KAI-KAI & 13 OTHERS v THE STATE

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Criminal No 1 of 1988, Hon Mr Justice SMF Kutubu CJ, Hon Mr Justice S Beccles Davies JSC, Hon Mr Justice SCE Warne JSC, Hon Mr Justice MO Taju-Deen JA, Hon Mr Justice AB Timbo JA, 29 September 1989

[1] Criminal Law & Procedure – Treason – Overt acts – Overt acts laid out in indictment for the offence of treason are not specific or distinct charges but merely further particulars – Preparation to overthrow the Government required to be proved beyond reasonable doubt – Whether count contained two or more separate offences and therefore duplicitous – Count did not allege that the appellants had "prepared or endeavoured" to overthrow the Government – Laying of multiple overt acts is permissible but proof of one overt act is sufficient to sustain a charge of treason – Conspiracy by several persons to undertake an act or acts that are preparatory to overthrow the Government is a sufficient overt act of treason – Treason and State Offences Act 1963 s 3(1)(a) – Criminal Procedure Act 1965 s 51, rr 3(4), (5)

[2] Criminal Law & Procedure – Misprision of treason – Common law offence in Sierra Leone – Person with knowledge that treason is merely being planned or committed has a duty to report such at the earliest opportunity – Misprision of treason a grave crime which endangers the very existence of the State – Constitution of Sierra Leone s 125

[3] Criminal Law & Procedure – Burden of proof – Beyond reasonable doubt – No rule that where case is based on circumstantial evidence the judge must give additional direction beyond burden of proof beyond reasonable doubt

[4] Criminal Law & Procedure – Hearsay evidence – Whether wrongfully admitted – Whether verdict unsafe – Jury would have arrived at same verdict even if hearsay evidence not admitted

[5] Criminal Law & Procedure – Alibi – No requirement that defendant prove alibi – Burden of proof remains on prosecution to prove guilt beyond reasonable doubt

[6] Criminal Law & Procedure – Accomplice evidence – Uncorroborated evidence of accomplice is admissible but judge must give warning that it is dangerous to convict unless corroborated – Failure to give warning will result in conviction being quashed – Accomplice cannot corroborate evidence of another accomplice – Independent evidence required

[7] Criminal Law & Procedure – Evidence of co-accused in course of joint criminal enterprise – Inadmissible unless expressly or by implication adopted by co-accused – Sworn evidence by co-defendant in course of joint trial is admissible as evidence against co-accused – No evidence that statement incriminating co-defendant had been retracted

[8] Criminal Law & Procedure – Evidence – Tape recording – Prerequisites for tape recording to be admitted in evidence

[9] Criminal Law & Procedure – Summing up – Misdirections – Whether miscarriage of justice or bias – No set formula for summing up – Whether case has been fairly put before jury – Whether no reasonable jury properly directed could have returned verdict – Court not entitled to substitute its views for that of the jury – Summon up must be viewed as a whole

[10] Words and Phrases – "Overt act"

In June 1987, the appellants were tried in the High Court before Williams JA and a jury on a four-count indictment of treason, misprision of treason and murder. Count 1 charged the first 16 accused with the offence of treason contrary to s 3(1)(a) of the Treason and State Offences Act 1963, with 26 overt acts laid out in the indictment (as set out in the judgement below). Four of the 16 accused were charged with the common law offence of misprision of treason (the deliberate concealment of

knowledge of a treasonable act or a felony). Four of the appellants were also charged with murder of a policer officer who was killed when the appellants were being arrested by security forces. The jury returned unanimous verdicts of guilty as charged in respect of all the accused. The death sentence was passed on the first 16 accused, while the 17th and 18th accused were sentenced to terms of imprisonment of 4 and 7 years respectively. All 18 appealed to the Court of Appeal against their conviction on various grounds. Four of the appellants convicted of treason were acquitted on appeal, but the Court of Appeal dismissed all the other appeals. The remaining 14 appellants appealed to the Supreme Court and contended variously that:

(1) the laying of overt acts on a count of treason was not permissible under s 3(1)(a) of the Treason and State Offences Act 1963;

(2) Count 1 was duplicitous and void because it contained several separate and distinct offences;

(3) the conspiracy overt act in Count 1 was not properly laid;

(4) the common law offence of misprision of treason was not part of the law of Sierra Leone following the repeal of the Treason Act 1351 by s 19(2) of the Treason and State Offences Act 1963;

(5) the trial judge had misdirected the jury in relation to the circumstantial evidence on which the murder convictions were based;

(6) in relation to the 5th and 12th appellants, that hearsay evidence was wrongly admitted and that their alibi defence was not properly considered;

(7) that the trial judge misdirected the jury in relation to accomplice evidence;

(8) that alleged statements made by suspects at the scene of the crime were improper and inadmissible;

(9) that the unsworn statement of the first appellant did not constitute evidence against the 5th appellant and should not have been admitted;

(10) that the tape recording of the 1st appellant was improperly admitted into evidence and prejudiced his trial;

(11) that the trial judge's 200-page summing-up did not fairly put the case of the defence to the jury and was biased.

Held, per Kutubu CJ, dismissing the appeals:

1. An 'overt act' is an act that is open to the world in the sense that it can be perceived by anyone placed to do so. The overt acts laid in Count 1 are no more than further particulars of the particulars of the offence charged. They are in themselves not specific or distinct charges, but merely further particulars. The indictment as laid under s 3(1)(a) of the Treason and State Offences Act 1963 together with the overt acts is correct, proper and in conformity with the provisions of s 51 of the Criminal Procedure Act 1965 and rules 3(4) and (5) . Under criminal procedure in Sierra Leone the proof required for any criminal offence is proof beyond reasonable doubt. In the instant case what the prosecution was required to prove against the appellants was the substantive offence of preparation to overthrow the Government of Sierra Leone by unlawful means, which is treason. *Fornah and 14 Others v The State* [1974-82] 1 SLBALR 48 and *Mattaka & Others v The Republic* [1971] EA 495 referred to.

2. Duplicity in a count is a matter of form not of evidence called in support of the count. Whether a count is bad for duplicity, one must examine the count itself, that is, the count's statement of offence, as read with its particulars of offence. If an examination shows that two or more offences have been charged therein, then the count is bad for duplicity and the conviction will be quashed. *Mallon v Allon* (1964) 1 QB 385; (1963) 3 All ER 843 and *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 applied.

3. An examination of Count 1 of the indictment clearly showed that the only offence charged in the statement of offence was treason, not treason and conspiracy or conspiracies. The particulars

of the offence alleged, that the appellants together prepared to overthrow the Government - not prepared or/and endeavoured to overthrow the Government. Had the statement of offence in Count 1 charged the appellants with two separate offences and the particulars of the offence alleged that the appellants had "prepared or endeavoured" to overthrow the Government as was the case in *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 the count would have been duplicitous and bad as the terms "prepared" and "endeavoured" would have related to distinct specific offences of treason. This was not the position in the instant case and the argument that Count 1 was bad for duplicity failed.

4. The various overt acts were not laid as substantive offences but as further particulars of the offence of the one and only count of treason in the indictment. In law, it is permissible to lay any number of overt acts in the same count of an indictment without making the count duplicitous. Where there are several overt acts laid in a count of an indictment and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficiently laid. In law, proof of one overt act will sustain the count provided that the overt act so proved is a sufficient overt act of the species of the treason count in the indictment. Consequently, the charge of the trial judge to the jury, that proof of one overt act is sufficient to sustain the count is correct and proper in law.

5. If several persons do an act preparatory to the overthrow of the Government by unlawful means, that amounts to treason under s 3(1)(a) of the Treason and State Offences Act 1963. Consequently, the respective acts of the parties can be laid as overt acts of the treason of preparing. In the instant case, the forbidden act under the Treason and State Offences Act 1963 with which the appellants were charged, was preparation to overthrow the Government of Sierra Leone by unlawful means. Conspiracy is a preparatory act, preparatory to the commission of an unlawful act. Therefore when persons agree to overthrow the Government by unlawful means, that agreement is a preparatory act, which amounts to a preparation to overthrow the Government by unlawful means contrary to s 3(1)(a) Consequently, the said agreement to overthrow Government by unlawful means is a sufficient overt act of the species of treason created by s 3(1)(a). Conspiracy to commit treason is a sufficient overt act of treason and can be properly laid in a count for treason. It is also possible in law to lay two or more conspiracy overt acts in a count for treason. *Mulcahy v The Queen (1868) LR 3 HL 306, David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 and *R v Greenfield* [1973] 3 All ER 1050 applied.

6. Neither the repeal of the Treason Act of 1351, nor the absence of any mention of this offence in the Treason and State Offences Act 1963, made any difference to the status of misprision of treason as a criminal offence in Sierra Leone. Under s 125 of the Constitution, it was quite clear that the English law applicable to Sierra Leone is the common law of England, the doctrines of equity and statutes of general application which were in force in England on 1 January 1880, which included the offences of misprision of treason and misprision of felony. *Sykes v DPP* [1962] AC 528; [1961] 3 All ER 33 applied. Dictum of Tambiah JA in *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 overruled.

7. As soon as a person becomes aware of a treasonable design, that is, a knowledge that treason is merely being planned or committed, it is his duty to reveal it to a Judge or Justice of the Peace or other authority at the earliest opportunity. Failure to do so is misprision of treason for which he may be prosecuted. It is the duty of every citizen to assist in the detection and suppression of crime, and prevention is better than cure. The 13th appellant, as a high-ranking Police Officer, had a duty which carried with it a high degree of responsibility. Much was expected of him at a time when it would appear to any reasonable person that the country was on the brink of a precipice. Regrettably, the 13th appellant was woefully wanting in foresight and the expected standards of a highly placed and disciplined Police Officer.

8. In a criminal trial, it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution

case is based on circumstantial evidence the judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion. The proper direction to be given in all criminal trials in Sierra Leone, irrespective of whether the evidence adduced at such trials is direct or circumstantial, is proof beyond reasonable doubt. *Woolmington v DPP* (1935) 25 Cr App R 72 and *McGreevy v DPP* [1973] 1 WLR 276; (1972) 57 Cr App R 424 applied. *Ogwa Nweke Onah v The State* (1985) 3 NWLR 236 not followed.

9. From the range of evidence, it was apparent that there were matters sufficient for the consideration of the jury, and further, that it was open to them to draw conclusions from the mass of evidence which would warrant them in deciding that the guilt of appellants had been established or not. In addition, the prosecution case against the appellants was based on common design. In law, if several persons act together in one common unlawful undertaking and death results, but it is not known by whom, all are responsible. Consequently, the 2nd, 3rd, 4th and 11th appellants were all responsible for the death of Mohamed Adama Rogers. On the totality of the evidence, no jury properly directed would have returned a verdict otherwise than that of guilty of murder.

10. It is a fundamental rule of evidence that hearsay evidence, whether oral or written (common law and statutory exceptions apart), is inadmissible in criminal proceedings. The essence of hearsay evidence is that the statement complained of was made in the absence of the accused person. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost. The rule, however, admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*, that is, the facts surrounding or accompanying a transaction which is the subject of the legal proceedings. *Subramanian v Public Prosecutor* [1956] 1 WLR 965 applied.

11. The hearsay evidence of DW20 based on the intelligence reports received was wrongly admitted by the trial judge in that it went beyond the principles laid down in *Subramanian*, in that the object of the evidence was to establish the truth of the statement in the intelligence reports not the fact that it was made. The trial judge misdirected himself by admitting DW20's hearsay evidence. However, the fact that evidence is wrongly admitted does not make the verdict unsafe unless it can be shown that the evidence has actually influenced the verdict of the jury. Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at. Disregarding the piece of hearsay evidence of DW20, there was other evidence left to the jury for consideration on a right direction, in determining the guilt or otherwise of the appellants. The jury were properly directed on that evidence and would have arrived at the same verdict if the hearsay evidence had not been admitted.

12. At a criminal trial with a jury, where an accused raises an alibi as a defence, it is the duty of the trial judge to explain that defence to the jury. He must explain to the jury what in law amounts to an alibi. It must be explained further to the jury that even where an accused raises an alibi, the burden of proving his guilt lies on the prosecution throughout the proceedings. In law, no duty is imposed on an accused to prove his alibi although nothing stops him from calling witnesses to buttress such alibi if he chooses. The jury must be told this in clear terms and that if an alibi fails the matter does not end there. The overall burden of proving the guilt of the accused lies on the prosecution. The standard of proof required of the prosecution is proof beyond reasonable doubt.

13. The trial judge in his summing-up directed the jury over and over on the burden of proof being on the prosecution to establish the guilt of the appellants and that he did this after reviewing the whole evidence and explaining the nature of their defences to the jury in non-technical language. The jury understood the trial judge's direction and were not confused by it in arriving at their

verdict and came to the conclusion that the prosecution had proved guilt beyond reasonable doubt.

14. In law, an accomplice simpliciter is a person who is involved in the actual commission of the crime charged, whether as principal or accessory in felony or persons committing, procuring or aiding and abetting in the case of misdemeanour. A police spy is not an accomplice for this purpose. An accomplice is always a competent witness for the prosecution, although the fact of a witness being an accomplice detracts materially from his credit. The uncorroborated evidence of an accomplice is admissible in law; but where an accomplice gives evidence for the prosecution, it is the duty of the judge to warn the jury that although they may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, has now become a rule of law.

15. Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed even if in fact there be ample corroborative evidence. Where the judge has given the jury an adequate warning on corroboration and has explained to them what is meant in law by corroboration, it is not necessary that he should point out to the jury the pieces of evidence which can amount to corroboration. In law an accomplice cannot corroborate the evidence of another accomplice. Corroboration of a witness's testimony must be afforded by independent evidence which affects the defendant by connecting or tending to connect him with the offence charged. It must be evidence which implicates him, that is, which tends to confirm in some material particular not only that the offence was committed, but also that the defendant committed it. It is for the judge to decide whether there is any evidence to show that a witness can be regarded as an accomplice, and it is for the jury to determine whether the witness is in fact an accomplice. In the present case, the trial judge correctly assessed the evidence and came to the right conclusion that PW18, PW21 and PW33 were not accomplices and he in no way misdirected the jury.

16. In the instant case, proper caution was administered to suspects before statements were obtained from them. In the course of ordinary police investigations visits were made to places mentioned in the several overt acts and not scenes of crimes simpliciter. As far as possible the proprieties were duty observed. The jury as judges of fact had the opportunity of seeing and hearing these witnesses give evidence and were in position to form their own impressions. Their verdict was an indication that they believed the statements of the appellants.

17. It is a fundamental rule of evidence that statements made by one accused person either to the police or to others, whether in the presence or absence of a co-accused, made in the course and pursuance of a joint criminal enterprise to which the co-accused was a party are not evidence against a co-accused, unless the co-accused either expressly or by implication adopts the statements and thereby makes them his own. It is the duty of the judge in a jury trial to impress on the jury that the statement of the accused person not made on oath in the course of the trial is not evidence against a co-accused and must be entirely disregarded. *R v Rudd* (1948) 32 Cr App R 138 and *R v Gunewardene* (1951) 35 Cr App R 80 applied.

18. However, it is a recognised and universal principle of law that, whereas a statement made in the absence of the accused person by a co-defendant cannot be evidence against the accused person, yet if that co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then his sworn evidence becomes evidence for all purposes in the case including that of being evidence against the accused person. Here, the 1st appellant elected to give evidence on oath in his own defence from the witness-box. His sworn evidence from the witness-box became evidence for all purposes in the case including that of being evidence against the accused, and there was no evidence that the 1st appellant retracted his statement his incriminating statement against the 5th appellant. *R v Meredith and Others* (1943) 29 Cr App R 40 applied.

19. In order for a tape recording to be admitted into evidence, he accuracy of the tape recording must be proved, the voice recorded must be properly identified, the evidence must be relevant and the recording must come from proper custody. All of these prerequisites were met in the current

case and the tape recording was properly admitted in evidence. *R v Maqsud Ali and Ashiq Hussain* [1962] 2 All ER 464 applied.

