidence without corroboration.

The fact that a witness poses a problem or a danger does not depend on who calls him but would depend on the type of witness, his role in regard to the crime committed and nature of the evidence he gives. It is because the court wants to rule out any dangers for instance of false implication or a motive to exculpate himself or any other dangers would it look for corroboration or warns itself. So long as a witness appears to the court to pose any danger then it has to be **cautious** when dealing with that evidence. It would therefore be logical that whether the evidence comes from the witnesses for the prosecution or the defence, the court ought to be cautious and rule out any dangers in order

to arrive at a proper conclusion. Although a witness may not fall into the category of accomplice <u>per se</u> he falls into the category of what is termed as a witness with an interest of his own to serve and as will be discussed later these two categories should be treated in the same way. If all the court is interested in is to arrive at a fair trial, then it should evaluate all the evidence irrespective of where it comes from and rule out all the dangers that may be posed. The Zambian position although it has not been spelt out would no doubt follow the reasoning or the principle as spelt out in the cases of <u>Musupi v The People</u> [30] and <u>Chimbo and Others v The People</u> [31] that in every case the danger of false implication must be exluded before a conviction can be held to be safe. If the witness is called by the defence but poses such danger, there is no doubt that the courts would exclude that danger by warning itself or looking for corroboration before acting on such evidence.

(vi) <u>WITNESS WITH INTEREST TO SERVE</u>

The term witness who may have an interest of his own to serve has been used by the Zambian

courts in more cases than is used in the case of English courts. The courts have added by judicial practice a new category of witnesses who require corroboration. A witness who may have an interest of his own to serve has been held to be a witness who for certain reasons may have a motive to give false evidence or to falsely implicate the accused. The instances when a witness has been held to have an interest of his own to serve can only be understood by looking at various cases.

In the case of Tembo (C) v The People [32] the appellant was convicted of theft of a motor vehicle. The conviction was founded entirely on the evidence of a prosecution witness in whose possession the stolen vehicle was found. The court found that the witness was an accomplice or a person with a possible interest to exculpate himself and therefore needed corroboration. The position was the same in the cases of Wamundila v The People [33] and Choka v The People [34] where the prosecution witnesses were found in possession of the stolen property. In the case of Mwambona v The People, [35] P.W.2 was found in possession of

a stolen oxen. He was held to be a witness with an interest of his own to serve and so was his herdsman P.W.3. In the case of Nchepeshi v The People [36] the appellant was convicted of murder; he and the deceased were both fishermen who lived about a mile apart on the banks of a river. P.W.s 7 and 8 who were called as prosecution witnesses told the court that they had been away from their home for several weeks and when they returned they saw the appellant in the yard outside their house; he appeared to be burying something with a hoe. They said that they asked the appellant what he was burying, and that he tried to run away; they stopped him and called some people from the river. When those people came they took the hoe from the appellant and started to dig up what was buried; and they saw that it was a body. They went and called the Police. During the trial counsel for the appellant argued that these were witnesses with a possible interest of their own to serve. Commenting on this the court held that:

> "The critical consideration is not whether a witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category, into which he falls or because of the particular circumstances of the case, may have a

> motive to give false evidence; once in the circumstances of the case it is reasonably possible that the witness has a motive to give false evidence the danger of false implication is present and must be excluded before a conviction can be held to be safe; the witness then falls into the general category of witnesses whose evidence it is dangerous to accept without corroboration or support". [37]

In this case the Supreme Court agreed with the finding of the trial judge that the witnesses were not witnesses with interests of their own to serve. The reasons given were that the dismembered body of the deceased was found in the yard of P.W.7 and 8's house and the witnesses would be unlikely to bury the deceased in their own yard, and also the fact that the appellant knew that the witnesses were away, it was more likely that he would have buried the body in their yard. This shows that before deciding on whether a witness has or may have an interest of his own to serve, the court ought to examine the circumstances of the whole case, and determine whether the witness would have a possible motive to give false evidence. This was laid down in the case of Likando v The People [38].

Although the term witness with an interest of his own to serve has been used several times, it is not very clear whether the category of such witnesses has received its own independent classification under witnesses whose evidence requires corroboration. This point will be illustrated by looking at the various Zambian Cases.

Firstly the terms 'witness with an interest of his own to serve' and 'accomplice' have been used so inter changeably that one does not know whether it is a way of showing the difference or similarity between the two types of witnesses. In some cases it gives the impression that the court has been unable to decide whether the witness is an accomplice or is one with an interest of his own to serve, for instance in the case of Tembo (C) v The People the court's holding was as follows:

> "There was no evidence, apart from that of James, to show that the car in question was at all material times ever in the possession of the appellant. As already indicated, the person in whose actual possession the car had been found was James who was released by the police purely on the strength of his own word, namely, that the ownership of the car vested in the appellant. This, therefore, places James in the category of an accomplice or, at the very least, a person with a possible interest of his own to serve". 39

This case seems to imply that if James was not an accomplice, then he was a witness with an interest of his own to serve. This would mean therefore that the two types of witnesses are distinguishable. The same phraseology was used in the case of Wamundila v The People [40] when the court held that where there is no corroboration of the evidence of an accomplice or of a witness with an interest of his own to serve, it is unsafe to convict on such evidence.

Is there therefore a distinction between an accomplice and a witness with an interest of his own to serve? Musupi v The People [41] holds that although there is a distinction between them, such distinction is irrelevant so far as the court's approach to their evidence is concerned; the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded. So, as far as Musupi's case is concerned the difference exists in termilogy but as far as the approach or treatment of the evidence given by them is concerned they are the same. Choka v The People [42] holds that a witness

with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration. In the Musupi's case the court expressed its fears that the tendency to use the expression "witness with an interest (or purpose) of his own to serve" carries with it the danger of losing sight of the real issue. It is evident therefore, that there is no distinction between the two types of witnesses as far as the approach to their evidence is concerned.

The distinction between the two witnesses was vividly given in the Musupi case as follows:

> "There is of course a distinction between a witness with a purpose of his own to serve and an accomplice; the accomplice certainly may have such a purpose, but the converse is not true - a witness with a purpose of his own to serve is not necessarily an accomplice. But this is an irrelevant distinction, the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded. And as Lord Hailsham pointed out, the categories of suspect witnesses are not closed; for instance, today, the same principle must be applied to the approach to a witness with a possible bias, such as a relative or an employee". 43

The distinction therefore does exist, in that an accomplice may have an interest of his own to serve but a witness with an interest of his own to serve

does not necessarily have to be an accomplice or is not at all times an accomplice. But despite this distinction the approach to their evidence is the same, that is the need to warn the jury, or for the court to warn itself and the need to look for corroboration. For practical purposes it is no longer law in Zambia for the court to warn itself since the Phiri case. The rule is to look for something more. A witness with an interest of his own to serve falls in a category of its own where he is found not to be an accomplice in the strict sense. The court in Nchepenshi' case stated that it must be remembered also that the categories of witnesses whose evidence it is dangerous to accept without corroboration or support are special categories such as accomplices, complainants in sexual cases, witnesses in identification cases, witnesses with possible interests of their own to serve and so on. This sort of statement shows that witnesses with interests of their own to serve are now recognized as forming their own separate category and should not always be lumped under the category of accomplices.

The approach taken by the Zambian courts in bringing the category of "witnesses with an interest of his own to serve" has helped in making the law of corroboration more flexible. The courts do not have to restrict the requirement for corroborative evidence to cases of accomplices but to other cases where because of the circumstances of the case a witness may be 'suspect'. Suspect is another term which is used in general terms to all types of witnesses whose evidence may be taken with caution.

What one would wish to see is a situation where the courts will cease to debate whether a certain witness is an accomplice, a witness with an interest of his own to serve and so on and look rather for one ground that is whether the witness has a motive to give false evidence. The term motive may be better than interest to serve but then interest to serve is wider and includes motive. This was also recommended in the Criminal Law Revision Committee.[44]

The Court may use terms like suspect witness or witness with a motive. **The classification of**

accomplices or witnesses with interests of their own to serve makes the law too technical and the debate as to what category one belongs to is a waste of time. The court should only consider issues like, who is the witness before the court, that is whether he is a relative of the accused, a participant in the crime, a wife and so on. What would be his motive in giving such evidence. Then the court will proceed to guard against the danger of his evidence. This approach will make it possible for the courts to arrive at a proper decision without any formalities and technicalities. The development in the law is welcome, it improves fact finding. It was observed in the case of Vetrovec v The Queen and Gaja after the court had surveyed the justification for a special rule for accomplice and found the rational insufficient that:

> "There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices is to fasten upon this branch of the law of evidence a blind and empty formalism". 45

This type of observation seems to require all witnesses to be treated the same and then examine

whether a particular witness may have a motive as already indicated.

(vii) WITNESS WITH BIAS

A witness with bias is a type of witness about whom the court may require to take caution or warn itself of convicting without corroboration. In the case of Shamwana and Others v The People,[46] P.W.68 a state witness was found to be biased against A6 (a Zairean National) and it was found that this bias stemmed out of the fact that A6 had formed a splinter political party which was abusing P.W. 68's political party's name by indulging in activities inimical to Zambia which consisted of plotting to overthrow the Zambia Government. P.W.68 said to the court that he would not be sorry to see A6 in trouble because of what he had done. The court found that in light of this bias, it was desirable for the trial judge to warn himself and relying on the principle in Mwambona v The People.[47] The Court held that though a witness with a bias is not to be regarded as a witness with purpose of his own to serve, nevertheless his evidence should be treated with caution and suspicion. The court

further observed that provided a court is alive to the bias or possible bias of a witness and makes due allowance for the same, it may convict even if such evidence is unsupported. In the Mwambona case it was P.W.3 an employee of P.W.2 who was held to be a witness with bias. The court found that an employee may in appropriate cases, be regarded as a witness with a possible bias, just as one might so regard a close relative, and in such cases one would approach such evidence with caution and suspicion. However, the court held that a conviction without corroboration is possible.

My comments in regard to a witness with bias would be the same as those made already. Why categorize such witnesses? Would a witness with bias be different from a witness with an interest of his own to serve? I would think that a witness with bias may in some instances pose more danger than any other type of witness because he may as much as possible try to implicate the accused either because he dislikes him so much, just as in the case of P.W.68 in the Shamwana's case or because he wants to protect some one. If a witness is a

relative or employee there might be more reason for him to give false evidence because although he is not connected with the offence his position in relation to the people connected with the offence is unique. I think the use of all these different categories may result into the court losing sight of the issue, which is mainly as already discussed, whether the witness may have a motive to give the evidence, the way he does or did. I recommend the court to use one terminology which is inclusive.

(viii) INNOCENT ACCOMPLICE

In its efforts to expand the meaning of accomplice and to be able to deal with different circumstances the courts have come out with what they have termed 'innocent accomplice' and 'innocent suspect witness'. These terms are illustrated in the cases of Chimbo and Ors. V The People [48] and Shamwana and Ors. v The People.[49] In the Chimbo's case the appellants were convicted of murder. They were alleged to have taken the deceased and his wife from their home, severely beaten them up and left them

in the bush, naked, tied up and gagged. The deceased was rendered unconscious and later died. The prosecution witnesses were the deceased's wife P.W.2 who identified the appellants as the culprits, and the driver of the truck P.W4 who transported the appellants, a self confessed accomplice. The only evidence connecting the appellants with the commission of the offence came from P.W.2 and P.W.4. P.W.4 was found to be a clear accomplice and the court sought to find corroboration from P.W.2. Counsel for the defence pointed out and the court did hold that P.W.2 was a suspect witness for the reason that she may have had a motive to falsely implicate the appellants. It was argued that P.W.2 and P.W.4 should be placed in the same category to the extent that the approach to their evidence would be similar since the danger to be guarded against was exactly the same. That would mean placing P.W4 a true accomplice and P.W.2 a suspect witness in the same category. On appeal the Supreme Court holding that one suspect witness can not corroborate another suspect witness (an issue to be discussed later) stated that this could only

be possible where one is an "innocent suspect witness". An illustration of this distinction was given by the court, that an innocent bystander whose evidence of identification is not free from the danger of an honest mistake would be an innocent suspect. P.W.2 was held not to be an innocent suspect since she might have had the same dangerous motive of false implication. <u>The case of Shamwana and Ors. v The People</u> involved prosecution witnesses who were tricked at the time of their recruitment that they were to be farm labourers. They were given arms and trained and they later learnt that the main purpose of their recruitment was to carry out a coup to overthrow the Zambian Government. When called to testify against the accused persons, the trial judge found these witnesses to be 'innocent accomplices' since they had been tricked. On appeal the Supreme Court discussing this issue found that those who deserted after finding out the motive of their recruitment were obviously innocent accomplices but those who remained and received arms must have become aware of their altered position and were not innocent accomplices.

As illustrated by the Chimbo and Shamwana cases, a witness could be an innocent suspect or innocent accomplice and the courts can decide on that, after examining the circumstances surrounding the case but mainly by deciding on the principle that he does not pose the danger of falsely implicating others.