20. As regards the trial judge's summing up, the proper approach is to look at the summing up as a whole in determining whether it contains misdirections or other matters verging on a miscarriage of justice. There is no set formula for a summing-up. Strong comments by the trial judge in summing-up cannot be equated with unfairness or usurpation of the functions of the jury. A judge is entitled to express his opinions and to make strong comments on questions of fact as long as he leaves the issues to the jury to decide. The key question is whether the case for the defence has been put fairly before the jury. On the general ground that the verdict is unreasonable or cannot be supported having regard to the evidence, the court is not entitled to reverse the verdict of the jury, unless no reasonable jury properly directed could have returned that verdict. The court is not entitled to substitute its views for that of the jury. While there were misdirections in the trial judge's summing-up, there was ample evidence against the appellants on which the jury could convict on all counts. There was here no miscarriage of justice and the appeals against convictions and sentence were therefore dismissed. *R v Linzee and O'Driscoll* [1956] 3 All ER 980, *McGreevy v DPP* [1973] 1 WLR 276]; (1972) 57 Cr App R 424, *R v Cohen & Bateman* (1909) 2 Cr App R 197 and *R v Ali* (1981) 6 A Crim R 161 applied.

Per Warne JSC:

21. In any civilized society, where the rule of law exists, misprision of treason is a grave crime. It is a grave crime in Sierra Leone. It is a crime which endangers the very existence of the State. For such a crime the maximum sentence is life imprisonment. It is one of the gravest offences know to the laws of Sierra Leone yet it carries a lower sentence than that for the offence of murder. In considering whether the sentence is inordinately long, one must bear also in mind the frequency with which such offence is committed and ensure whatever sentence is imposed will be a deterrent to others. In the twenty-eight years of the Independence of Sierra Leone, there have been as many coups and abortive coups as there have been general elections. The several attempts to overthrow the Government of Sierra Leone by unlawful means are not only disturbing but intolerable. It is reprehensible that persons who know of a coup plot or that treason has been committed should conceal this intelligence from authorities. They should feel the full weight of the law.

22. The summing-up by the trial judge was not impeccable and contained a number of misdirections (as set out in Warne JSC's judgement). However, it was necessary to take into account the length of the trial, the number of accused persons, the several objections of counsel for the number of accused persons, the several objections of counsel for the defence, some warranted and some absolutely unwarranted, and the advantage the judge and jury had to see and hear the several witnesses both for the prosecution and the defence. The Court of Appeal made a determined and critical scrutiny of the whole proceedings. The trial judge's summing-up was not open to the charge of bias. There are passages in it which are open to criticisms. But the summing-up must be viewed as a whole, and upon this view of it, the appellants were guilty of the offences as charged.

Cases referred to

David Lasana & 11 Others v R (1970-71) ALR (SL) 186
Fornah and 14 Others v The State [1974-82] 1 SLBALR 48
Mallon v Allon (1964) 1 QB 385; (1963) 3 All ER 843
Mattaka & Others v The Republic [1971] EA 495
McGreevy v DPP [1973] 1 WLR 276; (1972) 57 Cr App R 424
Mulcahy v The Queen (1868) LR 3 HL 306
Myers v Director of Public Prosecutions [1965] AC 1001
Ogwa Nweke Onah v The State (1985) 3 NWLR 236
Queen v Aspinall [1876] 2 QBD 48
R v Ali (1981) 6 A Crim R 161
R v Brisac (1803) 4 East 164

R v Cohen & Bateman (1909) 2 Cr App R 197
R v Greenfield [1973] 3 All ER 1050
R v Gunewardene (1951) 35 Cr App R 80
R v Henry Beecham [1921] 3 KB 464
R v Kojo Bodom & Others (1935) 2 WACA 390
R v Linzee and O'Driscoll [1956] 3 All ER 980
R v Maqsud Ali and Ashiq Hussain [1962] 2 All ER 464
R v Meredith and Others (1943) 29 Cr App R 40
R v Onufrejczyk [1955] 1 QB 388; (1955) 39 Cr App R 1
R v Rudd (1948) 32 Cr App R 138
R v Summers [1952] 1 All ER 1059
R v Taylor Weaver and Donovan 1928] 21 Cr App R 20
R v Turner and Others [1975] 61 Cr App R 67
R v Wann (1912) 7 Cr App R 135
R v Wolf (1914) 10 Cr App R 107
Shamwana v The People (1985) ZR 41
Subramanian v Public Prosecutor [1956] 1 WLR 965
Sykes v DPP [1962] AC 528; [1961] 3 All ER 33
Teper v R [1952] AC 480
Venn v The State [1974-1982] 1 SLBAR 172
Woolmington v DPP (1935) 25 Cr App R 72

Legislation referred to
Constitution of Sierra Leone 1978 s 125
Courts Act 1965 ss 58(2), 74
Criminal Procedure Act 1965 ss 3, 51(1), 52(1)
Criminal Procedure Code s 135 (Tanzania)
Criminal Procedure Rules r 3(1), (2),(4), 3(5)
Penal Code s 39 (Tanzania)
Penal Code (Cap 146) s 52 (Zambia)
Treason Act 1351 [UK]
Treason and State Offence Act 1963 ss 2, 3(1)(a), 17, 19(2)

Other sources referred to
Archbold [39th Ed] p 598, paras [1127], [1301]
Funk and Wagnalls Standard Dictionary of the English Language, International Edition
Halsbury's Laws of England [4th Ed] Vol 11 p 483
Jowitt's Dictionary of English Law [1977 Ed] 2nd Vol p 1300
Kenny's Outlines of Criminal Law [15th Ed] 1936
Oxford Universal Dictionary Illustrated [3rd Ed] Vol II 1970 Reprint
Smith & Hogan, Criminal Law [5th Ed] 1983
Stephen's Commentaries on the Laws of England [21st Ed] p 405
Taylor on Circumstantial Evidence [11th Ed] Vol 1 p74
Wharton's Law Lexicon [4th Ed] p 723

Appeal
This was an appeal by 14 appellants from a decision of the Court of Appeal on 22 September 1988, which dismissed their appeals against conviction in a trial before Williams JA and a jury on 1 June 1987 on a four-count indictment of treason, misprision of treason and murder. The facts appear sufficiently in the following judgment of Kutubu CJ.

Mr CF Margai for the 1st, 8th, 9th, 10th & 14th appellants.
Mr JA Wilson for the 2nd, 3rd, 4th & 11th appellants.
Mr CJ Betts and Mr SE Berewa for the 5th appellant.
Miss Isha Dyfan for the 6th & 7th appellants.
Mr Berthan Macauley Jnr for the 12th appellant.

Mr CA Osho-Williams and Mr ABC Johnson for the 13th appellant.
Attorney General for the State.

KUTUBU CJ: This is an appeal from the judgment of the Court of Appeal for Sierra Leone, comprising Turay JA, Thompson-Davis JA and Johnson J, dated 22 September 1988.

The brief history of this case can be succinctly stated. Eighteen accused persons were in the month of June 1987 arraigned before the High Court in Freetown on a four-count indictment of treason, misprision of treason and murder. Count 1 charged the first 16 accused with the offence of treason contrary to s 3(1)(a) of the Treason and State Offences Act No 10 of 1963. Four of the 16 accused were charged with the offence of misprision of treason, contrary to law.

The trial proceeded before Williams JA and a jury, from 1 June 1987 and was concluded on 17 October 1987. Suffice it to say that this trial was beset by many difficulties of unparalleled proportions in the history of criminal trials in this country, one such being the empanelling of juror which took four weeks to accomplish.

At the close of the case for both the prosecution and the defence, and after a long summing-up by the learned trial judge which lasted several days, the jury returned a unanimous verdict of guilty as charged in respect of the accused. The death sentence was passed on the first 16 accused, while the 17th and 18th accused were sentenced to terms of imprisonment of 4 and 7 years respectively.

It was against this background that all 18 convicted prisoners appealed to the Court of Appeal against their conviction on various grounds.

The 18th appellant also appealed against sentence. As was the position in the High Court, all appellants in the Court of Appeal were represented by counsel.

On the 16 appellants convicted of treason, the Court of Appeal upheld the appeals of the following four: Francis Augustine Ensah, Patrick Benedict Kai-Kai, Kazim Allie and Raymond Brima Dorwie, who were accordingly acquitted and discharged.

The appeals of the following twelve appellants were dismissed by Court of Appeal, namely: Gabriel Mohamed Tennyson Kai-Kai, Prince Deen Kai-Kai, Joseph John Harding, Daniel Sulaiman Kai-Kai, Francis Mischeck Minah, David Abu Samu, Francis Massaquoi, Amara Allieu Tarawallie, Joseph Abiodun Williams, Hassan Morlai Conteh, Conrad Innis and Haruna Vandy-Jimmy.

The murder appeals in respect of Prince Deen Kai-Kai, Joseph John Harding, Daniel Sulaiman Kai-Kai and Conrad Innis were dismissed.

So also were the appeals for misprision of treason in respect of Benjamin Orissa Dunacca Taylor and Sheku Deen Kamara.

Appellants have appealed to this court against the judgment of the Court of Appeal on various grounds. For the purpose of this judgment, the appellants who number fourteen in all, are now re-numbered 1-14, starting with the 1st appellant Gabriel Mohamed Tennyson Kai-Kai, and ending up with Sheku Deen Kamara, the 14th appellant.

The indictment upon which the appellants were convicted contained four counts which I shall proceed to set out as laid. The count for treason contains 26 overt acts in all.

Count 1

Statement of Offence: Treason contrary to s 3(1)(a) of the Treason and State Offence Act 1963, as amended.

Particulars of Offence: GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY JIMMY on divers days between that day

and 23 March 1987 in Sierra Leone prepared to overthrow the Government of Sierra Leone by unlawful means.

Overt acts of the said treason:

On 1 June 1986 and on divers days between that day and 23 March 1987 in Sierra Leone the said GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY ALLIE conspired together and with other persons unknown to overthrow the Government of Sierra Leone in that they agreed:

To lay ambush, attack and kill the President of Sierra Leone Major General DR JOSEPH SADIU MOMOH;

To make a broadcast over the Sierra Leone Broadcasting Service announcing the dissolution of Parliament, the suspension of the Constitution of Sierra Leone, the disbanding of the recognized party and the formation of a National Reformation Council;

To impose a dusk to dawn curfew in Sierra Leone; and

To overthrow and take over the Government of Sierra Leone by unlawful means.

Francis Mischeck Minah on a date unknown between 1 July 1986 and 23 March 1987 in Freetown incited Jamil Sahid Mohamed and Gabriel Mohamed Tennyson Kai-Kai and others unknown to overthrow the Government of Sierra Leone by unlawful means.

On a date unknown between 1 July 1986 and 23 March 1987 Francis Mischeck Minah incited Haruna Vandy-Jimmy to solicit and collect contributions in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means.

On a date unknown between 1 February 1987 and 21 March 1987 Haruna Vandy-Jimmy collected from inhabitants of Wonde Chiefdom, Bo District in the Southern province of Sierra Leone and other persons unknown the sum of Le80,000 (eighty thousand leones) on behalf of Francis Mischeck Minah in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means.

On Wednesday 11 March 1987 at 42 Waterloo Street, Freetown Gabriel Mohamed Tennyson Kai- Kai incited Daniel Sulaiman Kai-Kai and Joseph John Harding to overthrow the Government of Sierra Leone by unlawful means by giving the sum of Le500.00 (five hundred leones) to use as transport to recruit other persons to join in the plot to overthrow the Government of Sierra Leone.

On Wednesday 11 March 1987 in Freetown, Daniel Sulaiman Kai-Kai procured Conrad Innis and Samuel Taylor to join the said plot.

On Thursday 12 March 1987 at 42 Waterloo Street, Freetown, Daniel Sulaiman Kai-Kai and Gabriel Mohamed Tennyson Kai-Kai procured and incited David Abu Samu to join the plot to overthrow the Government of Sierra Leone by unlawful means.

On the same day Thursday 12 March 1987 at 42 Waterloo Street, Freetown in furtherance of the plot to overthrow the Government of Sierra Leone by unlawful means Joseph John Harding procured and incited Francis Massaquoi and Amara Allieu Tarawallie by giving them the sum of Le500.00 (five hundred leones).

On Thursday 12 March 1987 at 42 Waterloo Street, Freetown, Gabriel Mohamed Tennyson Kai-Kai incited Joseph John Harding, Daniel Sulaiman Kai-Kai, Francis Massaquoi, Amara Allieu Tarawallie, Conrad Innis and Samuel Taylor by giving them the sum of Le500.00 (five hundred leones) to join in a plot to overthrow the Government of Sierra Leone by unlawful means. He the said Gabriel Mohamed Tennyson Kai-Kai further procured Prince Deen Kai-Kai to join the aforesaid plot.

On Friday 13 March 1987, Daniel Sulaiman Kai-Kai and Joseph John Harding in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means reconnoitred Hill Cot Road, Freetown in the Western Area of Sierra Leone and selected points thereon for attacking and killing the President of Sierra Leone.

On Friday 13 March 1987, Joseph John Harding, Amara Allieu Tarawallie, Conrad Innis and others unknown attending a meeting at 42B Waterloo Street, Freetown and Gabriel Mohamed Tennyson Kai-Kai disclosed to them details of the plan to overthrow the Government by unlawful means.

On Saturday 14 March 1987, in Freetown in furtherance of their plan to overthrow the Government of Sierra Leone by unlawful means Joseph John Harding, Daniel Sulaiman Kai-Kai, David Abu Samu, Amara Allieu Tarawallie, Francis Massaquoi and Conrad Innis met at Aberdeen Bridge Freetown whence they proceeded to W26 Spur Road where Gabriel Mohamed Tennyson Kai-Kai incited them to join in a plot to overthrow the Government by unlawful means by showing to them assorted weapons to be used in furtherance to the said plot.

On Saturday 14 March 1987 at Freetown David Abu Samu incited Joseph Abiodun Williams to join in a plot to overthrow the Government by unlawful means by giving him the sum of Le30.00 (thirty leones).

On Saturday 14 March 1987 at W26 Spur Road, Freetown Gabriel Mohamed Tennyson Kai-Kai incited Josephus Abiodun Williams to join in a plot to overthrow the Government by unlawful means by giving him the sum of Le100.00 (one hundred leones).

On Sunday 15 March 1987 Daniel Sulaiman Kai-Kai, David Abu Samu, Josephus Abiodun Williams, Joseph John Harding, Amara Allieu Tarawallie, Francis Massaquoi, Sheku Deen Kamara, Conrad Innis, Gabriel Mohamed Tennyson Kai-Kai and other persons unknown in furtherance of the plot to overthrow the Government of Sierra Leone agreed Friday 20 March 1987 as the day to attack and kill the President along Hill Cot Road, Freetown and Gabriel Mohamed Tennyson Kai-Kai requested the aforementioned persons to bring their uniforms and military kit and they did bring the said uniforms and military kit as part of a plan on Thursday 19 March 1987 to overthrow the Government of Sierra Leone by unlawful means.

On the same day Sunday 15 March 1987 at No 42B Waterloo Street, Freetown, Gabriel Mohamed Tennyson Kai-Kai further incited Daniel Sulaiman Kai-Kai and Joseph John Harding to go and reconnoitre Hill Cot Road Freetown preparatory to a plan to ambush, attack and kill the President.

On Sunday 15 March 1987 at Freetown, Gabriel Mohamed Tennyson Kai-Kai in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means contacted a Mr Jaward of No 25 Bathurst Street, Freetown to procure arms and ammunition.

On or about 15 March 1987 Gabriel Mohamed Tennyson Kai-Kai in furtherance of the preparations to overthrow the Government of Sierra Leone by unlawful means procured arms and ammunition which he showed to Joseph John Harding, Daniel Sulaiman Kai-Kai, Josephus Abiodun Williams, Amara Allieu Tarawallie, Conrad Innis and other persons unknown.

On Sunday 15 March 1987 in Freetown in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means Prince Deen Kai-Kai procured Francis Augustine Ensah as a driver and Gabriel Mohamed Tennyson Kai-Kai gave the sum of between Le60 (sixty leones) and Le80 (eighty leones) to the said Francis Augustine Ensah in furtherance of the said plot.