(b) DUTY TO DECIDE ON STATUS OF WITNESS

As has been explored, the list of witnesses who either fall under the category of accomplices or not is inexhaustible. The Zambian Courts have as much as possible tried to keep the rule of deciding the status of a witness and then proceeded to determine how to deal with such witnesses. It was held in the case of Chimbo and Ors. v The People [50] that it is the duty of the trial judge if the circumstances so dictate to make a finding regarding the status of any particular witness. It has been held that, the Chimbo's case did not state that the status of every witness must be pronounced by the court but the need would only arise when the circumstances are such as to put the court on its inquiry. [51]

The case of Nchepeshi v The People lays out the proper principle as follows:

> "(i) A court cannot be called upon to address its mind to the question whether or not a witness falls into the category of witnesses whose evidence it is dangerous to accept without corroboration or support unless there is some evidence 'fit to be left to a jury', which raises that issue. The mere assertion by the accused that it was the witness and not the accused who was the culprit is not sufficient without more to raise the issue.
>
> (ii) Once the issue is properly raised, it is incumbent upon the court to consider it and rule upon it, the court should make a positive finding whether or not the witness is one whose evidence it is dangerous to accept without corroboration or support.
>
> (iii) The mere rising of the issue does not render the case a corroboration case as distinct from a straight forward issue of credibility, even though the issue has been raised, it is still perfectly proper for the court, having considered all the evidence and circumstances of the case, to conclude that the witness is not one who falls into the category of witnesses whose evidence it is dangerous to accept without corroboration or support". 52

The court therefore has to make a specific finding as to the status of the witness either on its own accord or when the issue has been raised by another person. It may sometimes be that the witness would have confessed to the commission of the offence or to participation in the commission of the offence,

and in this respect the status of the witness will be determined at the beginning of the trial. In other instances the prosecution may assist the court in determining the status of the witness by providing the relevant information. It was held in the case of R v Booth a New Zealand case that:

> "In order for the jury to assess the degree of danger involved in evaluating his uncorroborated testimony, it is necessary for the crown, to disclose whether the witness has for instance been offered or granted a pardon, whether it is not intended to proceed against him or whether in fact he has been charged with an offence arising out of or related to the matter with which the accused is charged. Such evidence in my opinion goes to the witness's status as accomplice, and that is a relevant matter for the jury to consider. It is particularly relevant in regard to the extent to which the evidence of that accomplice can be called upon to found a conviction of the accused". [53]

In the cases of Chipango and Muyangwa [54] the prosecution witnesses were given the indemnities by the D.P.P.; however, the judges in both cases failed or declined to treat these witnesses as accomplices. This course was greatly criticized on appeal and the Supreme Court stated that once the prosecution puts forward a witness as one who may have an interest to exculpate himself, the court cannot decline to

treat him as such without some very positive reasons. It is therefore incumbent on the court to take into account the recommendation of the prosecution regarding certain witnesses. In the case of Shamwana and Ors. v The People one of the witnesses P.W.5 was given an indemnity from prosecution and then presented as a prosecution witness. The court in addition to accepting the principles already stated on this matter, stated that the nature of inducement given to the witness must also be disclosed to enable the court to decide how powerful it has been and whether it can have an effect on the nature of the evidence given.

Although the court may in some instances have to rely greatly on the assistance given by the prosecution when providing the relevant information to enable it to determine the status of the witness, it may be noted however that in most cases it is the defence which may raise the issue regarding the status of the witness and the court should then rule on the issue when it is raised.

The court when deciding on the status of a witness with an interest of his own to serve must make a specific finding that his testimony should

be regarded with the same caution as that of an accomplice. This was decided in the case of Mwambona v The People.[55] This takes us back to the comments already made about the approach Zambian courts have taken towards the evidence given by an accomplice and a witness with an interest of his own to serve. The two types of witnesses have been treated as inseparable, and when ever the courts make a ruling or decision affecting an accomplice, it takes the opportunity to mention that it should be extended to a witness with an interest of his own to serve. In this respect however I would have preferred a position where if the court makes a specific finding that the witness is one with an interest of his own to serve it should then warn itself of the requirement for corroboration and not that his evidence be treated as that of an accomplice.

From the above, my own observation is that a precise definition of who an accomplice is should be given since this still seems not to be conclusive.

(c) THE DUTY TO WARN OF THE DANGERS OF CONVICTING ON UNCORROBORATED EVIDENCE OF ACCOMPLICE

(i) Is Rule peremptory or discretionary?

After the judge has determined on the status of the witness, that is if he has decided that the witness is an accomplice or a witness whose evidence requires corroboration, he proceeds to warn the jury (if it is in England) or himself of the dangers of convicting on the evidence of such witness without corroboration. The corroboration warning in Zambia is derived from the historical developments in England regarding this rule. The position was well reviewed by Baron, D.C.J. in the case of Phiri (E) and Ors. v The People.[56] Outlining the pre-1966 law in England, he stated that prior to that date the corroboration warning was strictly a rule of practice. He cited the case of R v Stubbs which stipulated as follows:

> "It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid; and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation".[57]

Baron, D.C.J. observed that the rule resulted in harsh results, particularly where the jury was not properly directed and by the nineteenth century judges were seeking to prevent "regrettable results by their directions to the juries and they were telling them that:

> "although it was legally competent for them to act on the unconfirmed testimony of an accomplice, it was dangerous to do so, and that they should not convict unless the accomplice was confirmed". 58

The case of R v Baskerville extended what was normally a rule of practice to that of a rule of law by setting out a principle which was later to be a guideline to the principle of accomplice warning. The case stated as follows:

> "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and, in the discretion of the judge to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence.
>
> This rule of practice has become virtually equivalent to a rule of law". 59

The principle in Baskerville case was followed in the cases of Machobane v The People [60] and Davies v D.P.P. [61] The holding became an authoritative pronouncement on the rule of law in relation to giving of the warning. Approving the principle in Baskerville, the court held that in a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution the judge must warn the jury that although they might convict on such evidence, it is dangerous to do so unless it is corroborated, and that although this was a rule of practice it now had the force of a rule of law. The case of Phiri (E) commenting on the holding in Davies stated:

> "There has been a more important difference, which was finally settled in Davies between what Lord Simonds called the 'discretionary' and the peremptory schools of thought; the one regarded an accomplice warning as being within the judge's discretion to give or to withhold, while the other; after 1907 and particularly after Baskerville, considered that what had been no more than a practice manifested 'an increasing tendency to assume the hard lineaments of a rule of law' although in some decisions even after Baskerville the 'discretionary' view still found expression. Davies settled the difference in favour of the peremptory school, specifically approving Baskerville on this point". [62]

The principle as stated above is what applies in Zambia today. This law is derived from the Davies's holding which stated as follows:

> "In a criminal trial, where a person who was an accomplice gave evidence on behalf of the prosecution, it was the duty of the judge to warn the jury that, although they might convict on his evidence, it was dangerous to do so unless it was corroborated, this rule although a rule of practice now had the force of a rule of law and where the judge failed to warn the jury in accordance with it, the conviction would be quashed, even if, in fact there was ample corroboration of the evidence of the accomplice, unless the appellate court could apply the proviso to S.4(1) of the Criminal Appeal Act, 1907".[63]

This has been the guiding principle both in England and in Zambia. It had been followed in several Zambian cases,[64] and in England it is what has been termed in the case of D.P.P. v Kilbourne the customary warning to the jury about corroboration. It is therefore peremptory or customary for the judge to warn himself and is now a recognized principle and has the force of a rule of law.

(ii) How to Warn

The issue has been, how does the judge warn himself of these dangers or what directions does

he give to the jury. Under English law the position is stated in the case of R v Savory [65] that the direction which must be given in such a case is a clear and plain direction on the desirability of corroboration. In the case of R v Price [66] the court held that the warning was not sufficiently precise, in that it failed to refer to the danger of convicting on the evidence of an accomplice and to make it clear that the jury should not act on the patient's uncorroborated evidence unless convinced that she was speaking the truth. The last aspect regarding the truth of the statement was criticized in Phiri's case as will be reviewed later. What emerges from these cases is that under English law the courts need only warn the jury of the dangers of convicting on the uncorroborated evidence of an accomplice and as stated in the case of R v O'Reilly [67] the rule that the jury must be warned does not mean that there has to be some legalistic ritual to be automatifally recited by the judge or that some particular form of words or incantation must be used, and if not, the summing - up is faulty and the conviction must be quashed. The case further held

that even failure to use the word corroboration is not fatal.

The Zambian position is different from that related above. The case of Phiri (E) states that when the judge warns himself of the dangers of convicting on the uncorroborated evidence of an accomplice, the dangers he is guarding against must be spelt out and these must be tailor-made to suit the circumstances of the particular case. Baron D.C.J. defending the stand taken by the Zambian Courts stated as follows:

> "While therefore there are certain principles common to all corroboration cases, each category of case has its own inherent dangers, and different cases within each category may depending on their facts, give rise to different dangers. It is therefore of little assistance to a jury to be told that it is dangerous to convict on the uncorroborated evidence of an accomplice or a prosecutrix as the case may be, unless the dangers and the reasons for the warning are explained. How otherwise can the jury decide whether the dangers have been excluded? Of course, as Lord Hailsham said in Kilbourne (5) referring with approval to the opinions expressed in D.P.P. v Hester (II) it is wrong for a judge to confuse the jury with a general if learned disquisition on the law. His summing up should be tailor made to suit the circumstances of the particular case". 68

The judge explained in that case therefore that although there is no magic formula to be used, the judge should explain the dangers in the particular case and give also the circumstances in which the jury can convict despite the absence of corroboration. The judge stated that the reason for taking each case differently is because the possible motives of the accomplice *may be various, and may vary from case to case and that is why the direction to the jury should* be tailor-made to suit the circumstances of the case. Another reason is for the judge to rule out the possibility of a fabricated story. The judge must be satisfied that the circumstances are such as to exclude that danger. In the Phiri (E)'s case the Director of Public Prosecutions wanting to follow the English position argued that an experienced judge must be assumed to know what the dangers are and to have heeded from, and that it is not necessary for him to spell them out or to explain in his judgment what circumstances have satisfied him that they have been excluded. On this, Baron D.C.J. commented:

> "These are untenable propositions. Even experienced judges can make mistakes; unless the judge's reasoning is disclosed it is impossible for an appellate court to know whether

the decision was influenced by
a misdirection of law or fact.
The judge's direction to a jury
is before the appellate court .---

A magistrate or even a judge may
be mistaken as to what precisely
are the dangers of convicting with-
out corroboration in a particular
case, before him; or he may be
mistaken in concluding that the
circumstances which are admittedly
present can safely be regarded as
excluding the dangers. But unless
the court's mind is revealed, no
one can say whether it proceeded from
erroneous premises or on false logic.
It is essential that the judgment
state, just as a judge would state
to a jury, the particular dangers
inherent in the circumstances of the
particular case; and the judgment
should explain what are the circum-
stances which satisfy the court that
the particular dangers have been excluded,
and why - just as the judge's direction
to a jury would explain what circumstances
are capable of so satisfying them. Of
course, a jury does not give reasons for
being so satisfied, but a judge
sitting alone must".69

The quotation above gives a brief summary of the Zambian position as regards the corroboration warning. This position was again applied in the recent case of Shamwana and Ors. v The People[70] and describing the English position as a liberal attitude emphasised the need for the judge to

reveal his mind on the matter by setting out the reasons for his conclusion.

The need to exclude the dangers has been distinguished from the need to give a corroboration warning. It was stated again in the case of Phiri (E) and Ors that:

> "There is a distinction, between the rule of practice, which now has the force of a rule of law, that a warning must be given of the dangers of convicting on uncorroborated accomplice evidence, and the law as to the circumstances in which a proper warning having in fact been given, the dangers may safely be regarded as having been excluded. The rules concerning conviction in the absence of corroboration are rules of law as developed by the decisions of the court".[71]

The position taken by the Zambian Courts requires the judge to reveal the dangers involved and whether these dangers have been excluded. It has been seen that in many cases for instance Magistrates remind themselves of the necessity for the prosecution to prove the case beyond reasonable doubt but when they come to analyse the evidence they make mistakes as to who bears this burden. In turn therefore, as regards the need to identify the dangers involved and ensuring that they have

been excluded, the judge might focus on aspects which are not really in issue. The appellate court should therefore be able to analyse the case and see whether the court arrived at a logical and proper conclusion.

In the case of Mweemba and Anor. v The People [72] the appellants were convicted of rape. The Magistrate commenced his judgment by warning himself of the danger of convicting on the uncorroborated evidence of the complainant, but did not in fact address himself to the question of corroboration. He did not say whether he found corroboration, and if so, what evidence he regarded as such, or whether he found there was no corroboration but that it was safe to convict without it. When the case went on appeal it was held that it is idle for a Magistrate religiously to recite the formula concerning the dangers of convicting on uncorroborated evidence and then proceed to ignore it.

(iii) Failure to warn and Application of the proviso

Since the need for the judge to warn himself of the dangers of convicting on uncorroborated

evidence of an accomplice has been held to be peremptory, certain consequences will follow where the judge fails to warn himself. It has been held both by English and Zambian Courts that where a judge fails to warn himself or the jury a conviction should be quashed even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso. [73]

The Zambian position, regarding the application of the proviso has been similar to the English position. In England the proviso is stipulated under S.4(1) of the Criminal Appeal Act, 1907. The Zambia Supreme Court Act, No. 41 of 1973 repealed and replaced The Court of Appeal for Zambia Act, Cap. 52. The present Act, stipulates as follows: -

> "S.15(1): On an appeal against conviction the court shall allow the appeal if it is of the opinion that the judgment of the Court before which the appellant was convicted or of the High Court in exercise of its appellate jurisdiction should be set aside -
>
> (a) On the ground that in all the circumstances of the case it is unsafe or unsatisfactory; or
>
> (b) ---------------------------------
>
> (c) ---------------------------------

> Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred". [74]

This section replaced and repealed S.14(1) of the former Act and for our present purposes the important amendment was the deletion of the former test "It is unreasonable or cannot be supported having regard to the evidence" and the substitution of the new test "in all the circumstances of the case it is unsafe or unsatisfactory". I shall now proceed to examine how the proviso has been applied in Zambian cases.

As it has already been mentioned the proviso would be applied where the judge failed to warn himself of the dangers of convicting on uncrrobo-rated evidence of an accomplice. [75] In the case of Butembo v The People [76] the appellant was convicted of rape. The Magistrate failed to warn himself of the desirability of corroboration of the complainant's evidence that she did not consent. It was argued on behalf of the appellant relying on R v Trigg [77] that the magistrate's

failure to warn himself of the desirability of corroboration should lead to an acquittal. The court held that in a proper case, notwithstanding that no warning as to corroboration was given when it should have been given, a conviction may be upheld. The case laid out the test that:

> "Does there exist in this case corroboration of such manifest cogency that the conclusion is not to be resisted that the jury properly directed would certainly have arrived at the same conclusion". [78]

The holding in Butembo was based on the holding in the English case of R v Lewis. [79] In that case the appellant was convicted on the evidence of accomplices who had pleaded guilty to stealing of goods and were bound over. The appellant was the receiver of stolen goods. In his summing up to the jury, the Chairman omitted to warn them that it would be unsafe to convict the appellant on the evidence of accomplices without corroboration. The court held that although the rule as to giving that direction is of universll application, it by no means follows that failure to give such direction is fatal to the conviction. The case then proceeded to lay out the principle that where the presiding judge at the trial omitted

to give any direction to the jury as to the danger of convicting the accused person on the uncorroborated evidence of accomplices, the conviction may be allowed to stand if, but only if, there exists corroborative evidence of such a convincing, cogent and irresistible character that the jury, if they, had received the proper direction must have come to the same conclusion. Again in the case of R v Moore [80] the courts reiterated that where there is substantial corroborat on, the court could not interfere with the verdict of a jury because of failure by the court to give a warning to the jury. In R v Savory [81] it was held that where there was sufficient and satisfactory corroboration, the court will not interfere as a rule with the conviction, in spite of the fact that the presiding judge failed to mention the question of corroboration. But where there is in fact no corroboration and no reference has been made in the summing - up to the desirability of such evidence then the court, will quash the conviction. The English case of R v Trigg [82] however held that cases in which no warning as to corroboration is given where it should have been given should

broadly speaking, not be made subject of the proviso although there are cases where the evidence has been such that the court has felt it possible to apply the proviso, but *that such cases in view of the court must be* regarded more as exceptional than as in any sense a regular matter. This case therefore calls for a restricted application of the proviso to very exceptional cases. This case did not receive much support from the Zambian case.

Another instance when the courts would apply the proviso was stipulated in the case of Phiri (E) and Ors. v The People.[83] This was held to be in the case where the trial court misdirects itself as to the law. An example of this was illustrated by Baron, D.C.J. in the above case when he stated as follows:

> "Suppose for example - and we have had many such cases in the subordinate courts where this error has been made - the trial court, having warned itself of the necessity for corroboration of the evidence of a prosecutrix in a sexual case, holds that there is strong corroboration of the commission of the offence but fails to appreciate that corroboration is required that it was the accused who committed it. And Suppose that in his analysis and evaluation of the evidence the trial court specifically deals with a witness whose evidence affords clear corroboration of the evidence of the prosecutrix as to the identity of the culprit, and expresses itself to be satisfied that

> the witness is telling the truth. Clearly the proviso should be applied in such a case, since the court has made specific findings of fact on the basis of which it must have convicted if it had not misdirected itself as to the law".[84]

Again in the case of Shamwana and Ors. v The People [85] the trial judge warned himself about the danger of acting on the uncorroborated evidence of PW5, PW 33-37 but was silent as to PW 68 and A7 which the court held was a misdirection. On the application of the proviso the court held that the test is whether even if the matter complained of had occurred, the trial court would on the facts of the case, certainly have arrived at the same conclusion. It further noted that the proviso exists for purposes of promoting the interests of justice and the cases in which it has been applied in this country are legion. However, the case emphasised that whether the proviso should be applied in any case, depends on the facts of that case and also on each individual appellant where there are two or more appellants.

In the case of Mweeba and Anor v The People [86] the trial judge simply said that he

accepted the complainant's evidence and this was held to be a misdirection. It was stated that the court must say whether it finds corroboration, and if so, what evidence it regards as such or whether on the other hand there is no corroboration but that it is safe to convict without it. The conviction could not stand unless the court could apply the proviso. In the case of Phiri (E) and Ors. v The People, the only evidence for the prosecution were two accomplices and the judge relied on the truth of their testimony based on their demeanour and the fact that they gave detailed account of the events and held that there was nothing else to support their testimony. The Supreme Court held that the judge, whose faith in the truthfulness of the accomplices was supported by nothing save their demeanour and the plausibility of their evidence, must be held to have misdirected himself and that the conviction could only stand if the proviso was applied.

The position taken by the Zambian courts is assisted by the fact that the trial court is required to reveal his mind as to the dangers which exist and why he thinks that they have

been excluded. In this way on appeal the court is able to decide whether the court misdirected itself and if it did, whether there is corroborative evidence to enable the court to apply the proviso. In that sense the application of the proviso in Zambia is not as strict as in England as noted by the case of Phiri (E) and Ors. The test which is laid down in this case and which has been the guideline for all other cases which came later was formulated by Baron D.C.J. as follows:

> "Was there corroborative or supporting evidence of such weight that the conclusion is not to be resisted that any court behaving reasonably, moving from the undisputed facts and any findings of fact properly made by the trial court would, directing itself properly, certainly have arrived at the same conclusion?".[87]

The court in most cases proceeds to examine the evidence to find out whether there is other evidence supporting that of the accomplice and if so, whether this other evidence is of such weight as to meet the foregoing test as formulated by Baron D.C.J in the Phiri (E)'s case. We shall now examine the different approaches

used by the courts to find that supporting evidence or to determine whether the conviction should be upheld.

(iv) The 'Something More' in The Phiri (E) and Others Case

The main test used by the courts in determining whether to set aside the conviction is the one given under S.15 of the Supreme Court of Zambia Act, as to whether it is unsafe or unsatisfactory and would uphold the conviction if no miscarriage of justice has actually occurred. A look at the various cases show the efforts made by the courts to give a guideline as to the nature of evidence that supports the proviso to be applied.

In the case of Machobane v The People [88] the appellant was convicted in the High Court of the offence of stock theft. The material evidence was based on the testimony of the appellant's brother in whose kraal were found cattle which belonged to the complainant. The appellant appealed against conviction and sentence. On appeal the court of appeal noted the failure

of the trial judge to treat the evidence of the witness as that of an accomplice, although he was found in possession of the stolen property. The Court held that while a conviction on the uncorroborated evidence of an accomplice is competent as a strict matter of law, the danger of such conviction is a rule of practice which has become virtually equivalent to a rule of law, and an accused should not be convicted on the uncorroborated testimony of a witness with a possible interest unless there are some special and compelling grounds. In this case the court found that there was no corroboration of the evidence of the witness and there were no special and compelling grounds for a conviction. The court of appeal did not give or define what it meant by special and compelling grounds. The Supreme Court again in the case of Mhango and Ors. v The People [89] applied the same principle in which it held that when the evidence is purely that of accomplices, it should not be relied upon in the absence of corroboration save for special and compelling reasons. Hesitating to define what it meant by special and compelling grounds, the court stated:

> "We do not propose to attempt a definition or even to give examples of what may in any given case constitute special and compelling grounds; these will inevitably depend on the facts and circumstances of the particular case. But in the present case not only are we quite unable to see any circumstances which might suggest that it is safe to rely on the uncorroborated testimony of the accomplice, but there are to the contrary compelling reasons for pointing to the circumstances as providing a classic illustration of the reasons for the unreliability of accomplice evidence and the principles underlying the development of this area of the law".[90]

The Supreme Court was then specifically asked to dispel doubts and explain the phrase "special and compelling grounds" in the cerebrated case of Phiri (E) and Ors v The People [91] which case became an authority on the law of corroboration in Zambia and which then introduced yet another phrase (something more" and replaced the former phrase of ' Special and Compelling' grounds".

The court laboured to find existing cases to come out with the meaning of the above phrase, quoting the East African Case of Haji Mohammed Saleh Mohammed [92] which decided that "in the absence of special or exceptional circumstances

a conviction before a judge or magistrate sitting alone, resting on uncorroborated accomplice evidence, is so dangerous that it should not be upheld". This principle was supported by the court. The court excluded the belief in the truth of the evidence of the accomplices based simply on their demeanour and the plausibility of their evidence as not constituting 'something more.' It also stated that the situation of finding 'something more' only arises where there is no corroboration. It then proceeded to explain what "something more" meant;

> "It can only be circumstances, which though not constituting corroboration strictly so called, yet satisfy the court that the dangers of convicting without corroboration have been excluded and that it is safe to rely on the accomplice evidence implicating the accused. Usually evidence of this kind will be in the nature of corroboration; it will support or confirm, notwithstanding that it is not corroboration in strict law.
>
> ---
>
> If the court is satisfied that the circumstances are such that the danger of the various accomplices having jointly fabricated a story has been excluded this would, at the time of Machobane have been a special and compelling ground, and would today be held to be corroboration in accordance with the modern less technical approach to that word.

> It would also be special and compelling ground that the circumstances are such as completely negative any motive for false implication of the accused". [93]

The court did therefore for the first time clarify the meaning of "special and compelling" grounds and at the same time defining the new term it introduced of 'something more'. It therefore for the first time introduced in the law of corroboration a less technical approach to what is corroboration as a matter of law. This test was to be applied to all other cases and not only to those of accomplice. It turned to the application of the proviso and formulated the test that:

> "The question in all cases is whether the suspect evidence, be it accomplice evidence, evidence of a complainant in a sexual case or evidence of identification, receives such support from the other evidence or circumstances of the case as to satisfy the trier of fact that the danger inherent in the particular case of relying on that suspect evidence has been excluded, only then can a conviction be said to be safe and satisfactory". [94]

After the case of Phiri (E) and Ors. the courts have applied the principle of looking for "something more" in order to apply the proviso and as already indicated the proviso

is not applied as strictly as in England, I shall now examine some of the Zambian cases to show how the courts have responded to the "something more" principle. In the case of Tembo (C) v The People,[95] the appellant was convicted of theft of a motor vehicle. The conviction was founded entirely on the evidence of a prosecution witness in whose possession the stolen vehicle was found. The trial court found the witness to be an accomplice whose evidence had to be received with caution but made no reference to the need for that evidence to be corroborated. On appeal the Supreme Court found that the evidence of an accomplice or a witness with a possible interest to exculpate himself needed to be corroborated at least by evidence of "something more" which though not constituting corroboration as a matter of strict law yet would satisfy the court that the danger that the accused has been falsely implicated had been excluded. The Court found that there was no corroboration in this case and found that it was not safe to convict the appellant. In the case of Choka v The People,[96]

the appellant was convicted of stock theft. The trial magistrate warned himself that the principal prosecution witness had a possible interest of his own to serve, and that his brother who supportdd his evidence equally had an interest or was a witness with a possible bias. He then held that they were telling the truth although there was in fact no corroboration or support. On appeal the Supreme court held that the witness with an interest of his own was to be treated as an accomplice to the extent that his evidence required corroboration or something more than a belief in the truth of his story. That, that something must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness. The same decision was given in the case of <u>Wamundila v The People</u> [97] where again the trial magistrate had relied on the truth of the witness's story although there was no corroboration. In all these cases the proviso was not applied.

The application of the proviso has been in very rare cases. It was applied in the case of <u>Phiri (E) and Ors</u> itself where the Supreme Court found that there were many odd coincidences to

which reference had been made in the judgment and that these coincidences constituted evidence of 'something more', they represented an additional piece of evidence which the court was entitled to take into account in finding support for the testimony of the accomplices. In the case of Zonde and Ors. v The People [98] the appellants were charged with aggravated robbery and were convicted accordingly. On appeal to the Supreme Court, it was argued that the trial judge erred in law by his failure to find and treat as an accomplice or a witness with a possible interest of his own to serve, a witness who was found in possession of a TV set belonging to the complainant barely a few hours after the robbery. The Supreme Court held that this contention was well founded and that the judge misdirected himself in failing to warn himself of the danger of acting on the uncorroborated evidence of such a witness. The court found that there was abundant evidence on which to convict the appellants and proceeded to apply the proviso despite the misdirection by the trial judge. Musongole v The People [99] also applied the proviso when the court found that there was corroborative

and supporting evidence of such weight that the trial magistrate, had he directed himself properly, would have arrived at the same conclusion. In the case of Shamwana and Ors. V The People, a treason case, it was argued inter alia that the proviso should not be applied on the ground that the misdirections were so grave and could not be cured by such application, and secondly that it could not be applied where, in a case requiring corroboration, as here, reliance was placed on the evidence of 'something more'. The court held that evidence in the nature of 'something more' was good enough to provide the requisite support where this was necessary and went on to give the test as already given in the Phiri (E) and Ors case. Here the court found supporting evidence from documents, the fact that there was a street map of Lusaka and rifles were found in the possession of some of the accused. The court's finding was as follows:

> "In the case now before us, we have given due consideration to the trial judge's misdirections against the background of the totality of the evidence, including the need to look for corroboration and the requisite warning as to the danger of acting on uncorroborated evidence that requires corroboration. Having done so and for the reasons already given, not only are we unable to apply the proviso in respect of A2, A4 and A8 but also that there is no evidence on which their conviction can

> be sustained. The appeals by these three appellants against their conviction are allowed; their convictions are quashed and their sentences are set aside.
>
> With regard to A1, A3 and A5, A6 and A7, we are satisfied that on the totality of the evidence and, regard being had to the overwhelming and corroborative nature of such evidence, even if the misdirection herein before referred to had not occurred, that is to say, had the trial judge properly directed himself, he would certainly have arrived at the same conclusion. We therefore apply the proviso and dismiss the appeals against their convictions". 100

(v) The Law After Phiri(E) and Ors

The introduction of the "something more" in the Zambian law of corroboration has been described as having made the courts adopt a less technical approach to what is corroboration as a matter of law. [101] From the cases discussed above the courts have looked for "something more" in order to apply the proviso and therefore cases which would have resulted in acquittals on technicalities for either because of lack of corroboration or a mere misdirection by the trial judge can now be dealt with under that principle. There is no doubt therefore that this principle of "something more" has worked out.