On Monday 16 March 1987 Daniel Sulaiman Kai-Kai and Joseph John Harding reconnoitred Hill Cot Road Freetown in the Western Area of Sierra Leone to mark and did mark positions for the attack on the Presidential motor-cade in furtherance of their plan to overthrow the Government of Sierra Leone by unlawful means.

On Tuesday 17 March 1987 in Freetown, Daniel Sulaiman Kai-Kai gave the sum of Le1,000.00 (one thousand leones) to Josephus Abiodun Williams, Joseph John Harding, Francis Massaquoi,

Amara Allieu Tarawallie and Conrad Innis to bring their uniforms and military kit the following day Wednesday 18 March 1987 in furtherance of the plot to overthrow the Government of Sierra Leone by unlawful means. And they the said Josephus Abiodun Williams, Joseph John Harding, Francis Massaquoi, Amara Allieu Tarawallie and Conrad Innis did bring the said uniforms and military kit.

On or about 18 March 1987 in Freetown, Gabriel Mohamed Tennyson Kai-Kai procured a quantity of arms and ammunition in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means and transferred part of the said arms and ammunition to No 42B Waterloo Street Freetown in a motor car, registration SN16000.

On or about 19 March 1987 in Freetown Gabriel Mohamed Tennyson Kai-Kai solicited Hassan Morlai Conteh and Prince Williams to procure a vehicle in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means.

On or about 19 March 1987 in Freetown, Gabriel Mohamed Tennyson Kai-Kai wrote a speech in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means which speech contained measures pertaining to the taking over of the Government of Sierra Leone and was recorded on a cassette.

On or about 20 March 1987 at No 25 Bathurst Street, Freetown in furtherance of a plot to overthrow the Government of Sierra Leone Kazim Allie gave to Gabriel Mohamed Tennyson Kai-Kai the sum of Le100,000.00 (one hundred thousand leones).

On or about 21 March 1987 Gabriel Mohamed Tennyson Kai-Kai received arms and ammunition at No W26 Spur Road Freetown and caused the said arms and ammunition to be conveyed by Hassan Morlai Conteh and Patrick Benedict Kai-Kai to No 42B Waterloo Street Freetown for delivery to Prince Deen Kai-Kai in furtherance of a plot to overthrow the Government of Sierra Leone. And he the said Gabriel Mohamed Tennyson Kai-Kai solicited Raymond Brima Dorwie at New England Police Station to join the said plot.

Count 2

Statement of Offence: Misprision of treason contrary to law.

Particulars of Offence: SHEKU DEEN KAMARA on 15 March 1987 in Freetown in the Western Area of Sierra Leone well knowing that TREASON had been committed by GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH , DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY in that the said GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAH, DAVID ABU SAMU. FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI AMARA ALLIEU TARAWALLIE. JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY had prepared to overthrow the Government of Sierra Leone by unlawful means, unlawfully concealed the commission of the said Treason.

Count 3

Statement of Offence: Misprision of treason contrary to law.

Particulars of Offence: BENJAMIN ORISSA DUMACCA TAYLOR on 21 March 1987 in Freetown in the Western Area of Sierra Leone well knowing that TREASON had been committed by GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAR, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE, JOSEPHUS ABIODUN WILLIAMS, PATRICK BENEDICT KAI-KAI,

HASSAN MORLAI CONTEH, CONRAD INNIS, KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY in that the said GABRIEL MOHAMED TENNYSON KAI-KAI, PRINCE DEEN KAI-KAI JOSEPH JOHN HARDING DANIEL SULAIMAN KAI-KAI, FRANCIS MISCHECK MINAR, DAVID ABU SAMU, FRANCIS AUGUSTINE ENSAH, FRANCIS MASSAQUOI, AMARA ALLIEU TARAWALLIE JOSEPHUS ABIODUN WILLIAMS PATRICK BENEDICT KAI-KAI, HASSAN MORLAI CONTER, CONRAD INNIS KAZIM ALLIE, RAYMOND BRIMA DORWIE and HARUNA VANDY-JIMMY had prepared to overthrow the Government of Sierra Leone by unlawful means, unlawfully concealed the commission of the said Treason.

Count 4

Statement of Offence: Murder contrary to law.

Particulars of Offence: PRINCE DEEN KAI-KAI, JOSEPH JOHN HARDING, DANIEL SULAIMAN KAI-KAI and CONRAD INNIS on 23 March 1987 at Freetown in the Western Area of Sierra Leone murdered MOHAMED ADAMA ROGERS.

The case for the prosecution is that between 1 June 1986 and on divers days between that day and 23 March 1987, Gabriel Mohamed Tennyson Kai-Kai, 1st appellant herein and 17 others committed the offence of treason, in that they prepared to overthrow the Government of Sierra Leone by unlawful means. Four of the appellants were charged with the murder of Mohamed Adama Rogers, an SSD Officer, and two others were charged with the offence of misprision of treason.

Several acts of preparation were laid in the twenty-six overt acts under Count 1 of the indictment, which included the allegation of conspiracy with other persons unknown to overthrow the said Government in that they agreed among others, to ambush, attack and kill the President of the Republic of Sierra Leone, disband the recognised Party, declare a dusk to dawn curfew, form a National Reformation Council and take over the Government by unlawful means.

The prosecution further alleged that in the said act of preparation to overthrow the Government several persons were solicited and incited to join the plot, monies were collected from individuals and paid to others in pursuit of the plot to overthrow the Government by unlawful means and that arms and ammunition were collected from persons and stored in places, while others were issued to some of the appellants in furtherance of the said plot.

At the trial in the High Court in Freetown, the prosecution called many witnesses, thirty-six in all, in support of their case including the appellants, some of whom gave evidence on their own behalf, while others made statements from the dock. On the charge of murder, the prosecution relied substantially on circumstantial evidence. On the whole, there was a total of forty-four exhibits.

Many grounds of appeal were filed on behalf of each appellant in this appeal, but on the whole, they are substantially identical and have common ground with those filed on behalf of the other Appellants. I now proceed to consider these grounds.

The indictment

Counsel contended on behalf of the appellants that the laying of overt acts is not permissible under s 3(1)(a) of the Treason and State Offences Act 1963, there being no reference to overt acts in any of the provisions under the said Act. It was also contended that the laying of the several overt acts under the same count rendered the count duplicitous and therefore void. That since the repeal of the Treason Act of 1351 by virtue of s 19(2) of the Treason and State Offences Act 1963 the inclusion of overt acts in a charge of treason ceased to have any place in our criminal laws, referring in particular to s 74 of the Courts Act No. 31 of 1965 and also the Criminal Procedure Act 1965 s 3 Part 1, captioned, "General Provisions Procedure".

This contention was common ground to almost all the appellants both in the Court of Appeal and in this Court. To buttress their arguments, counsel among others relied on the judgment of the Court of Appeal in the treason appeal of *Mohamed Sorie Fornah and Others v The State* [1974-82] 1 SLBALR 48 (Cr App 31/1974, 30 April 1975). Like in the present appeal, there was before the

Court of Appeal in *Fornah's* case the issue as to whether there was in our laws any legal basis for the inclusion of overt acts in charges under the Treason and State Offences Act 1963. This was a ground of appeal before their Lordships.

Livesey Luke JSC (as he then was), inter alia, had this to say:

> "The necessity for overt acts in an information or indictment of treason was first introduced by the Treason Act of 1351. According to the statute that requirement related only to the species of treason of "being adherent to the King's enemies in his realm", and not to any other species of treason. That species of treason was required to be proved by "open deed", which in more modern times has been defined as "any act manifesting the criminal object" (see *R v Thistlewood* (1820) 33 St Tr 681). In the 17th & 18th centuries the courts by judicial interpretation extended the requirement of an overt act to all species of treason. But the Treason Act of 1351 is no longer applicable in Sierra Leone. It was repealed by s 19(2) of the Treason and State Offences Act 1963. The question then is: are overt acts necessary in indictments for the species of treason created by the Treason and State Offences Act 1963? That is an arguable question, but it is not necessary to decide it in this appeal because the State chose to lay overt acts in the indictment in the instant case".

Suffice it to say that this issue was never decided by their Lordships' court. The question was left open, only to resurface in the Court of Appeal and in this court for our consideration and determination.

I now consider the term "overt act". What is an overt act? *Oxford Universal Dictionary Illustrated* [3rd Ed] Vol II 1970 Reprint defines the word overt as follows: open, not closed; uncovered. Open to view or knowledge; evident, plain, unconcealed, not secret.

The learned Attorney-General for the State referred us to *Wharton's Law Lexicon* [4th Ed] p 723 and *Jowitt's Dictionary of English Law* [1977 Ed] 2nd Vol p 1300. *Jowitt* defines "overt act", inter alia as, "an open act, or one consisting of something stronger than mere words, and evidencing a deliberate intention in the mind of the person doing it. The phrase is chiefly used in the law of treason it being a rule that a treasonable intention is not punishable unless it is evidenced by some overt act …".

Wharton's defines "overt act", inter alia, as follows:

> "The expression overt act means an act which shows the intention of the party doing it is used principally in connection with treason and conspiracy. A treasonable intention is not punishable unless it is manifested by an overt act. In the same way conspirators may make their criminal purpose clear by some overt act, such as an agreement to further their common design".

Following the respective legal definitions given to the term "overt act", I take it to mean that an overt act is an act that is open to the world in the sense that it can be perceived by anyone placed to do so.

In *Shamwana v The People* (1985) ZR 41, to which frequent references were made by counsel on both sides in the prosecution of this appeal, s 52 of the Republic of Zambia Penal Code (Cap 146) of the Laws of Zambia in relation to treason and allied offences makes specific reference to "overt act" and defines it in these terms:

> "Section 52—
>
> In the case of any of the offences defined in this chapter, when the manifestation by any overt act of an intention to effect any purpose is an element of the offence, every act of conspiring with any person to effect that purpose, and every act done in furtherance of the purpose, by any of the persons conspiring, is deemed to be an overt act manifesting the intention".

We in Sierra Leone, unlike Zambia, do not have a codified system of laws. We therefore look for our laws from the relevant provisions of the Constitution, in particular, s 125 of the Constitution of Sierra Leone Act No 12 of 1978 (as amended). I have looked in vain for an answer whether it is

permissible to lay overt acts under our Treason and State Offences Act 1963. However, the matter does not rest there.

Criminal proceedings in this country are regulated by the provisions of the Criminal Procedure Act No 32 of 1965 (as amended). It is an Act to consolidate and amend the law relating to Criminal Procedure. The relevant sections and rules for our purpose are in these terms.

Section 51(1) of the Criminal Procedure Act No 32 of 1965 states:

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

Rules 3(4) and (5) of the Criminal Procedure Rules state as follows:

Rule 3(4)—

> "After the statement of offence particulars of such offence shall be set out in ordinary language in which the use of technical terms shall not be necessary.
>
> Provided that (a) where any rule of law or any Act or statute limits the particulars of an offence which are required to be given in an information or indictment, nothing in this rule shall require any more particulars to be given than those so required; (b) It shall be sufficient if only the words of the section of the enactment creating the offence are set out in the particulars of the offence."

Rule 3(5) states:

> "The forms set out in the Appendix to these rules, or forms conforming thereto as nearly as may be, shall be used in cases to which they are applicable; and in other cases forms to the like effect or conforming thereto as nearly as may be, shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case."

Also in *Mattaka & Others v The Republic* [1971] EA 495 the appellants were charged with the offence of treason under s 39 of the Penal Code of Tanzania. The Criminal Procedure Code made no provisions as to the method of laying a charge for treason contrary to s 39(2) and the prosecution followed the English practice of setting out the various overt acts in each count after having first set out the statement of offence. It complied, however, with the Criminal Procedure Code as it set out a statement of the specific offence charged and then gave such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 135 of the Tanzanian Criminal Procedure Code, which is in the same terms as our s 51(1) of the Criminal Procedure Act No 32 of 1965 states:

> "Section 135—
>
> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

This procedure was not questioned and was in the view of the East African Court of Appeal correct. I am also of the opinion that it was both proper and correct procedure, since it complied with the provisions of s 52(1) of our Criminal Procedure Act No 32 of 1965.

The overt acts laid in the present count are no more than further particulars of the particulars of offence charged. They are in themselves not specific or distinct charges, but merely further particulars.

In my judgment and for the reasons stated supra, the indictment as laid under s 3(1)(a) of the Treason and State Offences Act 1963 together with the overt acts is correct, proper and in conformity with the provisions of s 51 of the Criminal Procedure Act No 32 of 1965 and rules 3(4) and (5) thereof. Under our criminal procedure the proof required for any criminal offence is proof beyond reasonable doubt. In the instant case what the prosecution was required to prove against the

accused/appellants herein was the substantive offence of preparation to overthrow the Government of Sierra Leone by unlawful means, which is treason.

It was further contended by the appellants that the count under which they were charged with treason was duplicitous and therefore void. In short, they complained that they were charges with several separate and distinct offences in the same count. In law, where two or more offences are charged in the same count of an indictment, the indictment is to that extent bad for duplicity. The law relating to duplicity is to ensure the protection of an accused person, by not subjecting him to an unfair trial so that he may know exactly what case he has to answer. It is also to give him an opportunity at some future date to plead *autre fois convict* or *autre fois acquit*, as the case may be.

It has been said time and again that duplicity in a count is a matter of form not of evidence called in support of the count. To ascertain whether a count is bad for duplicity, one must examine the count itself, that is, the count's statement of offence, as read with its particulars of offence. If an examination shows that two or more offences have been charged therein, then the count is bad for duplicity.

There is a long line of cases where it has been held that where there is duplicity in a count, the conviction should be quashed as it goes to the root of the jurisdiction. Thus Lord Parker, remarking in the case of *Mallon v Allon* (1964) 1 QB 385; (1963) 3 All ER 843, said:

> "That duplicity although is a highly technical point is one which goes to the jurisdiction of the court and if a good point, it is good whenever taken and the conviction should be quashed. An accused should know of what offence he is charged and convicted."

In *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 the appellants were charged with preparing or endeavouring to overthrow the Government of Sierra Leone by unlawful means. They were convicted of treason and sentenced accordingly. On appeal, the Court of Appeal set aside the conviction on the grounds that the counts were bad for duplicity.

I must now determine whether the count including the several overt acts is void for duplicity; and also, whether in a count for treason two or more conspiracy overt acts may be laid without making the count duplicitous. This brings me to a consideration of the provisions of s 51(1) of the Criminal Procedure Act No 32 of 1965, which I have already set out in appropriate places (supra).

Now the statement of offence in the instant case is treason, contrary to s 3(1)(a) of the Treason and State Offences Act 1963 (as amended). The particulars of offence inter alia are:

> "Gabriel Mohamed Tennyson Kai-Kai and … Haruna Vandy-Jimmy on 1 June 1986 and on divers days between that day and 23 March 1987 in Sierra Leone prepared to overthrow the Government of Sierra Leone by unlawful means".

An examination of Count 1 of the indictment clearly shows that the only offence charged in the statement of offence is treason, not treason and conspiracy or conspiracies. The particulars of offence alleged, that the appellants together prepared to overthrow the Government - not prepared or/and endeavoured to overthrow the Government. Had the statement of offence in Count 1 charged the appellants with two separate offences and the particulars of the offence alleged that the appellants had "prepared or endeavoured" to overthrow the Government as was the case in *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 the count would have been duplicitous and bad as the terms "prepared" and "endeavoured" would have related to distinct specific offences of treason. This is not the position in the instant case.

The contention of the appellants that the various overt acts laid in the indictment make Count 1 bad for duplicity is in my view insupportable in law and wholly untenable. Suffice it to say that the various overt acts were not laid as substantive offences but as further particulars of offence of the one and only count of treason in the indictment. In law, it is permissible to lay any number of overt acts in the same count of an indictment without making the count duplicitous.

Where there are several overt acts laid in a count of an indictment and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters

alleged as overt acts may be improperly so alleged, provide that the count contains allegations of overt acts that are sufficiently laid. In law proof of one overt act will sustain the count provided that the overt act so proved is a sufficient overt act of the species of the treason count in the indictment.