On the other hand, however, one could say that the "something more" principle has been often

applied when the case goes on appeal. The "something more" is supposed to have replaced the Machobane's "Special and compelling grounds", and had clarified the position by giving what the court should look for, yet even with that clarification the trial courts have not been in position to easily identify what piece of evidence would amount to corroboration or something more, or on many instances, they have misdirected themselves on the corroboration warning. What Phiri (E) and Ors. really did was to set out a list of procedures which the court ought to follow. These start with determining whether the witness is an accomplice, if he is then to warn itself on the dangers of convicting without corroboration. This has to take a particular form in the sense that the judge must point out the dangers and whether they have been excluded giving reasons for his conclusions. If he decides to look for corroboration, then he must make sure the main elements are corroborated. He otherwise looks for 'something more' which should not be a mere belief in the truth of the evidence of the accomplice based simply on his demeanour and the plausibility of his evidence. The

opinion has been that this is a very complicated procedure, and no doubt the cases which go on appeal show that the trial courts have in one way or another failed to comply with all that procedure.[102]

Whilst the English courts can rely on the truth and plausibility of the witness's story, the Zambian Courts have ruled this out. This automatically makes it harder to obtain convictions for certain crimes. For cases like sexual offences, for example prostitution, illegal sales or even illegal bribery, the evidence is normally only that of the parties to the offence. Again still even in big crimes or large scale organized crime and racketeering, it is the same situation. Heydon observed that "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly only come from the conspirators themselves".[103] This might have been one of the reasons why the English Courts still retained reliance on the witness's story being credible. The rule should not be indiscriminately applied in respect of all witnesses with the status of accomplice, irrespective of the circumstances of

the case. It takes no account of the accomplice's demeanour when giving evidence or the coherence of his evidence based on personal opinion derived from the court's knowledge of the facts. What the trial judge may think were the dangers or the motive of the witness may well not be thought to be the motive when the case goes on appeal. Sometimes it may well be that the trial judge may have to guess as to what might have been the motive. For the judge to be required to reveal his mind makes finding an issue for contention between the trial judge and the appellate court. This again may lead to a lot of acquittals. The Supreme Court in Phiri (E) and Ors. case stated that this enables the appellate court to examine what grounds the trial judge decided the case and whether he did not misdirect himself. The strictness of this requirement goes to throw a lot of doubt on the ability of the trial judge to handle cases where corroboration is required. The Supreme Court did not, however, realize that by putting all these formulas, it was making the application of the very formula it set up too complicated. The rule has been criticized for being too complex and technical.

The misdirections by the judges are already evident, looking at the number of appeals. Granville Williams in his article"Corroboration of accomplice" stated that;

> "The accomplice warning has become part of the mystique of the administrator of justice in England. It perhaps does some good, it certainly does some mischief, for it results in a number of guilty defenders getting off on appeal as a result of the trial judge having gone wrong in his direction on the law". 104

Again the requirement that the judge's mind must be revealed as to the dangers involved and whether these dangers have been excluded, although at the out set the procedure does not look **cumbersome** it may turn out to be that the dangers are not so obvious. In many instances as regards accomplice evidence the dangers or the motive may be easily detectible but in cases like sexual offences, may not be that easy for the judge to point out that the complainant might have falsely implicated the accused because of this or that reason. The reason is always hidden.

Wakeling on "Corroboration in Canada" criticized the use of the words "warning" and "dangerous to convict" as very strong phrases. He states that this:

> "may lead the jury, to disregard entirely the evidence of honest witnesses just because they happen to be accomplices, rather than just making the jury examine the evidence of an accomplice in the light of the particular circumstances which might reasonably cause him to be untruthful". 105

This would not be an issue within the Zambian context, because honesty of an accomplice per se can not be relied on to found a conviction as already discussed in the Phiri (E) and Ors case. Despite that however the Supreme Court in that case used the phrases, the judge must "direct" himself "as to the dangers of convicting" on the uncorroborated evidence of accomplice, and not the phrases criticized by Wakeling. It is not clear from the judgment whether the court disapproved the use of those phrases but since they were not used, one may assume that it took heed of the matter, but this could only be if the courts were aware of the criticisms. In the literal sense if one warns you about a person, it almost tantamounts

to saying that "do not rely on that person", he is not trustworthy or credible". That will lead to disbelieving what ever that person says unless there is other very strong supportive evidence.

The criticism which have been levelled against the rules as to corroboration have been realized in other countries too. In Singapore, the Evidence (Amendment) Act, 1976 abrogated rules making it obligatory for courts to warn itself and only required the court to identify the accused's accomplices and treat their evidence with caution. In England, the Criminal Law Revision Committee [106] recommended the abolition of the requirement of the accomplice warning as a matter of law, but that the court should have a discretion to warn in appropriate cases. The reason for this proposal as given by Cross on Evidence [107] was because of the difficulty of stating who an accomplice is and also on account of the fact that it is as safe to act on the uncorroborated evidence of some accomplice as it is dangerous to act on the uncorroborated evidence of many other witnesses of unquestionable character with regard to whom no

warning is required as a matter of law. If the judge has the discretion to give a warning where circumstances so require, then this will cover cases where there is need to consider giving of a warning where it has not been required under the present law. In Zambia, there is no indication as to what direction the courts would have liked to take if asked to reform the law although courts **never** change the law and from that leading case of Phiri (E) and Ors. the Supreme Court seem to have strengthened the application of the procedures which have to be followed. From that case itself, it would seem that the courts would have favoured a mandatory corroboration warning which takes into account the circumstances of the case. I doubt whether the legislature would make any legislative stipulations without taking into account the attitude of the courts towards the accomplice evidence, and this would be derived from the decided cases.

If there were to be any legislation as regards accomplice evidence, there would be four different situations which could be considered as regards corroboration:

(a) a standard corroboration direction for particular cases.

(b) a corroboration direction which varies with circumstances but is mandatory.

(c) a discretionary warning, recommended as the general rule by the Criminal Law Revision Committee.

(d) No provision for a warning at all, so that the only safeguard is the court of appeal or Supreme Court's right to interfere when the verdict is unsafe.

From these four proposed situations, I would prefer the third one (c) where the warning is discretionary and the judge using his prudence decides on what cases a warning should be given after seeing the danger which may be posed by allowing evidence without taking precautionary measures. In his daily work when writing judgments, a judge evaluates evidence, looks at different categories of witnesses, examines whether their evidence is credible or not and so the accomplice evidence should be just like any other of those cases where he can decide to warn or not to warn himself. Other writers have called for a complete abolition of all requirements for corroboration including that of accomplice.[108]

CHAPTER FIVE

WHEN CORROBORATION IS REQUIRED
(2) RULES OF PRACTICE

2. Sexual Cases

Another area, where the judge must warn himself of the dangers of convicting on the uncorroborated evidence of a complainant or prosecutrix is in cases of sexual offences. Sexual offences include rape, indecent assault and homosexual offences.

The cautionary rule in sexual cases is regarded as a peremptory requirement as appeals have been allowed where such warning has not been given. [1] In the case of Tembo v The People [2] where the appellant was charged with rape it was held that corroboration should be looked for and the jury should be warned of the danger of acting without it, in all cases of sexual offences, irrespective of the age or sex of the complainant or another party involved. Failure by the court to warn itself was held by Phiri (E) and Ors v The People [3] to be a misdirection that can only be cured by application of the proviso. The cautio-

nary rule requirement in sexual cases follows the same rules as for accomplice evidence though there are one or two differences in detail. This observation was made by Granville Williams in his article on "Corroboration in Sexual cases"[4] and confirmed by the case of Katebe v The People.[5] The differences between accomplice evidence and evidence in a sexual case are quite obvious. Courts tend to rely on the complainant's story rather than on the evidence given by the accomplice. The danger posed by the two is different although they are both suspect witnesses.

The nature of corroborative evidence required in most of the cases, be it in sexual cases or others is discussed under Chapter two.[6] It would therefore not be necessary to discuss this topic further in greater detail. The case of James v R gives a summary of the corroborative evidence required on a charge of rape as follows:

> "On a charge of rape the corroborative evidence must confirm in some material particular that intercourse has taken place and that it has taken place without the woman's consent, and also that the defendant was the man who committed the crime. In view of the possibility of error in identification by the complainant, corroborative evidence confirming in a material particular her evidence that the defendant was the guilty

> man is just as important as such evidence confirming that intercourse took place without her consent". 7

The possibility of error in rape cases is greater than in other cases. The circumstances in which the offence is committed is sometimes very traumatic. The complainant may find it difficult to recognise her assailant.

Both Zambian and English cases have held that a conviction can stand on the uncorroborated evidence of a complainant in a sexual case where the court believes her story or where it finds the testimony truthful. [8] In the case of Katebe v The People, [9] the appellant was convicted of indecent assault on a female. The complainant alleged that, the appellant accompanied by a friend knocked at the door of her house and she went outside. The appellant then grabbed her, threw her on the ground and attempted to rape her. Her call for help was answere by the barman of a nearby bar, whereupon the appellant and his companion ran away. The complainant said that she had known the appellant for a long time and had seen him clearly in the moonlight. The magistrate warned himself of the danger of convicting on the uncorroborated evidence of the complainant,

however, he believed her evidence and convicted the appellant in spite of the absence of corroboration. When the case went on appeal the Supreme Court held that it was satisfied that the trial magistrate was right when he considered that this was a case when he could convict on the uncorroborated testimony of the complainant if he believed her. As mentioned above this is one of the major differences between the accomplice evidence and that of a complainant in a sexual case. The court cannot rely on the honesty of the accomplice alone and as stated in the case of Phiri (E) and Ors. v The People [10] that in addition to the faith in his honesty, there must be other evidence to support his story; yet for the complainant his true statement alone would suffice.

It was again held in the case of Katebe v The People that a conviction on the uncorroborated evidence of the complainant in a sexual case is competent if there are special and compelling grounds. The case of Machobane v The People [11] was applied. It can be noted that Machobane's case did not define what special and compelling grounds were but Katebe defined this in regard to sexual cases that:

> " Where there are no motives for the prosecutrix deliberately and dishonestly to make a false allegation against an accused, and the case is

> in practice no different from any other in which the conviction depends on the reliability of her evidence as to the identity of the culprit, this is a 'special and compelling ground' which would justify a conviction on uncorroborated testimony".[12]

The 'special and compelling grounds' principle was further explained in the famous Phiri (E) and Ors v. The People case [13] which dealing with accomplice evidence introduced the principle of "something more" in the corroboration evidence. This principle has been well explained under the accomplice evidence.[14] It briefly should be some other evidence which although not constituting corroboration as a matter of strict law but satisfies the court that the danger that the accused has been falsely implicated has been excluded and that it is safe to rely on the evidence of the complainant in implicating the accused.

When a court fails to warn itself or misdirects itself in the case of sexual offences, a conviction would be quashed unless the proviso to S.15 of the Supreme Court Act is applied. The test for application of the proviso in sexual cases is the same as in accomplice evidence and has already been discussed in

detail under accomplice evidence.[15] In sexual cases, the proviso was applied in the cases of Butembo v. The People[16] and Musongole v. The People.[17]

One would pose a question whether the law as it stands regarding sexual offences is satisfactory or whether it needs any reform or amendment. The Yale Law Journal[18] reported that yielding to sustained criticism from feminists and prosecutors, New York State recently adopted legislation modifying the requirement that the testimony of a rape victim must be supported by additional evidence to sustain a conviction. Critics attacked this corroboration requirement as imposing a sexually discriminatory rule which severely inhibits convictions for the offence of rape. These groups pressed for total abolition. It had been established through research that in those states where corroboration requirement had been enforced strictly, there had been one obvious effect, and that was a comparatively low rate of conviction of rape. The reasons for this are obvious. Firstly the offence is difficult to prove because this is the type of offence where witnesses are seldom present, also circumstantial evidence may not even be available and many women would not have any

external injuries because they do not resist when confronted with a knife or offensive weapon. The writer called for a repeal of the requirement because of the "serious defects in the rule's rationale coupled with its negative effect upon successful prosecution". On the other hand the article on "Corroborating charges of Rape"[19] which did not seem to criticize the requirement for corroboration reported that the charge of rape is difficult to disprove. The judge has to choose between two conflicting stories that of the accused and the complainant. The article further noted that sexual accusations which are false are more frequent than untrue charges of other crimes. Both writers seem to be in favour of subjecting the complainant to psychiatric examination to determine the credibility of the complainant. The other safeguards supported are, the physical examination of the complainant to be compulsorily ordered to reveal fabricated accusation, to use a lie-detector test, and to examine the complainant' sexual activities. Granville Williams in his article on "Corroboration in Sexual Cases" called for mandatory corroboration in sexual cases. He supported the techniques used in the United States of

America like using a lie-detector test which English courts do not use. He supported the protection of the defendant by requiring a medical report on the prosecutrix and in addition a social worker's background report on her to reveal whether she has made accusations against other men in the past. Wigmore criticizing the requirement for the warning states that:

> "In the light of modern psychology, this technical rule of corroboration seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complainant witness in such charges. Better to inculcate the resort to expert scientific analysis of the particular witness's mentality, as the true measure of enlightenment - No Judge should ever let a sex-offence charge to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physcian". 21

Most of the criticisms against the rule and the suggestions made for reform seem to protect the defendant; they assume that the victim of a sexual offence is making false allegation and therefore there should be safeguards. The above suggested procedures might only reduce the number of cases being reported. The victims, may regret having reported the crime if they are put through

a long series of ordeals which are time consuming, costly, and often emotionally harrowing. In addition to the suggested medical examination the victim is normally subjected to rigorous cross-examination, during which embarrassing personal questions are asked to try and discredit her social behaviour. If a law is introduced which protects the defendant more than is necessary, then the victim remains unprotected and receives no justice.

It may also be noted that most of these cases are tried by males, the presiding justice, the prosecuting attorneys may all be males and in the court room the only female might be the victim herself. From personal observation sympathy is only drawn when the victim is a child but if she is an adult, she is normally frowned at. In the United States, lie-detector tests are used where these two are additional safeguards in favour of the prosecution. These have not been introduced in England, and Wigmore suggests that these should be introduced in England.

With regard to the Zambian situation, one has to consider whether the corroboration requirement should be made mandatory, be abolished completely or be left as it is, being discretionary for the judge

to warn himself of the dangers of convicting without corroboration. The problem of corroboration requirement in Zambia has not only been in sexual cases but has been a general problem. With the coming into effect of the principle of "something more" in the Phiri (E) and Ors. case the problem of finding corroboration seem to have been solved. The court would look at all the various circumstances of the case and find whether it would be safe and satisfactory to convict on the evidence. The account would suggest however that the judge may order the complainant to submit to psychiatric examination when he thinks it is so necessary or when there is any ground to suspect that a false accusation is being made. A compulsory psychiatric examination is not only expensive for a developing country but puts a complainant who is obviously credible to unnecessary trouble and embarrassment. As mentioned earlier, sexual offences are not so prevalent in Zambia and as such even the use of Lie-detector tests would be uncalled for where the meagre resources are needed for curbing crime in general by way of increasing the personnel and equipping them more.

3. Sworn Evidence of Children

Sworn evidence of children would be another area for which the judge would warn himself of the danger of convicting on it without corroboration. The rationale for looking for corroboration and the procedure for determining whether a child should give evidence on oath are already discussed in different chapters of this study. [22] What follows will therefore only discuss the nature of the warning given by the judge and the corroborative evidence required which has also been discussed under child's unsworn evidence at the beginning of this chapter. [23]

If a child gives sworn evidence after the judge has conducted a proper voire dire in terms of the Juveniles Act, the judge would proceed to warn the jury or himself of the dangers of acting on the uncorroborated evidence of this child. The requirement has been held to be peremptory and not a matter for the discretion of the particular judge. [24] Heydon in his book on Cases and Materials o Evidence stated that the warning is mandatory and does not depend on whether the child is an accuser.

In the Zambian case of Chisha v The People,[25] the Supreme Court following the case of R v Campbell,[26] laid out the principle which later became the leading principle on child sworn evidence and stated as follows:

> "It is well-established that as a matter of law, the sworn evidence of a child in criminal cases, does not require corroboration but that the court should warn itself that there is a risk in acting on the uncorroborated evidence of young boys and girls; See per Lord Goddard, C.J., in R v Campbell (1). As it is necessary to heed the warning corroboration of the sworn evidence of a child is, in practice, usually looked for. There need not now be a technical approach to corroboration; evidence of something more suffices. In Phiri (E) and Ors. v The People (2) at p.107 marginal 14 we said that evidence of "something more":
>
> 'Must be circumstances which, though not constituting corroboration as a matter of strict law, yet satisfy the court that the danger .... has been excluded and that it is safe to rely on the evidence.... implicating the accused".[27]

With a child, the Juveniles Act sets the rules, with a sworn child. It is the weight to be attached to her evidence. This principle was followed by the same court in the case of Tembo v The People[28] who then summarized the holding above and held that

evidence of all children who give evidence in court must be corroborated.

The two cases mentioned above leave no doubt that it is peremptory for the judge to warn himself of the danger of convicting on the uncorroborated sworn evidence of a child but they pose another question which is whether the requirement for corroboration in cases of children is a rule of law or practice? Silungwe C.J. in the Chisha case quoted Nokes on Evidence 2nd Edn and stated that sworn evidence of a young child, whether accomplice, or not requires corroboration in practice, and the judge should warn himself of the risk of acting on the uncorroborated evidence of such children. He further stated that the well-established rule of practice applies to all children who give evidence on oath. On the other hand if one looks at the case of Tembo, it would seem that requirement for corroboration is not a rule of practice but has now the force of a rule of law. Gardner, Ag.D.C.J. in that case framed the holding in Chisha as follows:

> "The evidence of all children who give evidence in court must be corroborated, in accordance with the judgement of Silungwe, C.J. in the case of Chisha v The People (1). [29]

From that holding, one would therefore make a conclusion that in regard to **a child's sworn** evidence, it has been a rule of practice for courts to look for corroboration of the child's evidence but that the rule of practice now has the force of the rule of law.

If a judge fails to warn himself of the danger of convicting on the uncorroborated evidence of the child's sworn testimony or if he fails to look for corroboration, this will be a misdirection which may lead to the conviction being quashed unless the proviso could be applied. The circumstances under which the proviso could be applied have been discussed in greater detail in this study under accomplice evidence.[30]

The nature of corroborative evidence which the judge may look for may be independent evidence that implicates the accused in a material particular[31] or evidence of "something more" within the interpretation of the _Phiri_ case as pointed out in the case of _Chisha v The People._ Another type of evidence which may come up would be the evidence of another child's sworn testimony. Would the sworn testimony of one child corroborate that

of another child? To enable one to answer this question, one must look at the issues already raised under the child's unsworn testimony which also discussed sworn child testimony. [32] The repetition is omitted already. However, this again applies to the criticisms raised in regard to child evidence, the shortcomings of the procedure employed and the conflict in the decisions of the courts. These again were discussed under the child's unsworn testimony. Another issue which needs consideration is that of mutual corroboration and this does not only affect child evidence but also applies to accomplice evidence vis-a-vis another accomplice, one suspect against another suspect witness and evidence of two or more complainants in a sexual offence case. The issue of mutual corroboration is discussed later in this study.[33]

4. Confessions

The question regarding confessions made by accused persons has been the subject of a considerable number of decisions. It is now an established rule of law that before a confession statement can be admitted into evidence, it must be proved beyond reasonable doubt that it was made freely and volun-

tarily. The case of Muwowo v The People [34] laid out the procedure required to be followed before a confession statement could be admitted into evidence. The case stated that if the accused objects to the admission of the confession statement or if it appears from the evidence that it might have been involuntarily obtained, a trial-within-a trial should be held. The judge would then rule on the issue of voluntariness and may decide to admit or reject the statement. Once the statement is admitted into evidence the issue is whether the judge can convict on it without corroboration.

In East Africa, after the legislature had made it mandatory for a confession statement to be made before a magistrate, the courts still took a strict view in relying on a confession statement. It was therefore held in the case of Tuwamoi v Uganda that:

> "A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true, The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied

> after considering all the material points and surrounding circumstances that the confession cannot but be true". [35]

The issue in cases of confession should be voluntariness. It is evident from the above holding of the court of Appeal that the truth is taken into account and although corroboration is not a requirement as a rule of law, the courts would however look for it as far as a confession is concerned. The English position as stated by J.D. Heydon "Cases and Materials on Evidence" is that a jury can convict on an uncorroborated confession, although circumstances may make a warning prudent.

In Zambia the case of The People v Hamainda [36] held that although a person can legally and properly be convicted upon his confession alone, this should only be done with great caution and when there has been some pointer in the evidence tending to confirm his guilt. This holding was later overruled in the case of Maketo and 7 Ors v. The People, [37] a Supreme court judgment which held that a conviction can be based on a well-proved uncorroborated confession. The court cited the case of R v Baldry [38] which held that a confession if well proved, is the best evidence that can be produced. The case of Hamainda, a High Court case was held to have been wrongly decided.

The Supreme Court emphasised this principle which overruled the Hamainda's case in the case of Pasulani Banda v The People when it stated as follows:

> "(1) The case of Hamainda v The People which required that before there can be a conviction on a confession statement above, there must be some other evidence pointing to the accused's guilt which renders it safe to rely on a confession, has been over-ruled by Donald Maketo and 7 others v The People and it is possible and proper in a proper case to convict on an uncorroborated confession.
>
> (ii) In any particular case it is entirely within the discretion of the court to prefer not to convict on a confession alone unless there is additional evidence which renders it safe to do so". [39]

The Zambian position therefore is clear from the above cases. The judge may decide to convict on a confession without looking for corroboration and the need to warn himself of any danger posed by a confession is also discretionary. Once the confession is well proved it is considered to be the best evidence that can be produced. [40]

In practice it will be very rare that the only evidence of guilt is a confession. [41] The police too would be very reluctant to bring a case for prosecution, where the only evidence available is that of a confession. Looking at the procedure of holding a trial within a trial and the introduction of the

Judges' Rules into evidence all these are efforts to cut down on the possibility of allowing a false confession statement into evidence. It could be argued that by the time the judge admits the confession into evidence, he must at that stage be satisfied that it is voluntary. However, if one takes into account that there are still widely reported cases of police torture and abuse to extract confessions, one wonders whether a stricter rule should not be introduced in the Zambian law. Ndulo in his Article "Confessions - Tainted evidence" [42] expresses the view that even in modern times confessions are still tainted with violence. In his article he expresses the view that a government seeking to punish an individual should produce the evidence against him by its own independent labours, rather than from the accused's own mouth. The police officer always has an interest to serve when extracting a confession.

This is an area where **in the author's opinion** the court should require corroboration or at least a mandatory corroboration warning. An accused person who may not have any external visible injuries may fail to establish that the confession was extorted from him. Taking into consideration that it is always impossible for him to produce any witnesses, since the confession is taken while in police custody, more

protection should be given to him. The author in this regard supports a mandatory corroboration warning or that at least the judge should look for corroborative evidence.

Another writer supported some sort of corroboration. In the Vanderbilt Law Review it was reported in an article on "Criminal Law - Confessions -Requirement of Corroboration of extra judicial Confession", [43] that the requirement of corroboration was originally to prevent convictions based on false confessions where there was in fact no actual loss or injury, but that today the purpose of the rule is to prevent convictions based on any false confession, whether obtained through mistake, illegal inducement, coercion or mental incompetence of the accused. The article recommended a flexible requirement of corroboration, integrated with other rules of evidence and proper instructions from the court as sufficient to protect the defendant in all his rights.

5. Single Identifying Witness

Single identifying witness cases have received consideration by the courts as areas where the courts must exercise caution. The concept of honest

mistake or mistaken identification has been the main issue for requiring caution. [44] Before the case of R v Turnbull, [45] the position under English law was that there is no obligation to warn of the danger of convicting on the evidence of identification without corroboration. [46] It was held in the case of Arthur v Attorney-General for Northern Ireland that

> "Where the case against the defendant depends wholly or substantially on the visual identification of the defendant by one or more than one witness, if the summing-up has dealt fully and fairly with the evidence relating to identification and is impecable in every other respect, it is not to be regarded as defective merely because it does not contain a general warning to the jury of the danger of acting on the evidence of visual identification. It would be undesirable to lay down as a rule of law that a warning in some specific form or partly defined terms must be given". [47]

The position under English law at that time therefore was that a conviction could be based on the evidence of a single identifying witness without the necessity of the court warning itself of the danger of an honest but mistaken identity.

The case of R v Turnbull decided in 1976 set out guidelines to be followed in identification cases, which later were to be the guidelines followed and forming the basis of the law existing in

Zambia. These guidelines were equally applied in the East African case of <u>Abdullah Bin Wendo and Anor v R,</u>[48] another case greatly relied on by the Zambian Courts. The guidelines formulated by Turnbull were as **follows:**

> " 1. That whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken.
>
> Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.
>
> 2. Where the quality of an identification is good, the jury can safely be left to assess the value of the identifying evidence even if there is no other evidence in support, provided always that an adequate warning has been given about the special need for caution. However where in the opinion of the judge the quality of the identifying evidence is poor, he should withdraw the case from the jury and direct an acquittal unless there is other evidence which supports the correctness of the identification.
>
> 3. That other evidence may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken, any odd coin-

cidence, if unexplained, may be supporting evidence.

4. A failure to follow those guidelines is likely to result in a conviction being quashed". [49]

The case above requires the court to warn itself or look for supporting evidence in cases of mistaken or poor identification.

Courts in Zambia have applied the Turnbull case addressing themselves to guidelines laid out in that case and taking into account in particular the reliability of the identification and the nature of supporting evidence available. It is necessary to examine some of these cases and review the approach used in view of the Turnbull guidelines.

In the case of The People v Swillah [50] the accused was charged with aggravated robbery. He was identified as one of the robbers by three witnesses. The opportunity to observe the accused was good but the witnesses were terrified and the lighting was poor. It was held that since the quality of the identification evidence was poor, it was necessary to seek a connecting link or other supporting evidence to connect the accused with the robbery and since there was no connecting link or supporting evidence,

the accused was acquitted. In the case of Haamenda v. The People [51] it was held that where the quality of identification is good and remains so at the close of the defence case, the danger of mistaken identification is lessened, that the poorer the quality, the greater the danger. In the latter event the court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. It further held that odd coincidences can provide corroboration.

Besides the poor opportunity for identification, the court held in the case of Banda v The People [52] that although recognition of a person one knows is less likely to be mistaken than identification of a stranger, however even in such cases the danger of mistake is present and must be considered. It was however noted that recognition is accepted to be more reliable than the identification of a stranger. The courts further ruled that the issue is not of the witness's credibility in the sense of truthfulness, or honesty but the reliability of his observation. [53]

In order to rule out the possibility of honest but mistaken identifications, the courts have held that there must be something other than the

witness's identification to connect the accused with the offence. The crucial point has been whether the court has to look for corroborative evidence of the single witness's identification evidence. The case of Mwasumbe v The People [54] stated that there must be a connecting link to rule out the possibility of mistaken identification being too much of a coincidence. Turning to the case of Turnbull itself, the nature of evidence required may be either corroboration in the legal sense or something which convinces the jury that the identification is not mistaken. The court held that odd coincidences, if unexplained may be supporting evidence. The evidence of a connecting link must be of such a weight as to take an honestly mistaken identification outside the realm of acceptable coincidence. [55]

The holdings in these cases take us back to the Zambian leading case of Phiri (E) and Ors. v The People [56] which has set out the nature of corroborative evidence which a court may look for. This corroborative evidence may not be evidence which constitutes corroboration in the legal sense but

may be in the nature of "something more", a connecting link or odd coincidence which tend to connect the accused with the commission of the offence.