Consequently, the charge of the learned trial judge to the jury, that proof of one overt act is sufficient to sustain the count is correct and proper in law.

I have looked at overt act 4 as laid in the indictment in respect of 5th appellant and also the learned trial judge's charge to the jury thereof. I am satisfied that there is nothing in the said overt act 4 touching and concerning the 5th appellant in relation to the treason charge. The direction of the learned trial judge is clearly wrong in this regard. But as already stated, where there are several over acts charged in a count of an indictment and a judgment is given on a general verdict of guilty on that count as was the case here, such judgment will be sustained, through some of the matters alleged as overt may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient and are sufficiently laid.

This in my view is the crux of the matter.

Was the conspiracy overt act in the count properly laid? A specific conspiracy charge is a common law offence (misdemeanour) and an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. It was defined by Willes J in *Mulcahy v The Queen* (1868) LR 3 HL 306 at 317 as follows:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means".

In *R v Brisac* (1803) 4 East 164, Grose J said at p 171:

> "Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them".

In *Queen v Aspinall* [1876] 2 QBD 48, Brett JA said at p 58:

> "The crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time certain things. It is not necessary in order to complete the offence, that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may fail. Nevertheless the crime is completed when they agreed".

If several persons do an act preparatory to the overthrow of the Government by unlawful means, that would amount to treason under s 3(1)(a) of the Treason and State Offences Act 1963. Consequently, the respective acts of the parties can be laid as overt acts of the treason of preparing. In the instant case, the forbidden act under the Treason and State Offences Act 1963 with which the appellants were charged, was preparation to overthrow the Government of Sierra Leone by unlawful means. Conspiracy is a preparatory act, preparatory to the commission of an unlawful act.

Therefore when persons agree to overthrow Government by unlawful means, that agreement is a preparatory act, which amounts to a preparation to overthrow the Government by unlawful means contrary to s 3(1)(a) of the Treason and State Offences Act 1963. Consequently, the said agreement to overthrow Government by unlawful means is a sufficient overt act of the species of treason created by s 3(1)(a) of the Act of 1963.

In law conspiracy to commit treason is a sufficient overt act of treason and can be properly laid in a count for treason. That this is so, is supported by a long line of authorities; see *Mulcahy v The Queen* (supra); *David Lasana & 11 Others v R* (supra).

In *R v Greenfield* [1973] 3 All ER 1050 it was held that the fact that the evidence disclosed other conspiracies did not make the count duplicitous. In *Mulcahy* (supra) two conspiracy overt acts

'were validly laid in the same count'. It is also permissible in law to lay two or more conspiracy overt acts in a count for treason.

Misprision of Treason

This case raises the question whether there is today such an offence as misprision of treason in Sierra Leone. Counsel for 13th and 14th appellants say that such an offence is not known to our laws; or if it was an offence, it has ceased to be so, since the repeal of the English Treason Act 1351 by virtue of s 19(2) of the Treason and State Offences Act No 10 of 1963, which in their view swept overboard the common law misdemeanour of misprision of treason. Until its repeal, the Treason Act of 1351 was law in Sierra Leone.

Counsel for State respondent says that there always has been such an offence, as is exemplified by the prosecution of the instant case. Misprision of treason is a common law misdemeanour and is committed when any person who knows, or has reasonable cause to believe, that another has committed treason, omits to disclose this information or any material part of it to the proper authority (Smith & Hogan, *Criminal Law* [5th Ed] 1983). It is also defined in *Halsbury's Laws of England* [4th Ed] Vol 11 p 483 as "an offence at common law, punishable by fine and imprisonment at the discretion of the court, for a person who knows that treason is being planned or committed not to report it as soon as he can to a Justice of the Peace or other authority".

Over the years eminent legal exponents of the common law have extended its scope to include bare knowledge and concealment. As soon as a person becomes aware of a treasonable design, that is, a knowledge that treason is merely being planned or committed, it is his duty to reveal it to a Judge or Justice of the Peace or other authority at the earliest opportunity. Failure to do so is misprision of treason for which he can be prosecuted (See *Stephen's Commentaries on the Laws of England* [21st Ed] p 405 at 406). I shall come to this aspect later in this judgment.

What appears in my view to have conduced learned counsel to subscribe to this erroneous assumption that misprision of treason is no longer an offence in Sierra Leone is the dictum of his Lordship Tambiah JA in the leading judgment delivered by his Lordship in the treason appeal of *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186, where his Lordship observed that misprision of treason was no longer an offence in Sierra Leone.

With respect, his Lordship took the view albeit mistaken, that the repeal of the English Treason Act of 1351 by s 19(2) of the Treason and State Offences Act 1963, ipso facto abolished the common law offence of misprision of treason, particularly so, when the repealing Act did not contain any provision relating to misprision of treason as known to English Law. Regrettably, as the position is, that was never the case. With respect it was a misconception on the part of the learned justice.

Suffice it to say that neither the repeal of the Treason Act of 1351, nor the absence of any mention of this offence in the Treason and State Offences Act 1963 makes any difference to the status of misprision of treason as a criminal offence in this country. It is quite another matter, however, if for purposes of convenience, simplicity and clarity our Parliament in its wisdom considers it desirable to spell out the offence of misprision of treason in our laws by appropriate legislation as in some of our sister common law jurisdictions.

Be that as it may, our position will be brought into proper focus if I trace the sources of our laws. The laws of Sierra Leone are to be found in s 125 of the Constitution of Sierra Leone, Act No 12 of 1978 and s 74 of the Courts Act, No. 31 of 1965. Section 125 inter alia states:

> "Subject to the provisions of the Constitution and any other enactment, the common law, the doctrines of equity, and the statutes of general application in force in England on the 1st day of January 1880 shall be in force in Sierra Leone".

From the foregoing, it is quite clear that the English law applicable to Sierra Leone is the common law of England, the doctrines of equity and statutes of general application which were in force in England on 1 January 1880 (s 74 of the Courts Act 1965 and s 125 of Act No 12 of 1978). In regard to the contentions of learned counsel for the appellants, I will dismiss such contentions as

there are, by reference to the memorable pronouncement of Lord Denning in *Sykes* case which I consider not only correct but appropriate in the circumstances.

Lord Denning in *Sykes v DPP* [1961] 3 All ER 33, held that misprision of treason and misprision of felony still exist in England. I must add here that I know of no authority to the contrary. By the reasons stated above, misprision of treason has always been and still is a common law offence in Sierra Leone.

In relation to misprision of felony, in the same case, his Lordship had this to say ([1962] AC 528 at 564; [1961] 3 All ER at 42):

> "My Lords it is said that this offence is out of date. I do not think so. The arm of the law would be too short if it was powerless to reach those who are 'contact' men for thieves who assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony".

By parity of reason, this principle, which in my view, is sound in law and grounded in common sense, is applicable to the offence of misprision of treason so that the arm of the law in Lord Denning's words would not be too short to reach not only those who hide treason but also those who conceal knowledge that treason is merely being planned or committed [see *Stephen* supra]. It is, I feel, good law, because it accords with our society's sense of justice, devoid of subtleties and technicalities in the particular circumstances.

Having held that the offence of misprision of treason is known to our laws, and that the 13th and 14th appellants were properly tried, I now come to consider the evidence adduced by the prosecution in respect of the appellants.

The 13th appellant, Benjamin Orrisa Dunacca Taylor, was up to the time of the abortive coup plot on 23 March 1987 and his subsequent arrest, a senior member of the Republic of Sierra Leone Police Force with a record of twenty-three years' service to his credit. During this period, he served in various capacities, including that of personal bodyguard to the 5th appellant, Francis Mischeck Minah, whom he served for a period of nine years, 1973-1982. He rose to the rank of Deputy Superintendent of Police, and at the time of his arrest, was Officer Commanding Central Police Station Freetown.

Briefly, the case for the prosecution was that on Saturday evening, 21 March 1987, the 13th appellant Benjamin Taylor visited Jay's Pub at Texaco, Aberdeen Road to have a drink. He found Mustapha Sheriff, 18th prosecution witness already there. Mustapha Sheriff received him warmly and served him a pint of beer and a second. According to the appellant, he refused the second pint as he was hungry, and was proceeding home to have his meal.

There and then Mustapha Sheriff called the appellant aside and told him that he, Mustapha Sheriff, had been approached by people in connection with a coup plot, but that he had not yet seen weapons and arms. Mustapha Sheriff, however, did not give the appellant the names of the coup planners, but promised to furnish him further details in this regard when he received full information, in any case, not later than following day. The appellant said OK and he left Jay's Pub for Aberdeen Village.

In keeping with his promise to call on the appellant, on the following day, Sunday 22 March, 1987 Mustapha Sheriff, accompanied by his friend Prince Williams, PW33, boarded a van and set out for Aberdeen Village to see the 13th appellant. Unfortunately for him, due to a road block, he was unable to reach the 13th appellant. They returned and instead, decided to drive to Wilberforce Village and divulge the planned coup plot to the Military Intelligence Branch, which, they did.

This piece of information set the machinery of the Security Forces in motion, culminating in the foiling of the coup plot in the early hours of Monday 23 March 1987 and the apprehension of the appellants and others.

> "As soon as a person becomes aware of a treasonable design, that is, a knowledge that treason is merely being planned or committed, it is his duty to reveal it to a Judge or Justice of the Peace or other authority at the earliest opportunity. Failure to do so is misprision of treason for which he may be prosecuted" [see *Stephen's Commentaries on the Laws of England*, supra].

Suffice it to say that these words are plain and unambiguous.

The evidence in this case was that Mustapha Sheriff informed the 13th appellant Benjamin Orissa Dunacca Taylor at Jay's Pub, about the planned coup plot, short of giving him the names of the plotters. In the circumstances of this case, was the tip-off given to the 13th appellant by Mustapha Sheriff not of such a nature and importance as to warrant its expeditious disclosure by the 13th appellant to the proper authorities in the style and manner of a Senior Police Officer, so that a stitch in time would save nine? In all the circumstances of this case, was the information from Mustapha Sheriff not of sufficient momentum and gravity as to put a Police Officer of the appellant's calibre and standing on the qui vive, making it incumbent on him to initiate immediate investigations without more? Finally, was the 13th appellant interested in any information from Mustapha Sheriff? I fail to see any evidence of it. His general attitude in my view, was one of apathy and resignation.

Suffice it to say that it is the duty of every citizen to assist in the detection and suppression of crime, and that prevention is better than cure. A fortiori, by the nature of his duty which carries with it a high degree of responsibility, much was expected of appellant at a time when it would appear to any reasonable person that the country was on the brink of a precipice. Regrettably, the appellant was in my view woefully wanting in foresight and the expected standards of a highly placed and disciplined Police Officer.

In the circumstances and for the reasons given, I am of the view that the Court of Appeal rightly and correctly dismissed the appellant's appeal. I have looked at the evidence and having regard to the special circumstances of this case, I find myself unable to uphold this appeal. The appeal is accordingly dismissed.

The 14th appellant, Sheku Deen Kamara was up to the time of his arrest, a private soldier in the Republic of Sierra Leone Military Forces, having served for eleven years.

The case for the prosecution is that the 14th appellant attended a secret meeting at 42B Waterloo Street, Freetown on 15 March 1987 together with the appellants herein, in order to prepare and overthrow the Government of Sierra Leone by unlawful means. There was no denying that the appellant attended this meeting, albeit once, and did not show his face there again. At this meeting, the logistics of the coup plot were discussed at length. Among those who attended were Gabriel Mohamed Tennyson Kai-Kai, 1st appellant, David Samu, 6th appellant, Francis Massaquoi, 7th appellant, Allieu Tarawallie, 8th appellant, Josephus Williams , 9th appellant and Conrad Innis, 11th appellant. In his voluntary cautioned statement, Ex "FF", appellant said:

> "I never thought of revealing this information to any authority because the whole plan seemed to have been impossible for a single Police Officer to stand and fight to overthrow the Government of Sierra Leone. O.C. Kai-Kai never gave me any amount to keep the information secret".

Again in his charged statement Ex "N" he said:

> "The reason why I failed to report was because I was not convinced that a Police Officer can succeed in making a coup in this country as there is a standing Military Force".

The appellants gave evidence on oath from the witness box. The jury saw the witnesses, heard them and on a consideration of the evidence adduced, returned a verdict of guilty as charged. The Court of Appeal considered this ground and dismissed it for want of substance.

In my view, no reasonable jury properly directed would have returned a verdict otherwise than guilty of the offence as charged. I agree with the findings of the Court of Appeal and hold that misprision of treason, which is a common law misdemeanour, constitutes an offence in this country,

punishable under our laws. In my opinion the sentence is neither severe nor inordinate. I would therefore be loath to interfere with it.

I would dismiss this appeal.

Murder Charge

The 2nd, 3rd, 4th and 11th appellants herein, were convicted of the murder of Mohamed Adama Rogers and sentenced to death by the High Court in Freetown, on 17 October 1987. They appealed against conviction to the Court of Appeal for Sierra Leone on various grounds.

It was contended on their behalf that the learned trial judge had in many respects misdirected the jury and also failed to put the case of the appellants adequately to them. Particular prominence was given to a contention that the learned trial judge had failed to direct the jury as to how they should view and approach circumstantial evidence, being the pith and substance of the case for the prosecution. That since the prosecution case was based substantially on circumstantial evidence, before appellants could be convicted on such evidence, it must be so mathematically accurate that it leads to one and only irresistible conclusion that the appellants murdered the deceased. It was therefore contended that the learned trial judge's direction to the jury, that they must not convict unless they were satisfied beyond reasonable doubt of the guilt of the accused, was not sufficient in law. Apart from this contention, the other points raised by counsel are wholly inconsequential and do not deserve serious consideration. It is sufficient therefore if I deal with the main issues.

The Court of Appeal dealt with these contentions and dismissed the appellants' appeals for want of substance. It held that there was evidence on which the jury properly directed were fully justified in returning a verdict of guilty against the appellants. On a consideration of the whole of the evidence, the Court of Appeal held the view that the learned trial judge's charge to the jury was proper, fair and accurate.

In a criminal trial, it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution case is based on circumstantial evidence the judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.

According to the evidence, the deceased, Mohamed Adama Rogers died from bullet wounds at 42B Waterloo Street Freetown, involving the appellants who were acting in furtherance of a conspiracy to overthrow the Government of Sierra Leone by unlawful means. The appellants and their confederates had assembled at 42B Waterloo Street Freetown, their rendezvous, waiting for the signal, to plunge into action. It came out in evidence that 42B Waterloo Street belonged to the 1st appellant Gabriel Mohamed Tennyson Kai-Kai, who put it at the disposal of his brothers 2nd, 3rd, 4th appellants and others for residential purposes. That was the position at 42B Waterloo Street on the night of Sunday 22 to Monday 23 March 1987.

The Security Forces had before Sunday evening 22 March 1987 got wind of the coup plot and the movements of the appellants and were taking counter measures to close in on them as they assembled at 42B Waterloo Street. At the same time, the appellants had discovered to their dismay that they had been betrayed and that their plans and secrets were now in the hands of the Security Forces. In anticipation of an imminent attack on them, appellants prepared themselves for the worse, as in their estimation retreat was no longer an option open to them in those circumstances.

According to the evidence, the 2nd appellant, Prince Deen Kai-Kai who, as it were, master-minded the affairs of the appellants at 42B Waterloo Street that night, gave each of them one sub-machine gun with magazines full of ammunition. The 3rd, 4th and 11th appellants went and took their positions by the veranda. The 2nd appellant who stayed downstairs loaded several weapons and waited there at the ready.

When the Police vehicle arrived at 42B Waterloo Street with its complement of security personnel, including the deceased Mohamed Adama Rogers, all four appellants opened fire on the

Police vehicle. Mohamed Adama Rogers who had just alighted from the vehicle was fired upon and he dropped dead on the spot. The bullet wound was 6 mm in diameter. It entered through his forehead and escaped through the occiput. After several bursts of fire from the appellants, they ran away, dropping their rifles and ammunition as they made good their escape. After many days of intensive search for the appellants, the 2nd, 3rd and 4th appellants were apprehended near the Liberian border, while the 11th appellant was arrested in the Freetown area.