Corroboration would therefore be required where the identification is poor but where there is good quality identification evidence from a reliable single witness, it should be competent for a court to convict even in the absence of other evidence to support it. It would seem therefore that in Zambia the need to warn of the danger of relying on the evidence of a single witness in identification 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.

Law in England

In his article Victor Joffe, on "Report of the Departmental Committee on Evidence of Identification in Criminal Cases" [57] states that several bodies had recommended that no conviction should be possible in cases of disputed identity unless

the evidence was corroborated, however the committees rejected the need for corroboration and one of the reasons given was that the term had become overburdened with technicalities that too many guilty men would go unpunished if this were implemented. On the other hand the Criminal Law Revision Committee [58] which proposed fairly, drastic changes in the law of corroboration had the majority of the committee in favour of a statutory requirement for the judge to give a warning of the special need for caution before convicting in reliance on the correctness of one or more identifications of the accused where the case depended wholly or substantially on this.

Law in Zambia

A review of Zambian cases shows that there are many cases where the issue of identification is disputed. In many cases, the observation is made when the conditions are not favourable for a correct or proper identification, in others, like in cases of aggravated robbery the conditions are traumatic. Taking into account the rising number of disputed cases, and the fact that criminals are in many instances using very sophisticated

methods like wearing masks, being heavily armed, or using explosives which make it almost impossible for the witnesses to recognize their assailants, it would be appropriate to adhere to the position already adopted by the Zambian courts. That is, if the conditions for proper identification were poor the court must warn itself of this danger and rule out the possibility of a mistaken identity. The guideline takes care of the prevailing situation in this country. The corroboration warning in this regard must be mandatory not discretionary. The requirement for corroboration has already been made flexible by the fact that the courts are not strict on finding corroboration in the strict sense but any other supportive evidence which may connect the accused with the offence. The case law as it stands in Zambia is therefore appropriate and applicable and the author supports it.

CHAPTER SIX

MUTUAL CORROBORATION

Some cases have come out to hold that a witness who himself requires corroboration cannot corroborate another. [1] Others contest this and state that with the exception of accomplices who are *participes criminis*, there is no general rule that witnesses who require corroboration can not corroborate one another. [2] Some cases have held that if the evidence of a given witness requires corroboration as a matter of practice or law, then any other testimony which also requires corroboration cannot be treated as supplying the requisite corroboration. [3] The reason given being that the quality of the corroborative testimony is the same in each case. They are both suspect and would not supply the requisite corroborative evidence. What has been stated is that evidence which itself requires corroboration can not be capable of providing corroboration, because it needs corroboration itself before it can be used to corroborate other evidence. Another reason against mutual corroboration has been the danger of a conspiracy between the witnesses to falsely implicate the accused.

The above reasoning which is mainly against mutual corroboration is greatly criticized in many cases. In the case of DPP v Kilbourne [4] it was held that mutual corroboration would be supported if there has not been any collusion between the witnesses. That case went on to hold that where several children, between whom there have been no collaboration in concocting a story, all tell similar stories, it would appear that the conclusion that each is telling the truth is likely to be inescapable and the corroboration is very strong. The same case held that in the case of accomplices, if they give independent evidence as to separate offences, when the circumstances are such as to exclude the possibility of a jointly concocted story, one can corroborate one another provided that the evidence as to the one offence is probative and admissible evidence as to the other. It was observed that in most of the authorities the accomplices were accomplices to a single crime, so the danger that they collaborated in concocting their story is obvious and it is therefore quite right that there should be a general rule that accomplices cannot corroborate each other although this need not be a universal rule. The outright

rule against mutual corroboration was therefore disapproved not only in the case of Kilbourne but also in the case of DPP v Hester [5] and other cases which preceded those two cases.

In Zambia, the case of Chimbo and Others v. the People [6] laid down a general rule that the evidence of a suspect witness cannot be corroborated by another suspect witness unless the witnesses are suspect for different reasons. However, in the case of sexual offences Mulenga v The People [7] stipulated that the rule against mutual corroboration must be limited to cases where the offence charged is a single offence, or a transaction, involving two or more complainants, but that if two or more complainants, in addition to alleging assaults on themselves, are eye witnesses of the assaults on the others, their evidence of assault on such other witnesses would be direct evidence and capable of being corroboration. Those two cases talk about single transaction which would imply that the witnesses may be accomplices or might have collaborated. The cases do not spell out the reasons for their restriction but the case of Phiri (E) and Others v. The People [8] clears this point in regard to accomplices which would

easily be taken to be the principle governing other witnesses like child witnesses and complainants in sexual offences since this case has been a leading case on the law of corroboration. The case was trying to define what was meant by special and compelling ground within the meaning of Machobane v The People [9] and it stated as follows:

> "If the court is satisfied that the circumstances are such that the danger of the various accomplices having jointly fabricated a story has been excluded this would, at the time of Machobane have been a special and compelling ground, and would today be held to be corroboration in accordance with the modern less technical approach to that word.
>
> It may also be a special and compelling ground that the circumstances are such as completely to negative any motive for false implication of the accused". [10]

The view taken by the Phiri (E) and Others case which is termed the less technical approach is the same principle laid down in the Kilbourne's case [11] above. The same principle was followed in the recent case of Shamwana and Others v The People.[12] The law in Zambia therefore is the same as that laid down in Kilbourne case.

The rule against mutual corroboration and the one that an accomplice cannot corroborate another

accomplice was criticized and its abolition was recommended in the Criminal Law Revision Committee. [13] The recent case seems to have taken cognizance of the matter and thus the recent modifications introduced in the Kilbourne and Phiri (E) and Others cases. Laying out a strict rule against mutual corroboration would only make the law apply unfairly especially in cases where the only evidence available is that of a suspect witness. The judge should in some particular cases be left to use his own discretion to determine whether under the circumstances, the danger of relying on the evidence of a particular witness has been excluded.

CHAPTER SEVEN

CONCLUSION

It has been noted from the study that corroboration is necessary in a number of cases, the most prominent ones being in cases of accomplice and children. This observation is based on the volume of cases which come from the lower courts to the Supreme Court and the attitude adopted by these courts. Despite the fact that corroboration has been a long established requirement, there are still areas for criticism .

One of the criticisms against the law of corroboration is that the rules are too technical. The requirement for corroboration in some cases is quite appropriate but the superior court has imposed very technical rules for its application. To demonstrate the technicality and complexity of the procedure the author wishes to demonstrate how a judge is expected to handle a case where accomplice evidence is in issue. Firstly, the judge must decide on the status of the witness, that is, he is expected to explain who is and who is not an accomplice. After that he must warn himself of the danger of convicting on the uncorroborated evidence of an accomplice. He must explain the

nature of the danger involved and if he decides to convict without corroboration, he must show that the danger has been excluded. If he finds that he cannot convict without corroboration, he must decide the issue of what corroboration is. If he does not find corroboration in the actual sense, he must look for some other evidence which may amount to corroboration. This is the time he considers whether there are any "special and compelling" grounds or "something more" to connect the accused with the offence.

When such a laborious procedure has to be applied by magistrates in the lower court, the issue becomes complicated. In many instances they misdirect themselves on the procedure and the convictions are quashed on appeal. Sometimes it is because the magistrates are poorly trained or because they do not have the up-to-date materials to keep abreast with the current law. The problem is not only in Zambia but all over in the Commonwealth. In the Canadian case of <u>Vetrovec</u> [1] it was argued that the corroboration requirement at common law was both unduly technical in its formulation and overbroad in its application. It was stated that so rigid is the rule that convictions are set aside almost by rule of thumb if it

was found that a warning in the correct words had not been given. The Law Reform Commission in Canada called for the abolition of all requirements for corroboration. In the case of D.P.P. v Kilbourne[2] the House of Lords pointed out a number of misdirections by the judge which had caused the court of Appeal to quash the conviction of the defendant.

In Zambia **in** the case of Phiri (E) and Ors. v The People [3] the Supreme Court for Zambia with five judges presiding clarified the procedure applied in corroboration cases, and in a very lengthy judgment resolved many issues on the subject. Many people take this case to be the guideline on corroboration law. The Supreme Court has also increased its readiness to apply the proviso to avoid successful but unmeritorious appeals.

In justifying the existing rules one may say that these are rules which have developed over the years either **through** legislation or by case law and therefore they derive their legitimacy from well established statutes and case law. The good thing about these rules is that the judges have been flexible as to what type of witnesses need corroboration. It was held in the cases of D.P.P. v Kilbourne [4] and The People v Casey [5] that:

> "The category of circumstances and special types of cases which call for special directions and warnings from the trial judge cannot be considered as closed. Increased judicial experience and indeed further psychological research may extend it". 6

The situation after <u>Phiri (E) and Others v The People</u> shows how flexible the Zambian Courts are ready to be. The introduction of the "Witness with interest of his own to serve" and the "something more" type of evidence have been recently included in the law of corroboration. The situation after Phiri showsthat there has been a lot of improvement in the interpretation of the law on the subject of corroboration in general and as regards accomplice and children evidence in particular. Further improvement can still be made as recommended below.

An Evidence Act and other enactments

It would be appropriate at this time for Zambia to have its own Evidence Act. Most of the evidence rules have been settled either by statutes or by case law but these rules are scattered all over in different books and law reports. When writing a study of this nature one finds problems in finding areas where corroboration is required. In a situation where books

are not readily available and law reports not up-to-date it becomes even more difficult for the judge to find this law. The task of law reform is entrusted with the Law Development Commission which has already embarked on drafting an Evidence Act.[6]

One would not at this stage venture into giving all the areas which would be incorporated in the Evidence Act but a few areas can be mentioned at this juncture.

(i) A specific definition of what would amount to corroboration should be given. This would include the definition given in the case of R v Baskerville [7] and the one in the case of Phiri (E) and Ors. v The People [8] which introduced "the something more" phrase.

(ii) The Act should include areas where corroboration should be made mandatory taking into account the observation made in the study. For instance corroboration may no longer be mandatory in cases of juveniles, defilement and procuration, perjury and sedition but may be mandatory

in cases of speed, identification and confession taking into account the dangers already discussed. Again attention should be given as to whether there should be a mandatory or discretionary warning as regards evidence of accomplices and complainants in sexual cases.

(iii) A precise definition of who an accomplice is should be given.

(iv) The rule for corroboration in sexual offences has been criticized as being sexist. This should be either abolished or reformed so as not to appear to be discriminatory.

(v) The issue regarding corroboration of suspect evidence by another suspect or what is termed as mutual corroboration should be resolved. Observations on this issue have already been made in this study.

The list presented above is not an exhaustive list of what the Act may include but there is apparent confidence that the Reformers would come out with an Act which will take into account the views of various institutions in the country. The law should take into account the local condition and as reported in The

"Times of Zambia" that

> "The time has come when we should ask ourselves whether this system (judicial) is the best given our circumstances under which most people who come to court are not legally represented, are illiterate and are not familiar with the language and procedure in use in our courts". 9

It can be noted with encouragement that there are Evidence Acts already existing in other Commonwealth countries from which examples may be drawn for instance there is the India Evidence Act, which was greatly adopted in East Africa. Uganda and Ghana also have evidence Acts which may be of great use. To emphasise the need for reform one may say that;

> "Laws are made by man to serve man. They must therefore be constantly altered so as to correspond to the dynamism of society. Anything short of that entails rigidity in the judicial system and the application of obsolete laws". 10

FOOTNOTES

CHAPTER ONE

NOTES TO PP. 1-6

1. A. Allott, New Essays in African Law, 1970 Butterworths, London, U.K.

2. W.L. Church, An Introduction to the Law of Zambia, 1974, University of Zambia, School of Law, Lusaka at p.168.

3. T.O. Elias, The Nature of African Customary Law, 1956, Manchester University Press, U.K.

4. M. Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, 1955 Manchester University Press, U.K.

5. op. cit.

6. For a historical background, see D.E. Needham, From Iron Age to Independence, A History of Central Africa, 1974, Longman Group Ltd U.K., and Hugh P. Africa, Ph.D Thesis on Language in Education in a Multilingual State, A case study of the role of English in the Educational System of Zambia.

7. W.L. Church,op. cit.

8. On the characteristics of Customary Law, see B.O. Nwabueze, Machinery of Justice in Nigeria, 1963, Butterworths, London U.K. M. Gluckman, Ideas and Procedures in African Customary Law, 1969, Oxford University Press; A.E.W. Park, The Sources of Nigerian Law, 1963, Lagos, African University Press, London; W.L. Church, op. cit.

9. A. Nekam, Experiences in African Customary Law, Third Melville J. Herskovits Memorial Lecture; delivered under the auspices of the Centre of African Studies, 1966, University of Edinburgh for the Centre of African Studies at p.3.

10. Art. 14 of The Royal Charter of Incorporation of the British African Company, October 29th 1889.

NOTES TO PP. 7 - 12

11. Reported in the Report of the Commonwealth Magistrates' Seminar held on the 27th July to 2nd August, 1980, Lusaka, Zambia.

12. Dated October 29th 1889.

13. Art. 15.

14. S14 of the Subordinate Court's Act, Laws of Zambia, Cap. 45.

15. The Penal Code provides that "No person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is presented in a written law". The same provision was carried into the present law, see Constitution Art.20(4) Laws of Zambia, Cap.I.

16. The Marriage Act, Cap. 211 of the Laws of Zambia regulates matters pertaining to Marriage under the Act. When a party opted to marry under customary law, then his marriage would be governed by customary law and the Marriage Act would not be applicable.

17. (1967) Z.R. 71.

18. (1938) 4 T.L.R. 63.

19. (1969) Vol. 2 East African Law Review, p.47.

20. B.O. Nwabueze, Machinery of Justice in Nigeria, 1963 Butterworths, London, U.K.

21. op. cit.

22. op. cit.

23. op. cit.