On the basis of the evidence adduced in this case, it cannot be said that there was no clear and convincing evidence of the presence of the appellants at 42B Waterloo Street Freetown on that fateful night, and also of their participation in the unlawful criminal act, the shooting incident culminating in the death of Mohamed Adama Rogers. In addition, there was overwhelming evidence connecting the appellants with the plot, and that they had the opportunity of committing those offences the prosecution alleged against them.

From the evidence adduced that the appellants conspired with others to overthrow the Government of Sierra Leone by unlawful means, the fact that they were well armed, the discovery of dangerous arms and ammunition of every description at 42B Waterloo Street, the residence of the appellants, the body of Mohamed Adama Rogers found at the scene of the crime, the statements of appellants giving details of the parts each of them played in this criminal undertaking, the absence of co-existing circumstances which might weaken or destroy the evidence adduced, though circumstantial, that the deceased was murdered by the appellants, confirmed the view of the appellate court that the appellants committed the offence charged. Indeed, these were all matters for the jury to consider in arriving at their verdict.

From the range of evidence, it was apparent that there were matters sufficient for the consideration of the jury, and further, that it was open to them to draw conclusions from the mass of evidence which would warrant them in deciding that the guilt of appellants had been established or not.

Counsel for the appellants in this court renewed with vigour and tenacity, the same arguments and submissions he had earlier made in the Court of Appeal, as to alleged misdirections. As in the Court below, counsel put much reliance on the authority of *Ogwa Nweke Onah v The State* (1985) 3 NWLR 236; also *Teper v R* [1952] AC 480 and *Taylor On Circumstantial Evidence* for his submissions.

In my view, the locus classicus on the law of circumstantial evidence is to be found in the judgment of the House of Lords in *McGreevy v DPP* (1972) 57 Cr App R 424 in which Lord Morris of Borth-Y-Gest reviewed a wide range of authorities on the subject.

This was an appeal to the House of Lords where the appellant's conviction for murder at his trial in Northern Ireland turned entirely on circumstantial evidence. Their Lordships were invited to consider the point of law, whether at a criminal trial with a jury in which the case against the accused depended wholly or substantially on circumstantial evidence, a special duty devolves on the trial judge to give a special direction to the jury on the question of proof of guilt, other than the general requirement that proof must be established beyond reasonable doubt.

Suffice it to say that in our criminal procedure the standard of proof is, and has always been, "proof beyond reasonable doubt". It is stated in *Archbold* [39th Ed] p 598 that notwithstanding the strictures in *R v Summers* [1952] 1 All ER 1059 upon the "reasonable doubt" direction, it nonetheless remains the fact that the House of Lords in *Woolmington v DPP* (1935) 25 Cr App R 72 and the House of Lords in *McGreevy v DPP* (1972) 57 Cr App R 424 and a substantial body of opinion remains of the view that that form of direction is preferable to the other. The direction is based upon the following passage in *Woolmington*:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to the qualification involving the defence of insanity and to any statutory exception: If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner as to whether (the offence was committed by him), the prosecution

has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

At page 95 of *Woolmington* the Lord Chancellor, Lord Sankey had this to say:

"When dealing with a murder case the Crown must prove: death as a result of a voluntary act of the accused and, malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as a result of a voluntary act of the accused which is either (1) intentional and (2) unprovoked".

In *Taylor on Circumstantial Evidence* [11th Ed] Vol 1 p74, it is stated that after the facts sworn to are proved, a further and a higher difficult duty remains for the jury to perform.

"They must decide not whether consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused. The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. Moral certainty and the absence of reasonable doubt are in truth one and the same thing".

Taylor, however, expresses the view that the form of any particular direction stems from the general requirement that proof must be established beyond reasonable doubt.

In *Tepper v R* referred to supra at p 498, Lord Normand inter alia said:

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest', and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

So also were the words used by Lord Goddard CJ in *R v Onufrejczyk* [1955] 1 QB 388; (1955) 39 Cr App R 1 (in dealing with the situation where in a murder case no corpse had been found) when at pp 394 and 3 of the respective reports he said:

"Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder when there has been no trace of the body at all. But it is equally clear that the fact of death, like any other fact can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion only".

In *Ogwa Nweke Onah v The State* (1985) 3 NWLR 236, on which counsel for appellant has put great reliance on the effect of circumstantial evidence, where the prosecution case was mainly circumstantial, the facts briefly, were as follows.

The appellant was convicted of murder and sentenced to death by the Anambra State High Court in Nigeria. She was alleged to have killed the deceased, a relation of her husband, by inflicting matchet cuts on her. The evidence against the accused was mainly circumstantial. The corpse of the deceased was found close to her compound. Blood stains were found on her wrapper. A blood stained matchet was also found in her room which she shared with her husband. Matchet cuts were found on the deceased.

However, there was no positive evidence linking the accused with the actual killing of the deceased.

The prosecution during trial failed to call as a witness one Eke Agbo, who seemed to know more than anybody else, the circumstances surrounding the killing and whose evidence could have helped a great deal in deciding the case one way of the other. Nevertheless, the learned trial judge convicted the accused as charged and this was confirmed by the Court of Appeal. The appellant appealed to the Supreme Court of Nigeria. It was held inter alia:

> "That before a person can be convicted upon circumstantial evidence, such evidence must be mathematically accurate that it points to the one and only irresistible conclusion that that person was the one responsible for the offence for which he has been charged".

Perhaps it will be pertinent to point out that in the *Onah* case the appellant was charged under the Criminal Code of Eastern Nigeria, unlike the instant case where appellants were charged with murder contrary to law. Murder is a common law offence, in Sierra Leone, where the guilt of the accused must be established by proof beyond reasonable doubt. Even in *Onah's* case it is significant to note from the Judgment of Kazeem JSC, one of the Justices of the Supreme Court of Nigeria on the panel, of the need for the general requirement, that proof must be established beyond reasonable doubt. The learned justice inter alia said:

> "It may well be that the appellant in this case in fact killed the deceased; however, the circumstantial evidence relied upon by the prosecution did not lead to the only conclusion that she was the one responsible for the murder of the deceased. The law also requires that the appellant's involvement with the offence must be proved beyond reasonable doubt…".

With respect, on the facts of *Onah's* case, no reasonable jury properly directed would have returned a verdict of guilty of murder against her.

In *Kenny's Outlines of Criminal Law* [15th Ed] 1936, it is said:

> "No distrust of circumstantial evidence has been sewn by English law. It does not even require that direct evidence shall receive any preference over circumstantial evidence".

Also in *R v Taylor Weaver and Donovan* 1928] 21 Cr App R 20 Lord Hewart said:

> "It is no derogation to say that the evidence is circumstantial".

Many instances are cited of important capital convictions of unquestionable standing based solely on indirect or circumstantial evidence. Admittedly, it has become the practice and also a settled rule in some Commonwealth jurisdictions that a special direction as to the way circumstantial evidence is to be viewed, should be given. Until lately, the attitude of our criminal courts in this jurisdiction where the case for the prosecution was based upon circumstantial evidence, was that to convict, such evidence should be cogent, compelling and water-tight, and should point exclusively to the accused. Proof beyond reasonable doubt now suffices for all purposes without more.

The principles underlying the judgment of the House of Lords in *McGreevy v DPP* can be summarised in the following terms:

- There is no special obligation on a trial judge for the purposes of summing-up to seek to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence the judge becomes under obligation to comply with special requirement.
- That although in certain types of cases there are rules of law and practice which require a judge to give certain warnings to a jury, there should be no set formula to be used by a learned judge.
- That in all cases, it is the duty of the judge to make clear to a jury in terms which are adequate to cover the particular features of the particular case that they must not convict unless they are satisfied , beyond reasonable doubt.

As I said earlier, in this judgment, our standard of proof in criminal cases is proof beyond reasonable doubt. The judgment in *McGreevy v DPP* in my view, is based on sound principles of law; a fortiori, it has the support of a substantial body of opinion, making it the locus classicus on the law relating to circumstantial evidence.

For the purpose of this appeal, I hold that the proper direction to be given in all criminal trials in this country, irrespective of whether the evidence adduced at such trials is direct or circumstantial, is proof beyond reasonable doubt.

I would also like to add that the prosecution case against the appellants was based on common design. It was alleged by the prosecution that appellants conspired with others to overthrow the Government of Sierra Leone by unlawful means. They led evidence to establish both the conspiracy and the common design to effect their unlawful purpose. In furtherance of the common unlawful purpose, the appellants on Monday 23 March 1987 at 42B Waterloo Street, killed Mohamed Adama Rogers, although it was not known by whom the fatal shot was fired. The evidence is already legion and need not be repeated here.

In law, if several persons act together in one common unlawful undertaking and death results, but it is not known by whom, all are responsible. Consequently, the 2nd, 3rd, 4th and 11th appellants are all responsible for the death of Mohamed Adama Rogers.

There is overwhelming evidence in support of the verdict of guilty of murder which the jury on proper direction rightly returned. The Court of Appeal confirmed the conviction and sentence of the High Court.

On the totality of the evidence, no jury properly directed would have returned a verdict otherwise than that of guilty of murder. The Court of Appeal cannot be faulted in dismissing the appellants' appeals and confirming the conviction and sentence. I would dismiss this appeal.

Misdirections/Wrongful Admission of Evidence/Hearsay Evidence

It was contended by learned counsel for the 5th and 12th appellants herein that the Court of Appeal erred in law in dismissing the appeal of appellants in spite of the wrongful admission of evidence against them, namely the hearsay evidence of DW20 relating to the intelligence report received by him about meetings allegedly held at Yannihun Village, Wonde Chiefdom, having regard to the nature of the said evidence and the nature of the learned trial judge's direction on it, and the wrongful basis on which the learned trial judge admitted that evidence. It was also contended by the appellants that the Court of Appeal was in error in refusing to hold that the learned trial judge misdirected himself by admitting the hearsay evidence of DW20. The objection was that that piece of evidence was ever allowed to be given and admitted by the learned trial judge, considering its prejudicial effect on the minds of the jury.

It is a fundamental rule of evidence that hearsay evidence, whether oral or written (common law and statutory exceptions apart), is inadmissible in criminal proceedings. In the celebrated case of *Subramanian v Public Prosecutor* [1956] 1 WLR 965 decided by the Privy Council, the following formulation of the Privy Council has gained wide acceptance. It is in these terms:

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

The essence of hearsay evidence is that the statement complained of was made in the absence of the accused person. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost. The rule however, admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*, that is, the facts surrounding or accompanying a transaction which is the subject of the legal proceedings.

In the prosecution of the treason count against the 5th and 12th appellants among others in the High Court in Freetown, it was alleged by the prosecution that on Sunday 22 March 1987, the 5th and 12th appellants herein convened a meeting at Yannihun, Wonde Chiefdom, Bo District where monies were collected in furtherance of a conspiracy to overthrow the Government of Sierra Leone

by unlawful means. Their defence was an alibi, both denying presence, participation and knowledge of the said meeting. Witnesses both for the prosecution and the defence gave evidence in court.

DW20 M.M. Bangura, Senior District Officer Bo District testified on behalf of the 12th appellant Haruna Vandy-Jimmy. Under cross-examination, DW20 said inter-alia, that from intelligence reports received from the area, it was reported that a meeting was at Yannihun by the 12th appellant, 5th appellant and others and that monies were collected on behalf of the appellants. This piece of evidence was admitted by the learned trial judge. In his charge to the jury the learned trial judge had this to say:

> "Well, the Senior District Officer is a disinterested witness who holds no bias for either the the 16th or 5th accused or for Paramount Chief Dabo, therefore this piece of evidence ought to be taken very seriously. The 5th and 16th accused have denied holding any meeting at Yannihun. The witnesses called by the prosecution had testified here that that meeting was held. The witness for the 5th accused has testified here that such a meeting was never held. The Senior District Officer who was a defence witness confirmed that from intelligence report reaching him a meeting was indeed held and monies were collected as alleged by the prosecution. Therefore gentlemen of the jury this is evidence which you should take into consideration in considering your verdict in so far as the 16th and 5th accused persons are concerned and if you are satisfied that the evidence given by the Senior District Officer is one which is worthy of credit, then it should assist you to come to your conclusion on the verdict you will give against the 5th and 16th accused".

Having regard to DW20's evidence and the nature of the learned trial judge's direction on it to the jury, the contention of appellants is valid to the extent that the hearsay evidence of DW20 based on the intelligence reports received was wrongly admitted by the learned trial judge in that it went beyond the principles laid down in *Subramanian*, in that the object of the evidence was to establish the truth of the statement in the intelligence reports not the fact that it was made. The learned trial judge misdirected himself by admitting DW20's hearsay evidence. The Court of Appeal also erred in law in holding that that piece of evidence was rightly admitted by the learned trial judge.

Be that as it may, the fact that evidence is wrongly admitted does not make the verdict unsafe unless it can be shown that the evidence has actually influenced the verdict of the jury. Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at.

The question is, barring the evidence of DW20, was there other evidence before the jury for consideration in assessing the guilt or otherwise of the appellants in relation to the Yannihun affair? Suffice it to say that the prosecution called witnesses to support their allegation that the appellants held meetings in Yannihun on Sunday 22 March 1987 and collected monies in furtherance of a plot to overthrow the Government of Sierra Leone. These witnesses were emphatic in their assertions particularly their identification of the appellants. The appellants also called witnesses to prove that no meetings were held by them in Yannihun on Sunday 22 March 1987 and that they were neither at Yannihun that day nor took part in any transactions there. In both cases the prosecution and the defence relied on the evidence adduced in support of their case.

In his summing-up to the jury, the learned trial judge carefully and repeatedly explained to them the burden and standard of proof in criminal proceedings. On the basis of his direction to the jury, they heard the witnesses and watched their demeanour and assessed their credibility which as judges of fact was within their province. By their verdict, it was clearly demonstrated that the jury believed and accepted the evidence of prosecution witnesses and disbelieved the evidence of defence witnesses.

The question as I see it, is whether looking at the proceedings as a whole and taking into account what has properly been proved, the conclusion arrived at has been a just one. In my view, disregarding the piece of hearsay evidence of DW20 relating to the transactions in Yannihun, there

was other evidence to be left to the jury for consideration on a right direction, in determining the guilt or otherwise of the appellants. The jury were properly directed on that evidence

In my view the jury would or must inevitably have arrived at the same verdict if the evidence complained of had not been admitted.

The Alibi

It was argued by counsel for the 5th and 12th appellants that the Court of Appeal erred in its consideration of the alibi of Haruna Vandy-Jimmy and the evidence of the prosecution witnesses in so far as the alleged meeting in Yannihun of 22 March 1987 was concerned and the presence of the 5th appellant herein.

The case for the prosecution on overt act 3 depended on the presence of the 5th and 12th appellants, together at Yannihun on Sunday 22 March 1987. The appellants contended that on the basis of the evidence both for the prosecution and the defence, it was highly improbable, if not impossible for the 5th and 12th appellants to have been together in Yannihun Village at the time alleged. Their defence was an alibi, that the appellants were not at Yannihun and could not have taken part in any criminal acts there calculated to overthrow the Government of Sierra Leone by unlawful means as alleged.

The prosecution called several witnesses not only to prove that meetings were held in Yannihun on the date in question, but also to show that the appellants participated in those meetings and that monies were collected in furtherance of a conspiracy to overthrow the Government of Sierra Leone by unlawful means. The appellants also called witnesses who adduced evidence refuting the evidence of prosecution witnesses. Was the 12th appellant's alleged presence at Yannihun one of mistaken identity as contended on his behalf? On the basis of the evidence adduced, in particular, that of PW22 Musu Bawo and the verdict of the jury, this contention appears to be far-fetched and devoid of truth.

At a criminal trial with a jury, where an accused raises an alibi as a defence, it is the duty of the trial judge to explain that defence to the jury. He must explain to the jury what in law amounts to an alibi. It must be explained further to the jury that even where an accused raises an alibi, the burden of proving his guilt lies on the prosecution throughout the proceedings. In law, no duty is imposed on an accused to prove his alibi although nothing stops him from calling witnesses to buttress such alibi if he chooses.