24. Local Courts Act, Cap. 54 of the Laws of Zambia, S.12.

25. Mvunga M.P. "Application and Administration of Customary Law in Zambia" Reported in the Report of the African Commonwealth Magistrates' Seminar, held on the 27th July to 2nd August, 1980 Lusaka, Zambia.

NOTES TO PP. 12-21

26. The Report on the Law of Succession, the Law Development Commission, Lusaka, September, 1982.

27. W.L. Church, "Common Law and Zambia" Reported in Law in Zambia by M. Ndulo 1984 East African Publishing House Ltd p.1 at p.23.

28. S.2 of Ordinance No. 4 of 1963 was re-introduced under Chapter 4 of the Laws of Zambia (1970).

29. op. cit.

30. op. cit.

31. A.E.W. Park, The Sources of Nigerian Law, 1963, Sweet and Maxwell, African University Press.

32. A.E.W. Park, supra.

33. (1969) Vol. 2 East African Law Review 47 at p.67.

34. For Local Conditions see p.23.

35. op. cit.

36. Allott and Church agreed that it was the common law of England which was applied at all times. However N.A. Ollenu writing on Land Law in Ghana stated that a clear distinction must still be made between "the common law" which in general means the rules derived from English and other common law sources and customary law, a fact which showed that other common law sources could be used.

37. op. cit at p.22.

38. (1967) Z.R. 71 at p.74.

39. The English Law (Extent of Application) Ordinance No. 4 of 1963.

40. Northern Rhodesia Proclamation No. 1 of 1913.

41. See p.4 on Customary Law.

42. See p. 14 on date.

43. R.B. Seidman "The Reception of English Law in Colonial Africa Revisited" (1969) Vol.2 East African Law Review 47 at p.69.

NOTES TO PP. 21 - 33.

44. (1910) 2 N.L.R. 1.

45. op. cit.

46. Art. 21(2).

47. High Court Act, S.11(1).

48. Laws of Zambia, Cap. 45.

49. /1955/1 All E.R. 646 at p. 653.

50. (1969) Vol. 2 East African Law Review 1 at p.9.

51. op. cit.

52. In the case of Kalimukwa v The People (1971) ZR 85 the Supreme Court refused to follow cases from the Northern Rhodesia Courts holding that such cases which had followed English precedent could not be considered binding in the wake of trying to minimize reliance on past precedents, Also see the case of Paton v Attorney-General (1969) S.J.Z. 10.

53. Chapter 4 of the Laws of Zambia, 1970.

54. (1978) Z.R. 304.

55. Act No. 35 of 1973 of the Penal Code.

56. (1982) Z.R. 122 at p. 135.

57. (1957) 40 Cr. App.R (C.A.) 304 at p.306.

58. (1974) 58 Cr. App.R. (C.A.)304 at p.306.

59. (1957) 40 Cr. App.R. 95.

60. Vol. VI N.R.L.R. 24.

61. See p. 207.

CHAPTER TWO FOOTNOTES

NOTES TO PP. 34 - 47

1. Longman Dictionary of Contemporary English, Longman Group Limited, 1978, Harlow and London.

2. J.D. Heydon, Cases and Materials on Evidence, 1975 Butterworths, London.

3. [1916-17] All E.R. 38 at p. 43; [1916] 2 K.B. 658.

4. [1929] 1 K.B. 99 at p. 102.

5. (1973) Z.R. 287 at p. 291 quoting Lord Diplock in D.P.P. v Esther [1972] 3 All E.R. 1056.

6. (1971) Z.R. 85 at p. 87 - full facts stated at p. 111.

7. R v Whitehead op. cit.

8. op. cit.

9. (1934) 24 Cr. App.R. 44.

10. (1972) Z.R. 29 at p.30, and also Ndakala v The People (1974) Z.R. 19 which held that evidence of recent complaint would show consistency and this helps the prosecution case. The collary of that must also be accepted, that if there is no prompt report, that must be weighed in the scales against the prosecution case.

11. (1962) 4 Cr. App.R. 319.

12. (1961) 129 C.C. 289 (B.C.C.A).

13. (1943) 10 E.A. 60.

14. op. cit.

15. (1973) Z.R. 287.

16. supra.

17. (1962) 46 Cr. App.R. 319.

18. (1961) 129 C.C. 289 (B.C.C.A.) See page 41 the torn clothes was held to be independent evidence capable of corroborating the accused's testimony.

NOTES TO PP. 47 - 61

19. R v Baskerville [1916-17] All E.R. 38; [1916] 2 K.B. 658.

20. 68 D.L.R. 2d. 528 at p.533.

21. (1973) Z.R. 289 at p.290.

22. op. cit.

23. [1973] 1 All E.R. 440 at p.456.

24. (1973) Z.R. 287 at p. 291.

25. A.A. Wakeling, Corroboration in Canadian Law, The Carswell Company Limited, Toronto, Canada.

26. (1978) Z.R. 79 and (1972) Z.R. 101.

27. (1978) Z.R. 79 at pp. 91-92.

28. SCZ Judgment No. 12 of 1985 at pp. 91-92 (unreported).

29. (1961) 129 C.C. 289 (B.C.C.A) - See facts at p.41.

30. (1978) Z.R. 44.

31. op cit.

32. R v White (1974) 27 C.R.N.S. 66.

33. Thomas v R (1952) 4 D.L.R. 306.

34. [1965] 2 All E.R. 405.

35. (1947) 2 D.L.R. 625 at p.629.

36. (1973) Z.R. 287 at p.291.

37. Wakeling A.A. Corroboration in Canadian Law, The Carswell Company Limited, Toronto, Canada, 1977 at p.59.

38. Wakeling, supra, at p.56.

39. op. cit.

40. Rupert Cross, Evidence 4th Edn. 1974 Butterworths and Co Publishers Ltd, London.

NOTES TO PP. 62 - 76

41. (1961) 40 W.L.R. 663 at p. 691.

42. (1977) Z.R. 151 at p. 151.

43. Banda (N) v The People (1978) Z.R. 300 at p. 302; Chizu v The People (1979) Z.R. 225 at p.226 and Maulla and Anor v The People (1980) Z.R. 119.

44. Nikutisha and Anor v The People (1979) Z.R. 261 at p. 266.

45. [1973] A.C. 296, [1972] 3 All E.R. p. 1056 at p. 1059.

46. J.D. Heydon, Evidence Cases, and Materials on Evidence, 1975 Butterworths, London, U.K. at p.84.

47. (1980) Z.R. 36 at p.38.

48. SCZ Judgment No. 3 of 1981.

49. (1978) Z.R. 79 at p. 91.

50. supra, at p.91.

51. See pp. 187 to 197.

52. (1968) 53 Cr. App. Rep. 150.

53. (1966) Z.R. 126.

54. (1975) Z.R. 13 at page 14.

55. (1952) 194 F. 2d 150.

56. (1962) Criminal Law Review at p. 662.

57. (1967) 67 part 2 Columbia Law Review 1137 at p. 1138.

58. op. cit.

59. "The Rape Corroboration Requirement - Repeal not Reform" (1972) 81 Yale Law Journal 1365.

60. Manongo v The People (1981) Z.R. 152.

NOTES TO PP. 77 - 88

61. English Digest, Volume 22; 88 E.R. 1548.

62. Muna Ndulo "The Tainted Nature of a Confession" (1972-73) Zambia Law Journal.

63. "Criminal Law - Confession - Requirement of corroboration of extra-judicial confessions" Reported in Modern Law Review (1941) Vol. 5 at p. 236.

64. (1981) W.L.R. 120.

65. (1982) Z.R. 122 at p. 147.

66. (1973) 89 Law Quarterly Review at p. 552.

67. (1973) 2 W.L.R. at p. 876; and [1973] All E.R. 624.

68. [1949] A.C. 253 at p. 280.

69. Cortifield v Hodgson [1966] 2 All E.R. 205 and Pitman v Byrne (1926) S.A.S.R. 207.

70. [1976] 3 All E.R. 549 at p. 550.

71. (1977) Z.R. 192 at p. 194.

72. (1975) Z.R. 227.

73. (1976) Z.R. 338.

74. (1960) 44 Cr. App. Rep. 158 at p. 163.

75. (1952) 36 Cr. App. R. 72.

76. [1921] 1 K.B. 22; [1920] All E.R. Rep. 462.

77. [1966] 2 All E.R. 205.

78. (1926) S.A.S.R. 207.

79. J.D. Heydon "Can Lies Corroborate" Reported in (1973) 89 Law Quarterly Review at p.552.

80. [1981] W.L.R. 120.

81. (1982) Z.R. 123.

82. [1967] 2 Q.B. 338.

NOTES TO PP. 89 - 105

83. Laws of Zambia, Cap. 160.

84. (1959) 43 Cr. App. R. 212 at p. 215.

85. (1967) 51 Cr. App. Rep. 102.

86. [1929] 1 K.B. 99; [1928] All E.R. 186.

87. (1973) Z.R. 232 at p. 235.

88. (1892) 17 Cox C.C. 503.

89. 1880 14 Cox C.C. 390.

90. [1908] 2 K.B. 680.

91. [1891] 2 Q.B. 534,

92. (1968) Z.R. 19 at p. 20.

93. op. cit at p. 235.

94. (1966) 50 Cr. App. Rep. 144.

95. (1973) Z.R. 191 at p. 193.

96. (1975) Z.R. 294.

97. (1968) Z.R. 181 at p. 182.

98. (1963-1964) Z.R. 54 at p. 56.

99. Cap. 160 Laws of Zambia.

100. See S. 157(a) to (c) of the Criminal Procedure Code, Cap. 160 of the Laws of Zambia and Chibuye v The People (1970) Z.R. 28 at p. 29.

101. [1894] A.C. 57.

102. [1970] A.C. 304.

103. (1973) 57 Cr. App. R 381.

104. supra at p. 401.

105. supra at p. 418.

106. (1946) 31 Cr. App. R. 158.

107. [1941] 1 K.B. 5.

NOTES TO PP. 105 - 117

108. [1920] 3 K.B. 643.

109. (1982) Z.R. 122 at p. 148.

110. Supreme Court Appeal No. 84 and 85 of 1986 (unreported).

111. supra at p.3.

112. (1982) Z.R. 122 at p. 148.

113. See E.R. Hilgard and R.C. Atkinson, Introduction to Psychology, 4th Ed. 1967, Harcourt, Brace and World Inc. New York at pp. 163-186.

114. (1962) 4 Cr. App.R. 319.

115. (1966) 50 Cr. App. R. 122.

116. (1971) Z.R. 85.

117. (1980) Z.R. 259.

118. See Zimba supra.

119. (1974) 25 C.R.M.S. 381 at p. 386.

120. Wakeling A.A. Corroboration in Canadian Law, The Carswell Company Limited, Toronto, Canada at pp. 25-26.

121. (1908) 45 SC. L.R. 473.

122. See Nsofu at p. 46.

123. (1978) Z.R. 44.

124. (1973) Z.R. 287 at p. 290.

125. supra at p. 290.

CHAPTER THREE FOOTNOTES

NOTES TO PP. 121 - 126

1. (1973) Z.R. 326 at p. 326.

2. Mwewa v The People (1978) Z.R. 27; Makhanganya v R (1963) R & N 698; The People v Banda (1972) Z.R. 307; Sakala v The People (1972) 150; Goba v The People (1966) Z.R. 113; D.P.P. v Hester [1972] 3 All E.R. 1056.

3. Vol VI N.R.L.R. 24.

4. (1974) Z.R. 18.

5. Laws of Zambia, Cap. 217.

6. The People v Banda (1972) Z.R. 307; Mwape v The People (1979) Z.R. 54; Makhanganya v R (1963) R & N.L.R. 698.

7. 17 Statutes 435.

8. (1957) 40 Cr. App. R. 95 at p. 99.

9. (1974) Z.R. 18.

10. [1959] E.A. 92.

11. Laws of Kenya Cap. 20, s.19(1).

12. (1963) R & N.L.R. 698.

13. Northern Rhodesia Ordinance, Vol. XLVI, S.120.

14. (1980) Z.R. 36 at p.40.

15. (1974) Z.R. 16. The same view was expressed in the case of Sukurlite v R (1963) R & N.L.R. 857 at p.860.

16. (1950) 13 M.L.R. 235 .

17. (1971-72) Zambia Law Journal 160.

18. (1971-72) Zambia Law Journal at p. 161. Also S.8 of the Penal Code 1972 mentioned in the quotation is now S.14(2) of the Penal Code, Cap. 146.

NOTES TO PP. 127 - 138

19. (1972) Comnd 4991 Cl. 188.
20. [1950] 1 All E.R. 335.
21. [1964] 1 All E.R. 205.
22. 46 Law Quarterly Review 138.
23. (1964) Crim. L.R. 769.
24. (1975) Z.R. 30.
25. op. cit.
26. Laws of Zambia, Cap. 217.
27. [1973] A.C. 296; [1972] 3 All E.R. 1056.
28. (1936) 25 Cr. App.R. 18.
29. op. cit.
30. (1978) Z.R. 277.
31. [1972] All E.R. 1056.
32. op. cit.
33. supra at p.102.
34. Vol. VI N.R.L.R. 24.
35. op. cit.
36. (1972) Z.R. 307.
37. (1963) R & N.L.R. 698.
38. supra.
39. op. cit.
40. op. cit.
41. op. cit.
42. [1964] 1 All E.R. 205.
43. [1964] Cr. E.R. 205 at p.206.

NOTES TO PP. 140 - 151.

44. (1964) Cr. L.R. 769.

45. [1973] A.C. 729; [1973]1 All E.R. 440.

46. supra.

47. Mwewa v The People (1978) Z.R. 277 Supreme Court case which followed the holding in the case of DPP v Hester [1972] All E.R. 1056.

48. (1972) Z.R. 30.

49. (1963) R & N.L.R. 698.