The jury must be told this in clear terms and that if an alibi fails the matter does not end there. The overall burden of proving the guilt of the accused lies on the prosecution. The standard of proof required of the prosecution is proof beyond reasonable doubt.

In short, the trial judge should give the jury the following directions:

- A specific direction on the burden of proof in relation to the defence of alibi.
- That even if the alibi is rejected they must nevertheless go on to consider the case for the prosecution in its bid to establish the guilt of the accused beyond reasonable doubt.
- The defence however weak must be put to the jury.
- That even if the accused's alibi fails, the prosecution did not necessarily succeed.
- That even where the alibi is rejected they can only convict on the evidence led by the prosecution if they feel sure of the guilt of the accused.

What were the respective alibi defences of the 12th and 5th appellants in relation to the Yannihun Meetings?

In his evidence at his trial, the 12th appellant Haruna Vandy-Jimmy recalled the morning of Saturday 21 March 1987 in Bo. He left Bo that day and travelled to Freetown, arriving there at 4 pm He proceeded to 44 Wellington Road, Kissy Mess Mess, where he met PW36 Anthony Kallon. He did not go out until the morning hours of 22 March and travelled to Freetown to attend Parliament on Monday 23 March 1987. In short he was not at Yannihun on Sunday 22 March and could not have done what the prosecution alleged he did. The appellant in his evidence stated that at 12.30 pm

on Friday 20 March 1987 he and his party left Freetown for Bo, arriving there by 4pm. They had lunch in Bo at one Lansana Kallon's residence, and took off at 4.45 pm for Pujehun arriving there at 7pm.

On Saturday 21 March 1987 he held a meeting at Yoni from 11 am to 1.40 pm. On Sunday 22 March 1987 after seeing into accommodation, he left Pujehun for Bo at 12.30 pm, arriving there at 3 pm. They had lunch at Lansana Kallon's residence and the party left for Freetown at about 4pm, arriving in Freetown at 7.15 pm. Although the appellants were not in law bound to do so, yet they called witnesses in support of their alibi defences which they had every right to do. The learned trial judge considered the whole evidence adduced by both the prosecution and the defence including the alibi defence and dealt with the several burdens and standards of proof. Even though there was no specific direction on the burden of proof in relation to an alibi defence as was the proper thing to do, nevertheless, there was no evidence of any misdirection on the part of the learned trial judge in his summing-up to the jury, which could amount to a shifting of the burden of proof from the prosecution to the appellants in respect of their respective alibi defences.

The learned trial judge in his summing-up directed the jury over and over on the burden of proof being on the prosecution to establish the guilt of the appellants and that he did this after reviewing the whole evidence and explaining the nature of their defences to the jury in non-technical language. The jury understood the learned trial judge's direction and were not confused by it in arriving at their verdict.

By their verdict the jury rejected the evidence adduced on behalf of the appellants and felt sure that their guilt had been proved by the prosecution beyond reasonable doubt. They accepted the evidence of the prosecution. In my view this ground is not tenable and there has been no miscarriage of justice.

Accomplices

This was a common ground of appeal both in the Court of Appeal and before this court. It was contended by the appellants that the learned trial judge misdirected the jury into believing that PW18, PW21 and PW 33 were not accomplices, although he went on to warn them of the need for corroboration of an accomplice's evidence. It was also contended by counsel that the learned appellate justices failed to consider this ground and consequently failed to make a pronouncement on it.

In law, an accomplice simpliciter is a person who is involved in the actual commission of the crime charged, whether as principal or accessory in felony or persons committing, procuring or aiding and abetting in the case of misdemeanour. A police spy is not an accomplice for this purpose.

An accomplice is always a competent witness for the prosecution, although the fact of a witness being an accomplice detracts materially from his credit. The uncorroborated evidence of an accomplice is admissible in law; but where an accomplice gives evidence for the prosecution, it is the duty of the judge to warn the jury that although they may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, has now become a rule of law.

Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed even if in fact there be ample corroborative evidence. Where the judge has given the jury an adequate warning on corroboration and has explained to them what is meant in law by corroboration, it is not necessary that he should point out to the jury the pieces of evidence which can amount to corroboration. In law an accomplice cannot corroborate the evidence of another accomplice.

Corroboration of a witness's testimony must be afforded by independent evidence which affects the defendant by connecting or tending to connect him with the offence charged. It must be evidence which implicates him, that is, which tends to confirm in some material particular not only that the offence was committed, but also that the defendant committed it.

It is for the judge to decide whether there is any evidence to show that a witness can be regarded as an accomplice, and it is for the jury to determine whether the witness is in fact an accomplice. Is

there any justification in the criticism of the learned trial judge of a misdirection by him in law in this regard? Did the learned trial judge misdirect the jury in holding that there was no evidence capable of regarding PW18, PW21 and PW33 as accomplices? Did the learned trial judge usurp the functions of the jury, by taking away from them the function of deciding whether PW18, PW21 and PW33 were in fact accomplices?

I have looked at the whole evidence adduced by PW18, PW21 and PW33. I am also satisfied that the learned trial judge reviewed their evidence scrupulously to the jury and explained the law applicable to the facts. I am satisfied that the learned trial judge correctly assessed their evidence and came to the right conclusion that there was no evidence capable of pointing to PW18, PW21 and PW33 as accomplices. What evidence there was points to the contrary. The learned trial judge in no way misdirected the jury in believing that PW18, PW21 and PW33 were not accomplices. In my view his direction was fair and proper.

Having held that the learned trial judge did not misdirect the jury on the question of PW18, PW21 and PW33 not being accomplices, the only issue here that calls for our consideration and decision is whether in all the circumstances of the case there was need for the learned trial judge to give the warning on accomplice evidence to the jury. In my view this was unnecessary after the learned trial judge's finding that PW18, PW21 and PW33 were not capable of being classed as accomplices since the evidence was lacking in this regard. Be that as it may I am satisfied that the jury were in no way confused or misled by the learned trial judge about the categories of the three witnesses not being accomplices and he rightly left this matter to them for their decision.

The jury were part of the trial; they saw PW18, PW21 and PW33, heard their evidence from the witness box and watched their demeanour. They understood the roles played by each of these witnesses and appreciated everything. Having looked at the whole records submitted to this court, by no stretch of the imagination can anyone rightly conclude on the evidence before the court that PW18, PW21 and PW33 could be regarded as accomplices. In my view they made all efforts to gather information with a view of thwarting the coup plot which they ultimately succeeded in doing. They aided the Security Forces in unearthing the coup plot and their conduct on the whole could not be described as participants in the crime charged.

Alleged statements made by suspects at scene of alleged crime

Counsel for the appellants contended that the alleged statements made by suspects in the instant case at the scene of the alleged crime was improper and therefore not admissible in law. Counsel relied on the case of *R v Kojo Bodom & Others* (1935) 2 WACA 390.

In my view, the facts of *Kojo Bodom* are exclusively referable to the circumstances of that case and cannot be said to be applicable to the facts of the instant case. In *Kojo Bodom*, the accused were charged with murder and convicted. They appealed against the conviction on two material grounds – one misdirection by the learned trial judge in his summing-up to the assessors and the reception of inadmissible evidence.

The deceased who lived at a village was reported missing. A search party was instituted by the village chief and subsequently his dead body was found hanging on a tree. Suspicion fell on four accused as the perpetrators of the crime. They were then tied hand and foot and thoroughly beaten with the object of making them confess. The police were then sent for and the prisoners arrested and cautioned. They were then taken to the locus in quo where they made certain admissions. They were then formally charged with murder and each of them made a confession.

At the trial these confessions were admitted in evidence though objected to at the time. The court found that they made the confessions before a person in authority and that they were induced to make these confessions because of the severe beatings they received.

The court also strongly deprecated the course of action taken by the police in taking the suspects to the locus in quo for the purpose of obtaining admissions from them and that admissions were made, and were given as evidence against the accused.

Suffice it to say that in the case of *Kojo Bodom*, all the ingredients which make an accused's confession inadmissible were present. Can the same be said of the instant case? I don't think so. In the instant case, proper caution was administered to suspects before statements were obtained from them. In the course of ordinary police investigations visits were made to places mentioned in the several overt acts and not scenes of crimes simpliciter. As far as possible the proprieties were duty observed.

It should also be emphasised that this was a jury trial, where witnesses for the prosecution gave evidence as well as some of the appellants in their own defence. The credibility of police witnesses was challenged by the appellants or counsel for the appellants about the oral statements, giving rise to trials-within-a-trial. The correct process and procedure was followed by the learned trial judge after which he ruled on admissibility of these statements.

The jury as judges of fact had the opportunity of seeing and hearing these witnesses give evidence and were in position to form their own impressions. Their verdict was an indication that they believed the statements of the appellants.

As I see it, what is important and material in these circumstances irrespective of where the statements are obtained, is the paramount consideration that to be admissible, if they amount to extra judicial confession, they must meet the requirements of voluntariness, not obtained in breach of the Judges Rules. Complaints are always encountered in this regard; some true, others not so true. be that as it may, I will consider a clog on the proper exercise by the police of their investigatory function and, indeed, on the administration of justice itself if we grope ceaselessly for new expedients however desirable in this connection. We can only hope for improvements.

In my view, these oral statements apart, there was other evidence before the jury for consideration in arriving at their verdict. The conviction of the appellants was based on the totality of the evidence adduced in court which in my judgment cannot be faulted in the instant case. It is therefore incorrect to state and indeed insupportable in law to hold that the learned trial judge misdirected himself on the legal status of an accused's statement made at the scene of the crime as contended by the appellants. This ground accordingly fails.

Exhibit JJJJ

It was also contended by learned counsel for the 5th appellant that Ex JJJJ, the unsworn statement of the 1st appellant Gabriel Mohamed Tennyson Kai-Kai, did not constitute evidence against the 5th appellant, Francis Mischeck Minah, and that it was a fundamental misdirection of the learned trial judge when he directed the jury that Ex JJJJ could be used against the 5th appellant. Counsel submitted further that the learned trial judge had a legal duty to inform the jury that Ex JJJJ was not evidence against the 5th appellant.

There is no doubt that it is a fundamental rule of evidence that statements made by one accused person either to the police or to others, whether in the presence or absence of a co-accused, made in the course and pursuance of a joint criminal enterprise to which the co-accused was a party are not evidence against a co-accused, unless the co-accused either expressly or by implication adopts the statements and thereby makes them his own: see *R v Rudd* (1948) 32 Cr App R 138. And it has repeatedly been that it is the duty of the judge in a jury trial to impress on the jury that the statement of the accused person not made on oath in the course of the trial is not evidence against a co-accused, and must be entirely disregarded: see *R v Gunewardene* (1951) 35 Cr App R 80, a decision of the English Court of Appeal, where Lord Goddard LCJ said, inter alia, at p 91:

> "If no separate trial is ordered, it is the duty of the judge to impress on the jury that the statement of the one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded".

However, it is the recognised and universal principle of law that, whereas a statement made in the absence of the accused person by a co-defendant cannot be evidence against the accused person, yet if that co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then his sworn evidence becomes evidence for all purposes in the case including that of being

evidence against the accused person. This has neither been altered nor detracted from the decision in *R v Meredith and Others* (1943) 29 Cr App R 40. The headnote to that case states a course which it may be desirable to adopt in directing the jury on a joint trial in certain cases. The headnote is in the following terms:

> "Where several prisoners are tried jointly and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly becomes evidence against his co-prisoners they should not regard it as such, but should use that evidence only for the purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him".

On the principles stated above Ex JJJJ cannot therefore without more be evidence against the 5th appellant. However, at the joint trial in the High Court, the 1st appellant herein, Gabriel Mohamed Tennyson Kai-Kai, maker of Ex JJJJ, elected to give evidence on oath in his own defence from the witness-box. His sworn evidence from the witness-box became evidence for all purposes in the case including that of being evidence against the accused.

It was seriously contended by counsel for the 5th appellant, that when the 1st appellant gave evidence on oath from the witness-box, he retracted his prior incriminating statement against the 5th appellant, that is Ex JJJJ. Was there a retraction of Ex JJJJ by the 1st appellant? I have to look for an answer from the records of proceedings furnished to this court.

Now what is the meaning of the word "retract"? The *Oxford Universal Dictionary Illustrated* [3rd Ed] Vol II 1970 Re-Print defines the "retract" as follows: To withdraw, recall, revoke, rescind. *Funk and Wagnalls Standard Dictionary of the English Language*, International Edition defines the word "retract" as follows: To take back (an assertion, accusation, admission); make a disavowal (of), recant."

I have read these records closely, but regrettably, I have failed to find any evidence of a retraction of Ex JJJJ from the records. Far from retracting Ex JJJJ as contended by counsel for the 5th appellant, the 1st appellant in his evidence from the witness-box in relation to Ex JJJJ, stopped short, conveniently picking extracts here and there, supposedly in the sanguine hope of extracting himself from the conspiracy charge, and not in our view, with a motive of helping the 5th appellant. In his evidence from the witness-box, the 1st appellant gave extracts here and there from Ex JJJ of conversations which took place between himself, the 5th appellant and Jamil Sahid Mohamed in Jamil's sitting room down stairs.

Like the 1st appellant, the 5th appellant also made a voluntary cautioned statement Ex HHHH. He elected to give evidence on oath from the witness-box. He challenged portions of Ex JJJJ; the statement of the 1st appellant where he had mentioned his name. The 5th appellant also denied on oath the testimony of the 1st appellant.

The question arising from this situation is, whether it was correct and proper for the learned trial judge to leave these matters to the jury for their consideration in arriving at their verdict. In my view, it was the duty of the judge to leave the matters to the jury to decide, and this was what he did.

In the light of the authorities, we are satisfied that the learned trial judge did not misdirect the jury in the circumstances. There was nothing to show on the records that the 1st appellant retracted Ex JJJJ.

Exhibit ZZZZQ

Counsel for the 1st appellant submitted to us that their Lordships in the Court of Appeal erred in law in holding that Ex ZZZZQ, the tape recording of the voice of the 1st appellant Gabriel Mohamed Tennyson Kai-Kai was properly admitted in evidence and therefore did not prejudice the appellant's trial, thereby depriving him of an acquittal. It was also contended that the circulation of the transcript of Ex ZZZZQ amongst the jury without proper proof of it was illegal and prejudicial to the appellant's case. Counsel submitted that the pre-requisites for the admissibility of the tape

recording were absent. He itemized the following requirements as conditions precedent to the admissibility of the tape recording in evidence.

- The accuracy of the tape recording must be proved.
- The voice recorded must be properly identified.
- The evidence must be relevant.
- Ex ZZZZQ must come from proper custody.

Counsel referred to the authority of *R v Maqsud Ali and Ashiq Hussain* [1962] 2 All ER 464. As to whether the pre-requisites referred to by learned counsel were established in the instant case the following passage from the judgment of Marshall J can serve as a useful guide as it is germane to the issues contended in the present appeal, at p 469:

> "What is clear to this Court is that this case appears to have raised for the first time in the grounds of appeal the question whether a tape recording is admissible in law. Counsel for the appellants did not seem eager to argue the matter with any great force or in any real detail, but the court nevertheless invited counsel for the Crown to address the court, if he desired, on the issue and this he has done. We think that the time has come when this court should state its view of the law on a matter which is likely to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are constructed. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise would not be picked up by the naked eye have been admitted and now there are devices for picking up, transmitting, and recording conversations. We can see no different in principle between a tape recording and a photograph.
>
> In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged".

Was Ex ZZZZQ, the tape recording, relevant in the instant case? The answer is a clear yes, since it touches and concerns overt act 24 of Count 1 of the indictment which is in the following terms:

> "On or about 19 March 1987 in Freetown, Gabriel Mohamed Tennyson Kai-Kai wrote a speech in furtherance of a plot to overthrow the Government of Sierra Leone by unlawful means which speech contained measures pertaining to the taking over of the Government of Sierra Leone and was recorded on a cassette."

The first appellant gave evidence on his own behalf from the witness box. The jury saw him and heard his voice distinctly as he gave his evidence-in-chief and also answered questions under cross-examination.

PW26 Seth Amedofo who tendered Ex ZZZZQ and in whose custody it had been, knew the 1st appellant very well and both had been on terms of familiarity over a long period. The first appellant was therefore no stranger to PW26 and he, PW26, was capable and qualified enough to identify his voice with relative ease and confidence.

It will be pertinent to point out that Ex ZZZZQ was played in open court in the presence and hearing of the jury, the learned trial judge and 1st appellant among others. It was contended by the appellant that the cassette did not belong to him, that it was not his property since it did not bear his initials nor his signature, as the other cassettes over which he claimed ownership. It was also

contended by counsel for the appellant that since the jury were left unaided by the non-production of an expert evidence to positively identify the voice on Ex ZZZZQ as that of the 1st appellant, it would be wrong and unsafe to conclude without more that that was the voice of the 1st appellant.

Counsel submitted that Johnson J was in error in failing to distinguish between *Maqsud's* case and the instant case, in that in *Maqsud's* case one of the appellants admitted that the recorded voice was his whereas in the instant case the 1st appellant denied that the voice was his.

With respect to learned counsel, this submission is not borne out by the records in this case, particularly Ex GGGG, the cautioned statement of the 1st appellant in which he admitted the authorship of ZZZZQ. In Ex GGGG, the 1st appellant said inter alia:

> "In one of our meetings they asked that I prepare a speech to reflect their views and the views of the people of this country at this point in time. They demanded to see it in a subsequent meeting. Since some of them were suspicious of the negative aspect of this plan I then decided to please them by preparing a speech and recording it on a cassette tape and to hold on to it.
>
> In a subsequent meeting I had the privilege to play the cassette to only few and read the draft to the greater number of the group. That was the cassette played to me and the group on 23.4.87 in the office of Mr Prince Cole, Commissioner CID. That was my voice, and it was done to impress on them that it was not something negative but rather positive. This was to let them be assured as some of them were getting very suspicious of the negative aspect of the whole plan"

In the light of the foregoing synopsis, it seems to me very clear that all the pre-requisites laid down by learned counsel and also those postulated in *Maqsud's* case were met in the instant case. In the light of clear evidence to the effect, I would regard the suggestion rather preposterous that the surest and safest way of identifying the voice of the 1st appellant on Ex ZZZZQ is through the medium of an expert evidence. In my view the evidence in this regard is not worth any such frolic. The reception of the evidence complained of is not wrongful and was not in any way prejudicial to the 1st appellant.

I am also satisfied that the circulation of the transcript of the tape recording to the jury was proper as a matter of administrative convenience needing no consent from counsel or appellant. I find no justification in the criticism of the learned appellate justice. I am satisfied that Ex ZZZZQ, the recorded cassette, was properly received in evidence.

I have already considered what I think are the more important and serious contentions raised by this appeal. These cover a wide range a complaints as can be seen in appropriate places in this judgment. These considerations apart, nearly all the appellants in this appeal, in one way or the other, criticised the learned trial judge's summing-up referring to appropriate passages in the summing-up.

Indeed the summing-up in this case was rather long and tedious, running into nearly 200 type-written pages. It was contended by appellants that the learned trial judge's summing-up did not adequately or fairly put the case of the defence to the jury. They also complained of strong and unfair comments on the part of the learned trial judge. The records of the learned trial judge's summing-up were furnished to this court and we scrupulously read through them.

It seems to me, however, that counsel for the appellants on the whole, have looked at the summing-up from a narrow compass. This is regrettable. I think that the proper approach is to look at the summing up as a whole in determining whether it contains misdirections or other matters verging on a miscarriage of justice.

In this regard the words of Lord Goddard LCJ in *R v Linzee* (1956) 3 All ER 980 at p 982 are on point:

> "In every judge's summing-up, nearly some sentence can be found, if one goes through it with a magnifying glass, where one can say that it is not quite accurate or that something else ought to have been said. The fact is that one should not look at the summing-up in that way. The summing-up must be taken as a whole and it must be seen that there is no mis-statement of law".

It has also been authoritatively said over and over again that there is no set formula for a summing-up. In *McGreevy v DPP* (1972) 57 Cr App R 424 Lord Morris of Borth-Y-Gest said, at p 281:

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case but also upon the view formed by and style that will be fair and reasonable and helpful".

Strong comments by the learned trial judge in summing-up cannot be equated with unfairness or usurpation of the functions of the jury. A judge is entitled to express his opinions and to make strong comments on questions of fact as long as he leaves the issues to the jury to decide. In this connection I find it appropriate to re-echo the words of Channel J in *R v Cohen & Bateman* (1909) 2 Cr App R 197. He said at p 208 – 209:

> "In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevance of questions of fact, and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of every confident expressions in the summing-up does not show that it is an improper one. When one is considering the effect of a summing-up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact".

A direction in a criminal trial cannot always maintain the precise balance which people sometimes think a direction to a jury should preserve. The learned trial judge finds it necessary because the facts compel him to direct the jury in such a way as to indicate to them his opinion, having told them that they are judges of fact. A conviction cannot be quashed because a summing-up is adverse to a particular defendant. The only question is whether the case for the defence has fairly been put before the jury.

As was aptly said in the judgment of the New South Wales Court of Criminal Appeal in *R v Ali* (1981) 6 A Crim R 161, inter alia:

> "A summing-up must present a balanced account of the conflicting cases but when one case is strong and the other is weak, it does not follow that a balanced summing-up will be achieved by under- weighting the strong case and over-weighting the weak case. If one case is strong and the other is weak, then a balanced account inevitably will reflect the strength of the one and the weakness of the other".

On the general ground that the verdict is unreasonable or cannot be supported having regard to the evidence, this court is not entitled to reverse the verdict of the jury, unless no reasonable jury properly directed could have returned that verdict. We are not entitled to substitute our views for that of the jury. It is pertinent to refer to the dicta of Lord Morris of Borth-Y-Gest in *McGreevy v DPP* [1973] 1 WLR 276 where he said at p 281:

> "The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence will not proceed further to consider whether the effect of that piece of evidence is to point to the guilt or is returned or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt"

The substance of the appellants case was put before the jury, and the jury having heard the whole of the evidence, were in a position on proper direction to come to their verdict which they did by convicting the appellants. There was ample evidence against the appellants on which the jury could convict on all counts, and by their verdict it must be assumed that they did not accept their defence. The Court of Appeal confirmed the convictions.

Indeed, there are misdirections in the learned trial judge's summing-up. It has been said over and over again that there is no perfect summing-up. In our opinion therefore, the arguments which have been directed to us, powerful as they are, fail.

We approach the question whether or not it is our duty to apply the proviso here by considering whether the evidence was overwhelming and whether a jury properly directed in this case could have come to any other verdict other than that of guilty.

In those circumstances we are quite satisfied that there was here no miscarriage of justice, that the proviso ought to be applied and the appeals against convictions and sentence are dismissed.

WARNE JSC: I wish to add a few words of my own in support of the judgment of the learned Chief Justice.

Much work and effort have been exerted by both sides in presenting their arguments to this court, indeed great scholarship has been displayed as well. As a result, I wish to congratulate counsel both for the appellants and the State/Respondent for such dedication to duty in the interests of their respective clients.

Having listened avidly to their various submissions, I wish to emphasize certain points which the learned Chief Justice has already dealt with in his judgment and put clearly on record that the laws of Sierra Leone are those contained in s 125(1) of the Constitution of Sierra Leone (Act No 12 of 1978). They are:

"(1) The Laws of Sierra Leone shall comprise—

(a) this Constitution;

(b) enactments made by or under the authority of Parliament established by this Constitution;

(c) any Orders, Rules and Regulations made by any person or authority pursuant to a power conferred in that behalf by this Constitution or any other law;

(d) the existing law;

(e) the common law.

For the purpose of the opinion I am going to express in my judgment, I will also state sub section 2 of s 125 herein. It provides:

"(2) The common law of Sierra Leone shall comprise the rules of law generally known as the doctrines of equity; and rules of customary law including those determined by the superior Court of Judicature".

During the course of the arguments, some counsel for some of the appellants left me with the impression that they may have lost sight of what the laws of Sierra Leone are. This brings me to the gravamen of the contention of counsel for appellants who were convicted for the offence of treason.

It is pertinent to refer to the particulars of the offence which the learned Chief Justice has stated in his judgment. I only wish to highlight the substantive offence for which the appellants were indicted in count 1 "on 1 June 1986 and on diverse days between that day and 23 March 1987 in Sierra Leone prepared to overthrow the Government of Sierra Leone by unlawful means.

The offence is the preparation to over throw the Government of Sierra Leone by unlawful means, and s 3 (1)(a) of Act No 10 of 1963 as amended state that it is treason.

Wharton's Law Lexicon defined treason as "To betray. An offence against the duty of allegiance and the highest known crime; for it aims at the very destruction of the very Commonwealth itself".

Having a clear view of what the offence of treason is, I will now deal with the contention of counsel. They argued with great tenacity that since no provision is made in the Treason and State Offences Act 1963 as amended, the laying of overt acts in count 1 in the indictment is bad in law. They argued further that there is no justification in law for the laying of overt acts in count 1. I agree there is no provision in the said Act for the laying of overt acts but is the laying of over acts in a count defective? I do not think so. They are, in my opinion, further particular of the particulars of offence in the indictment regarding count 1.

In s 2 of Act No 10 of 1963, it is stated that "Offence under this Act" includes any act, omission or other thing punishable under this Act." The appellants have been charged under s 3(1)(a) of the said Act. What is the justification for the laying of overt acts in count 1? The answer, in my view, is contained in the Criminal Procedure Act 1965 ss 3 and 51.

Section 3 provides the following:

"Without prejudice to the provisions of any enactment, all criminal offences shall be enquired into, tried and otherwise dealt with according to the provisions of this Act"

The relevant provision of this Act is s 51 to which the learned Chief Justice has already referred. I will only emphasise the following words in s 51(1) "together with such particulars as may be necessary for giving reasonable information as to the nature of the charge".

Section 51(2) is even clearer, and I will repeat it: "(2) notwithstanding any rule of law or practice, an information shall, subject to the provisions of this Act, not be opened to objection in respect of its form or contents if it is framed in accordance with the rules under this Act".

The rules under this Act are contained in the First Schedule in the Criminal Procedure Rules rr 3(1), (2) and (4). The above provisions to which I have referred are part of the Laws of Sierra Leone, vide s 125 Act No 12 of 1978. In my view, the contention of counsel is untenable and the overt acts are properly and justifiably laid according to law.

The cases of *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186 and *Fornah and 14 Others v The State* [1974-82] 1 SLBALR 48 have been cited by counsel in support of their contentions. In these cases, the issue of the laying of overt acts in a court for the offence of treason was never decided nor was a definitive opinion expressed by the Court of Appeal. However, Livesey Luke JSC (as he then was) in the case of *Fornah and 14 Others* made an attempt to address the issue. Suffice it to say, in all these cases overt acts were laid in the count for treason. It seems to me, this practice, as Hon Mr Justice Luke termed it in *Fornah* and 14, has been adopted by the State in the instant case. Be that as it may, it is a practice which has its foundation in law. This ground of appeal fails.

Is proof of one overt act sufficient to ground the conviction for treason?

Counsel for the appellants have argued forcefully that the charge of the learned trial judge to the jury that the proof of one overt act is sufficient to found a conviction for treason is bad in law. This is indeed the direction of the learned trial judge to the jury. The Court of Appeal, it seems to me, agreed with the Judge.

It is my view that the Court of Appeal did not advert its attention to the repeal of the Treason Act 1351 by s 19 of the Treason and State Offences Act No 10 of 1963, as amended. It is provided in the Treason Act 1351 that the proof of one overt act was sufficient to ground a conviction for the offence of treason. This Act, having been repealed by Act No 10 of 1963 (supra), we are now to look through our Act to see what proof is required for offences committed under the said Act.

Under the Laws of Sierra Leone, of which the said Act is one, the proof required for any criminal offence is proof beyond reasonable doubt. As a result, in the instant case, what the prosecution was required to prove was the substantive offence of preparation to overthrow the Government of Sierra Leone by unlawful means, which is treason. The proof was proof beyond reasonable doubt. I have already opined that overt acts are not charges but further particulars of the particulars of offence. As an adjunct to these particulars, the overt acts have been laid.

It is my view that, where evidence has been led by the prosecution in support of the overt acts, that will suffice, if such evidence proves any of the overt acts beyond reasonable doubt.

Counsel for the appellants has further contended that some of the overt acts as laid create offences specifically provided for in s 17 of the Treason and State Offences Act No 10 of 1963 as amended.

Section 17 provides as follows:

> "Any person who attempts to commit any offence under this Act, or solicits, or incites or endeavours to persuade another person to commit an offence, or aids or abets or does any act preparatory to the commission of an offence under this Act, shall be deemed to have committed such offence and on conviction shall be liable to the same punishment and to be proceeded against in the same manner as if he had committed the offence".

It is at once clear that this is an all-embracing section which covers every section of the Act that creates an offence. The operative words in s 17 are "shall be deemed to have committed such offence…". "Deemed" has not been interpreted under the Act but "offence" has been, and I have already referred to it.

In my view, "deemed" means "regarded as" or "considered to be". In my opinion, separate offences are not created by s 17. The contention is untenable. Be that as it may, I have already opined that the overt acts are not laid as charges. As such, they cannot be deemed to be offences under the Act. At the expense of repetition they are further particulars of the particulars of offence.

On the totality of the evidence, the overt acts have been proved beyond reasonable doubt.

Misprision of Treason

Counsel for the appellants who were convicted for the offence of misprision of treason have argued that misprision of treason is not an offence in Sierra Leone. They have relied on the obiter dictum of Tambiah JA in the case of *David Lasana & 11 Others v R* (1970-71) ALR (SL) 186. This obiter is not the law nor is it, with respect to the learned Justice, persuasive.

The charge has been laid in breach of the common law. This offence is a misdemeanour at common law and carries a maximum penalty of life imprisonment.

Counsel for the 14th appellant has also contended that the sentence of seven years imprisonment imposed on the 14th appellant is inordinately long and excessive.

It is trite law that the common law is part of the laws of Sierra Leone – vide s 125 of Act No 12 of 1978. The common law is not static but must continue to develop, as it has, over the years.

In support of my view, I refer to the case of *R v Turner and Others* [1975] 61 Cr App R 67 et seq, where Lawton LJ referred to the speech of Lord Reid in *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1021, a case in which it was sought to extend the band or reception of hearsay in evidence, Lord Reid said: "The common law must be developed to meet the changing economic conditions and habits of thought; and I would not be deterred by expressions of opinion in this House in old cases. But that there are limits to what we can or should do. If we are to extend the law, it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations, that must be left to legislation". I entirely agree with the learned Law Lord and I adopt the statement. In my view, this pronouncement is applicable in every case where the common law exists as in the case of the inadmissibility or hearsay evidence.

I will now consider the case against the 13th and 14th appellants respectively.

Both have appealed against conviction and the 14th appellant has appealed against sentence as well.

I believe counsel conceded that misprision of treason is an offence in Sierra Leone. However, counsel for 13th appellant has submitted that the prosecution has failed to prove the case against the appellant, that in the evidence against the 13th appellant PW18 Mustapha Sheriff testified inter alia as follows:

"At about 6 pm we joined a taxi and the 12th accused alighted at Congo Cross and I continued and went to Jay's Bar at Aberdeen Road Texaco. Whilst there OC Benji (17th accused identified) came into the bar. I served him a pint of beer and then a second. I called him to a corner and told him that people had called me about a coup, but I had not yet received information as I had not yet seen weapons and arms. I told him if I received full information either on the 21st or the 22nd March 1987, I would be informing him again. He said OK and went outside".

Counsel for the appellant said this evidence did not support Count 3 in the indictment.

At a cursory glance at the evidence, it would seem the contention and arguments are cogent, compelling and persuasive.