50. Criminal Law Revision Committee (11th Report) 1972 Comnd 4991 Cl. 19.

51. Roads and Road Traffic Act, Cap. 766, S.192 (3) and (4) of the Laws of Zambia.

52. [1938]4 All E.R. 127.

53. [1950]2 All E.R. 89.

54. (1906) 94 L.T. 577; 70 J.P. 216; 22 T.L.R. 432; 50 Sol Jo. 377.

55. [1938]4 All E.R. 98; 82 Sol Jo. 854.

56. (1963) R & N.L.R. 932.

57. (1968) R & N.L.R.

58. Cross and Wilkins on Evidence, p. 85.

59. (1865) L & G 575; 15 Digest 830.

60. (1941) 10 Crim. App.R. 112.

61. 15 Digest 830.

62. [1952]1 All E.R. 450.

63. [1958] E.A. 289

64. (1841) Car & M 132; 15 Digest 830.

65. (1930) 2 W.W.R. 602; 15 Digest 833.

66. J.D. Heydon 'Cases and Materials on Evidence' London, Butterworths 1975, p.75.

NOTES TO PP. 151 - 160

67. Rupert Cross, 'Evidence', London Butterworths, 1974.

68. op. cit.

69. R v Baskerville, [1916] 2 K.B. 658; [1916-17] All E.R. 38.

70. (1975) Z.R. 104.

71. op. cit.

72. (1952) 194 F. 2d 150.

73. (1952) 194 F. 2d 150 reported in Heydon on Evidence at p. 79.

74. (1914) II Crim. App. R. 217.

75. (1909)2 Cr. App. Rep. 6.

76. (1961) R & N.L.R. 166.

77. (1906) 70 J.P. 347, 3 Digest 452.

78. (1860) 5 H. & N 625, 3 Digest 452.

79. [1877] 2 Q.B. 611, 3 Digest 453.

80. (1933) 97 J.P. Jo 754, 3 Digest 453.

81. [1947] K.B. 831; 3 Digest 453.

82. [1952] 1 All E.R. 450; 3 Digest 452.

83. [1952] 7 Q.B. 902; 3 Digest 452.

84. [1917] 1 K.B. 16; 3 Digest 452.

85. [1966] 2 All E.R. 205.

86. (1926) S.A.S.R. 207.

CHAPTER FOUR FOOTNOTES

NOTES TO PP. 162 - 180

1. Archbold Pleading, Evidence and Practice in Criminal Cases 40th Ed., London Sweet and Maxwell, 1973, para. 1425.
2. [1954] A.C. 378; [1954] 1 All E.R. 507.
3. (1978) Z.R. 79 at p. 90.
4. p. 207.
5. (1954) 17 Modern Law Review 25 at p.26.
6. (1954) Cambridge Law Journal 169.
7. (1978) Z.R. 271.
8. (1976) Z.R. 200.
9. Penal Code, Cap. 146 of the Laws of Zambia S.294(2).
10. Penal Code supra. S.294(2)(i),(ii),(iii).
11. (1978) Z.R. 300.
12. Rupert Cross, Cross on Evidence 4th Edn, 1974, London, Butterworths.
13. op. cit.
14. (1978) Z.R. 402 and Machobane v The People (1972) Z.R. 101.
15. (1975) Z.R. 161.
16. Penal Code, Cap. 146, s.318(1) and (2).
17. (1971) Z.R. 145; See also R v Price [1968] 2 All E.R. 282.
18. SCZ Judgment No. 12 of 1985 at pp. 55 to 56.
19. (1978) Z.R. 304.
20. (1909) 2 Crim. App.R 53; (1909) 73 J.P. 239 C.C.A.
21. (1848) 12 J.P. 776.

NOTES TO PP. 181 - 196

22. (1977) Z.R. 334.

23. (1967) 1 W.L.R. 1051.

24. (1965) N.I. 138.

25. op. cit at p. 140.

26. (1971) Z.R. 168 at p. 171.

27. Criminal Appeal No. 25 of 1977 - Reported in The Commonwealth Law Bulletin, Vol.4, No. 3 of July 1978.

28. [1940] 2 All E.R. 229.

29. [1960] 1 All E.R. 298.

30. (1978) Z.R. 271.

31. (1982) Z.R. 20.

32. (1978) Z.R. 402.

33. (1978) Z.R. 151.

34. (1978) Z.R. 243.

35. (1973) Z.R. 28.

36. (1978) Z.R. 362.

37. supra at p. 365.

38. (1975) Z.R. 161.

39. (1978) Z.R. 402 at p. 404.

40. op. cit.

41. op. cit.

42. (1978) Z.R. 243 and also Muchabi v The People (1973) Z.R. 193.

43. op. cit at p. 274.

44. 11th Report, 1972 Comnd. 1 4991, Cl. 185.

45. (1982) Commonwealth Law Bulletin, Vol. 8 No. 4 of October 1982 at p. 1372.

NOTES TO PP. 197 - 211

46. SCZ Judgment No. 12 of 1985 (unreported).

47. (1973) Z.R. 28.

48. (1982) Z.R. 20.

49. op. cit at pp. 96-99.

50. op. cit.

51. Likando V The People (1975) Z.R. 161.

52. (1978) Z.R. 362 at pp. 365-366.

53. (1982) 2 NSWLR 847 Reported in the (1984) Commonwealth Bulletin, Vol. 10 No. 1 of 1984 at p. 170.

54. (1978) Z.R. 304 and (1976) Z.R. 320.

55. (1973) Z.R. 28.

56. (1978) Z.R. 79.

57. Deans 555.

58. Phiri (E) and Ors v The People (1978) Z.R. 79 at 86.

59. [1916] 2 K.B. 658 at p. 663.

60. (1972) Z.R. 101.

61. [1954] A.C. 378; [1954] 1 All E.R. 507.

62. op. cit at p. 87.

63. op. cit at p. 508.

64. Ticky v The People (1968) Z.R. 21, Solo v The People (1967) Z.R. 99, Machobane v The People (1972) Z.R. 101.

65. (1944) 29 Cr.App.R. 1.

66. [1968] 2 All E.R. 282.

NOTES TO PP. 211 - 225

67. [1962] 2 Q.B. 722.

68. Phiri (E) and Ors. op. cit at p.90.

69. supra at pp. 93-94.

70. SCZ Judgment No. 12 of 1985 (unreported).

71. op. cit at p.98.

72. (1973) Z.R. 127.

73. Supreme Court of Zambia Act, Cap. 52 of the Laws of Zambia, S.15 and the English Criminal Appeal Act, 1907, S.4(1).

74. S.15(1)(a) of Supreme Court of Zambia Act, Cap. 52 of the Laws of Zambia.

75. Davies v D.P.P [1954] 1 All E.R. 507; Musongole v The People (1978) Z.R. 171; Butembo v The People (1976) Z.R. 193. R v Lewis [1937] 4 All E.R. 36; Phiri (E) and Ors. v The People (1978) Z.R. 78.

76. supra.

77. (1963) 47 Cr.App.R.94

78. Butembo v The People op. cit at p. 194.

79. op. cit.

80. (1943) 28 Cr. App.R. 111.

81. (1944) 29 Cr. App.R.1.

82. [1963] 1 W.L.R. 305.

83. op. cit at pp. 108-9.

84. supra.

85. op. cit.

86. (1973) Z.R. 127.

87. Phiri (E) and Ors V The People op. cit at p.109.

88. (1972) Z.R. 101.

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89. (1975) Z.R. 275.

90. Mhango and Ors v The People (1975) Z.R. 275 at 278.

91. op. cit.

92. (1933) 15 K.L.R. 109.

93. Phiri (E) and Ors op. cit at p.95.

94. supra at p. 106.

95. (1978) Z.R. 402.

96. (1978) Z.R. 243.

97. (1978) Z.R. 151.

98. (1981) Z.R. 337.

99. (1978) Z.R. 171.

100. Shamwana and Ors v The People SCZ Judgment No. 12 of 1985 (unreported).

101. Melvin LM, Mbao "Phiri (E) and Ors v The People" A case comment reported in (1981) 13 Zambia Law Journal at p.57.

102. J.D. Heydon, Cases and Materials on Evidence, London, Butterworths, 1975 and the case of Vetrovec v The Queen and Gaja S.C.C. (1982) Reported in the Commonwealth Law Bulletin Vol.8 No. 4 of 1982 October, page 1372 have all expressed the view that the procedure is very complicated.

103. supra at p.74.

104. (1962) Crim. L.R. 588; J.D. Heydon (1973) Crim. Law Rev; Ian Dennis "Corroboration Requirement reconsidered (1984) Crim. Law Rev. 316.

105. A.A. Wakeling, Corroboration in Canadian Law, The Carswell Company Ltd; Toronto, Canada, 1977 at p.110.

106. (1972) Comnd 4991; 11th Report paras. 183-5 and 194.

NOTES TO PP. 240 - 248

107. Rupert Cross, Evidence, London, Butterworths 1974.

108. Ian Dennis "Corroboration Requirements reconsidered (1984) Crim. Law, Rev. 316.

CHAPTER FIVE FOOTNOTES

1. R v Trigg [1963] 1 All E.R. 490; R v Manning (1968) 53 Cr. App. 150. R v Midwinter (1971) 55 CR.App.R. 523.

2. (1966) Z.R. 126.

3. (1978) Z.R. 79.

4. (1962) Crim; Law Rev. p. 662.

5. (1975) Z.R. 13.

6. Page 34.

7. (1971) 55 Cr.App.R 299.

8. R v Jones (1925) 19 Cr.App.Rep 40; R v Freebody (1935) 25 Cr. App.Rep. 69; R v Manning (1968) 53 Cr.App.Rep 150.

9. (1975) Z.R. 13.

10. op. cit at page 92.

11. (1972) Z.R. 101.

12. op. cit at p.13.

13. op. cit.

14. pages 162 to 242.

15. pages 216 to 225.

16. (1976) Z.R. 193.

17. (1978) Z.R. 171.

18. "The Rape Corroboration Requirement" "Repeal not Reform" (1972) 81 Yale Law Journal p.1365.

NOTES TO PP.249 - 260

19. (1967) 67 Columbia Law Review at p. 1137.

20. (1962) Crim. Law. Review at p.662.

21. Dean Wigmore, Evidence, 3rd Edn p. 2061.

22. Pages 68 to 70 and pp. 119 to 144.

23. Pages 119 to 144.

24. Rupert Cross, Evidence, 4th Edn. London Butterworths 1974, p. 182 and J.D. Heydon Cases and Materials on Evidence, London, Butterworths 1975 at p. 84.

25. (1980) Z.R. 36.

26. [1956] 2 All E.R. 272.

27. (1980) Z.R. 36 at p.37.

28. (1980) Z.R. 218.

29. (1980) Z.R. 218 at p. 219.

30. Pages 216 to 225.

31. For detail of what amounts to "corroborative evidence" See pp. 34 to 65.

32. Pages 131 to 144, pp. 253-262.

33. pages 271 to pp. 275.

34. (1965) Z.R. 91.

35. [1967] E.A. 84.

36. (1972) Z.R. 310.

37. (1979) Z.R. 23.

38. (1852) 2 Den Cr. 430.

39. (1979) Z.R. 202 at p. 203.

40. Annel M. Silungwe supports this view in his LLM dissertation on "Confession in Criminal Cases in Zambia".

41. J.D. Heydon on "Cases and Materials on Evidence" expresses this view.

42. (1973) Zambia Law Journal 5 at p. 101.

43. (1959/60) 13 Verd.

44. See Chapter 2 pp. 65-78 requiring Corroboration.

45. [1976] 3 All E.R. 549.

46. R v Long (1973) 57 Cr.App.Rep. 871.

47. (1971) 55 Crim.App.Rep. 161 at p. 161.

48. (1953) 20 EACA 166.

49. [1976] 3 All E.R. 549 at pp.549 to 550.

50. (1976) Z.R. 338.

51. (1977) Z.R. 184.

52. (1978) Z.R. 227 Same holding in the cases of Mushala and Ors v The People (1978) Z.R. 58 and Chimbo and Ors. v The People (1982) Z.R. 20.

53. Chimbo and Ors v The People (1982) Z.R. 20; Nyambe v The People (1973) Z.R. 228; Nachitumbi and Anor v The People (1978) Z.R. 285.

54. (1978) Z.R. 354.

55. Kapuloshi and Ors v The People (1978) Z.R. 200.

56. (1978) Z.R. 79.

57. (1976) Vol. 39 Modern Law Review at p. 707.

58. (11th Report) 1972 Cmnd. 4991.

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1. R v Prater [1960] 1 All E.R. 298; Githae s/o Gathigi v R (1956) 23 EACA 440; R v Ramazani bin Mawingu (1936) 3 E.A.C.A. 39.

2. D.P.P. v Hester [1972] 3 All E.R. 1056; and D.P.P. v Kilbourne (1973) 57 Cr.App.R. 381.

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3. R v Manser (1936) 25 Cr. App.R. 18.

4. (1973) 57 Cr.App.R. 381.

5. [1972] 3 All E.R. 1056.

6. (1982) Z.R. 20.

7. (1972) Z.R. 271.

8. (1978) Z.R. 79.

9. (1972) Z.R. 101.

10. (1978) Z.R. 79 at p. 95.

11. op. cit.

12. SCZ Judgment No. 12 of 1985.

13. (11th Report) 1972. Cmnd 4991.

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1. (1982) 136 D.L.R. 301 at p. 324.

2. [1973] 1 All E.R. 440.

3. (1978) Z.R. 79.

4. op. cit.

5. (1963) 1.R. 33.

6. Official Law Development Commission, File No. LDC/104/2/7.

7. [1916] 2 K.B. 658; [1916-17] All E.R. Rep. 38.

8. (1978) Z.R. 79.

9. The Times of Zambia - Wednesday, September 9, 1987. "Time Zambian Laws suited Local Conditions".

10. The Times of Zambia - see Footnote 9 above.

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