There are several schools of thought as to what evidence would be sufficient to ground a conviction for the offence of misprision of treason.

There is one school which is of the view that the accused/appellant must not only know that treason is being planned or has been committed, but he must know the perpetrators of the treason.

There is yet another school of thought which holds the view that the accused/appellant having known that treason is being planned or has been committed, he has a duty to disclose this intelligence to the authorities within a reasonable time that he knows even though he does not know the perpetrators.

There is yet the other school of thought which holds the view that once the accused/appellant knows that treason is being planned, threatened or committed, he should with due diligence ascertain the facts and disclose those facts to the authorities even though he is not aware of where the traitors will strike, when they will strike or who they are.

In my opinion, these various schools of thought are clear manifestations of the development of the common law.

In this entangled web, how do we determine the issue in the Sierra Leone contest, that is to say, under the common law of Sierra Leone? I will address the issue in this way, by referring to a local expression: "If one has been bitten by a snake, he should be wary of a worm". The English idiom is "Once bitten, twice shy".

Here was a Senior Police Officer, to whom an information has been passed on by a member of the Republic of Sierra Leone Military Forces about a coup plot; he decided to go home because he was not only hungry, but to await further information from the same source. In fact, the information, albeit scanty, was passed on to an appropriate authority. In my view, he the 13th appellant ought not to have allowed the informant to disappear from his sight. In his capacity as a Senior Police Officer, he should have been alerted there and then and made further investigation. The history of coups and abortive coups in this country since Independence in 1961 is proverbial and should be fresh in the minds of every responsible citizen. The 13th appellant did not pursue the matter as he ought to have. If he had, he would soon have known if it was a hoax or a fact. If it was a hoax, Mustapha Sheriff would have been charged for public mischief, but if it was a fact, he would have been duty bound to inform higher authorities. Failure to pursue the information further was in my view, criminal negligence. What if Mustapha Sheriff, had not gone back to give him further information, as in fact, he was prevented from doing? Would he have gone in search of Sheriff? Perhaps! However as it turned out he never made any effort to seek Sheriff. In my opinion, his inertia, compounded his criminal folly.

I subscribe to the school of thought which holds the view that when once a person knows that treason is being planned or committed, he should with due diligence ascertain the facts and disclose that information to the authorities even though he does not know who the traitors are, where they will strike or when they will strike.

I think this is the common-sense view of interpreting the common law.

In my opinion, the 13th appellant was justifiably convicted for the offence of misprision of treason. His appeal therefore fails.

The 14th appellant appealed against his conviction and sentence. The evidence against the 14th appellant is overwhelming. He was involved in the preparation to overthrow the Government of Sierra Leone by unlawful means, until he himself realized it was a difficult undertaking. In his voluntarily cautioned statement Exhibit FF he said, inter alia:

> "I told him I was not going to join in any plan with O/C Kai-Kai to overthrow the Government of Sierra Leone because O/C Kai-Kai is a frustrated man and if he had any good intention, he should have done so at the time he was carrying rank and not at this moment when the authorities have demoted him in rank. At this stage, Tarawally told me that he was thinking about the same issue and that O/C Kai-Kai had a certain secret which he failed to reveal to us and he also will not join in the plan. He further told me that he was going in search of Massaquoi to warn him not to join in them plot. Since then I did not see any of them again. I never thought of revealing this information to the authorities because the whole plan seemed to have been impossible for a single Police Officer to stand and fight to overthrow the Government of Sierra Leone. O/C Kai-Kai never gave me any amount to keep this information as a secret".

It is a trite law that what the 14th appellant said about Tarawally is not evidence against him; but what he said about his involvement is not only evidence against himself, but purely a jury matter. The jury found him guilty of the offence as charged and, in my view, I do not think the verdict ought to be disturbed and I will not disturb it. It is small wonder he was not charged for treason but the prosecution had a right to prefer what charge they wished.

As to the appeal against sentence, I will examine the circumstances in order to determine whether the sentence is inordinately long. I think it will be useful to look at the history of the custodial sentence as a punishment under the common law. "Imprisonment as a punishment was alien to the common law of England". This was a statement made by Lord Justice Lawton in the case of *Turner* (supra).

The Learned Law Lord had this to say: "We have reminded ourselves that imprisonment as a punishment was alien to the common law of England".

We here are operating, inter alia, under the common law of England and Sierra Leone. The principles enunciated by the learned Law Lord which should guide the Courts in passing sentence for serious crimes is contained in the case of *Turner* (supra). The learned Law Lord continued:

> "It was the task of judges under the Commission of General Gaol Delivery to clear the gaols and not to fill them with convicted offenders".

The learned judge then went through the history of punishment for offences committed by individuals against the State and eventually he came to the point where terms of imprisonment became a deterrent.

It is to be noted that corporal punishment was in existence in England until abolished by the Criminal Justice Act of 1948.

The learned judge then opined what should be the appropriate deterrence for grave crimes involving violence or threat of violence. It became clear that these offences deserved long terms of imprisonment.

The judge then referred to the abolition of the death penalty which had an effect upon the length of sentences.

The judge then went on to say:

> "Since there is now no death penalty, the only sentence which can be imposed for the most serious crime known to English law, treason apart, is that of life imprisonment. With very rare exceptions, those who are sentenced to life imprisonment are discharged from prison at some time. The date when they are discharged depends upon the circumstance of the offence … Very few, however, are kept in custody after about 15 years.

> This has created a difficult sentencing problem for the courts … because it seems to us it is not in the public interest that even for grave crimes, sentences should be passed which do not correlate sensible and fairly with the time in prison which is likely to be served by somebody who has committed murder in circumstances in which there were no mitigating circumstances.
>
> There is another aspect of this problem we have to bear in mind. Grave crimes fall into categories. There are some which are wholly abnormal. These circumstances are horrifying. They may endanger the State. What is to be done with those who commit such crimes? There are other crimes which are very grave but which cannot be regarded as normal".

The learned judge then gave examples of the two categories of crime then added, "The problem has been whether crimes of gravity, but common occurrence, should be treated as abnormal crimes. We have come to the conclusion that they should not. They fall into category of their own which calls for sentences lower than those which would be appropriate for crimes of an abnormal character".

I will deal with the appeal against sentence by the 14th appellant guided by the principles propounded by Lawton LJ and adopt the ratio decidendi which I think will be useful to courts trying criminal cases.

The death sentence still exists in Sierra Leone for murder or treason. There is therefore no need to measure the sentence passed on the 14th appellant against the sentence for murder or treason. It is however necessary to determine what category to place the offence of misprision of treason.

In any civilized society, where the rule of law exists, misprision of treason is a grave crime. It is a grave crime in Sierra Leone. It is a crime which endangers the very existence of the State. For such a crime I will consider the maximum sentence which is life imprisonment as against the circumstance in which the offence was committed. It is one of the gravest offences know to the laws of Sierra Leone yet it carries a lower sentence than that for the offence of murder.

In considering whether the sentence is inordinately long, one must bear also in mind the frequency with which such offence is committed and ensure whatever sentence is imposed will be a deterrent to others.

In the twenty-eight years of the Independence of Sierra Leone, there have been as many coups and abortive coups as there have been general elections. The several attempts to overthrow the Government of Sierra Leone by unlawful means are not only disturbing but intolerable. It is reprehensible that persons who know of a coup plot or that treason has been committed should conceal this intelligence from authorities. I think they should feel the full weight of the law.

In the case of the 14th appellant he did not only attend a meetings where the coup was formulated, he only reneged, because he felt it was impossible of success.

I do not think there are any mitigating circumstances why the court should interfere with the sentence imposed on the appellant. The sentence of 7 years is not inordinately long. The appeal is therefore dismissed.

Hearsay Evidence

Counsel for the 5th appellant has criticized the learned trial judge and the Court of Appeal for receiving in evidence the evidence of DW20 because it was hearsay evidence. Hearsay evidence ought not to be admissible in a criminal trial unless it forms part of the *res gestae*. Vide the case of *Teper v R* [1952] AC 480. In this case the learned judge said, "and the evidence shall only be admitted if it satisfies the strictest test of close association with the crime in time, place and circumstances". This case was decided in the Privy Council. Lord Normand in his opinion said:

> "The rule against the admission of hearing evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour will throw on his testimony is lost. Nevertheless, the rule admits of certain guarded

and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*".

I entirely agree with the learned Law Lord.

In the instant case, the evidence of DW20 ought to have been excluded because it was hearsay evidence and did not form part of the *res gestae*. This rule applies even to the evidence of a witness called by the defence. The criticism by counsel is justified. Nevertheless the question arises, did the inadmissible evidence preclude the court from considering the other evidence that was available? I do not think so. In my view, there was other admissible evidence against the 5th appellant which the jury considered.

Evidence of Mustapha Sheriff

Counsel for the appellants have contended that the evidence of Mustapha Sheriff PW18 was that of an accomplice and that the learned trial judge misdirected the jury in this regard.

The foundation of the prosecution's case against all the appellants was the evidence of Mustapha Sheriff. No doubt, Sheriff was at once a villain and a hero, depending on whether his evidence was for the prosecution or against the appellants. The evidence of Sheriff was clear, succinct and to the point. The cross-examination of the witness by counsel for some of the appellants did not address the gravamen of the charge. On the contrary, some of the questions were not only irrelevant but very insulting and scandalous.

Was Sheriff an accomplice? The learned trial judge did not think he was and directed the jury accordingly and the jury by their verdict did not think that he was an accomplice. I do not think he was either.

In view of the number of accused persons before the trial court, each one being represented by counsel, I think it is appropriate to call in aid the case of *R v Turner and Others* [1975] 61 Cr App R 67.

There are several issues in that case which have similarities to the instant case, e.g. several accused persons on the same indictment, the length of the trial, hearsay evidence by defence witness, principal witness being tainted as accomplice, oral statements being made by accused persons to police and given in evidence and the complaint of inordinately long sentence.

The *Turner* case was one involving bank robbers. One of the robbers became a Crown witness. As a result of his statements to the police, his accomplices were apprehended, prosecuted and many of them convicted and received long prison sentences. The ex-bank robber who was the Crown witness, was called Smalls. In that case, Smalls was not only an accomplice, but the prosecution, the defence and the judge and jury knew he was an accomplice. Among some of the issues which emerged at the trial were those which I have already mentioned, and I believe they are analogous to some of the issues in the instant case. How did the court address these issues?

With regard to hearsay evidence, the court held that it is inadmissible even when part of the res gestae.

No doubt the trial of the instant case was indeed a lengthy one. There must be a way by which this can be obviated in the future. A lengthy trial is a strain on those involved – the judge whose responsibility it is to take notes of the evidence in long hand; the jury who has to sit out and listen attentively – and in the instant case, were kept together in one place for the duration of the trial; and above all the expense of the trial to the taxpayers. These are disturbing features which ought to be considered by all the authorities concerned.

Be that as it may, I will continue to highlight the portions of the judgment which are germane to the instant case.

There have been serious complaints by counsel for the appellants that it was improper for statements to be obtained by investigators from suspects at alleged scenes of the crime where prosecution is pending. They have relied on the case of *R v Kojo Bodom & Others* (1935) 2 WACA 390 at 391.

In answer to the complaints, I will re-echo the words of Lawton LJ in the case of *Turner* (supra):

> "Apart altogether from the problem of length and expense there was the problem of evidence of a number of police officers as to oral statements (colloquially known as verbals) which the accused are said to have made after arrest. Defence counsel had to challenge this evidence if their instruction from their clients made challenges necessary. As almost happens in this class of case at the Central Criminal Court (but not so commonly on circuit) nearly all the defending counsel challenged the credibility of the police witnesses giving evidence about oral statements. They were severally accused of lying, bribery, fabricating and planting evidence, perjury in the case, the theft of £25,000, threatening witnesses, assault and drunkenness. The existing practice followed by the police for putting this kind of evidence before courts almost inevitably leads to attacks on the credibility of police officers. If the evidence is true, as it usually is, the jury is greatly helped. It is a matter of human experience which has long then recognized, that wrong doers who are about to be revealed for what they are, often find relief from their inner tensions by talking about what they have done. In our judgment and experience this is a common explanation of oral admissions made at or about the time of arrest and later retracted. But if the evidence of such oral admissions is untrue, as regrettably it sometimes is, defendants are unjustly and unfairly put at risk".

In the instant case, the oral statements of the appellants which were made to the police officers and given in evidence were vigorously tested in cross-examination. It seems to me that the statements were challenged because they were admissions which were damaging to the case for some of the appellants. However, some of the appellants gave evidence in their own defence and the jury had the opportunity of seeing and hearing the witnesses and they were the judges of facts. The verdict is indicative of the fact that they believed the statement. The case of *Kojo Bodom & others*, I regret to say, is not helpful to appellants in his case. I adopt the statement and observations of Layton LJ and in my view, I can find nothing unsafe or unsatisfactory about the convictions of the appellant even if they were based on the statements made to the police officers and the convictions were not based solely on those statements.

Misdirections / Miscarriage of Justice

Counsel for the appellants have complained forcefully that the learned trial judge misdirected the jury in law and in fact and as such the appellants were deprived of the chance of acquittal. Before considering the passages referred to I will cite the case of *R v Wolf* (1914) 10 Cr App R 107 where it was stated: "An isolated incorrect passage in a summing-up is not sufficient ground for quashing a conviction if the court is satisfied that the jury appreciate the proper questions for them". I do agree that this is the common sense and correct approach.

In a jury trial, it is a presumption that the jurors follow the proceedings and fully understand the evidence. However, in a short and simple trial, if the learned trial judge fails to assist the jury in the summing-up by not reviewing the evidence, the court will not quash the convictions on that ground simpliciter. The situation is different in a lengthy and complicated trial. The instant case is in the latter category. The summing-up in the instant case, is copious and to a certain extent, repetitive. If the learned trial judge misdirected the jury on a question of law, the convictions would need to be quashed.

If it is a misdirection on a question of fact, the convictions need not be quashed, unless the misdirection is such that it will be tantamount to a substantial miscarriage of justice.

Ground 8 of the grounds of appeal filed on behalf of the 1st appellant seems to epitomize the contentions of some of the other appellants.

Ground 8 states:

> "Their Lordships exoneration of the trial judge's bias and prejudice during the conduct of the trial is manifestly unjust and unfair to the appellants thus resulting in a substantial miscarriage of justice, as such blatant bias and prejudice disabled the trial judge from rendering that much

needed assistance to the jury to guide them in their deliberations in reaching a free, impartial and an unbiased verdict".

Counsel then proceeded to cite twenty-five passages in the summing-up which he felt were prejudicial to the appellant.

On a cursory glance at the ground of appeal, it seems to me that the contention is about the manner in which the learned trial judge reviewed the evidence and his comments on the evidence.

Let me here and now remind ourselves that the learned trial judge is part and parcel of the trial court, albeit, in the position of an umpire. Strong comments by the learned trial judge on the evidence is no justification for any scathing attack upon the person of the judge or his conduct of the case. Strong comments are permissible provided the judge does not usurp the functions of the jury.

Having said this, I will now consider the passages complained of (highlighted in *italics* below). In considering these passages, I will only comment on those which I believe are prejudicial to the interests of the appellant.

"Some of these statements are what the law would describe as confession statements. Others are evasive and others still denials".

In my view, this direction to the jury is equivocal. Voluntary cautioned statements by the accused are either confessions or denials or confessions and justification. If the statement is evasive, it is tantamount to a denial. It is again not clear whether the judge was commenting on the confession statement as being evasive or whether the denials ware evasive. I think the direction is unclear and the complaint is tenable.

"Gentlemen of the jury, a lie told out of court may amount to corroboration of the case against the person who tells the lie and there is no obvious reason why lies told on a certain type told in evidence of an accused should not have similar effect. The contrivance of falsehood can sometimes only be explained on the footing that the contriver is anxious to conceal his guilt although this is not always so. There is a clear distinction between a lie told out of court and evidence given in the witness box which the jury reject as incapable of belief or as otherwise unreliable".

I believe in this passage, the judge was referring to false statements made by a prisoner. I will here refer to the 35th Edition of *Archbold, Criminal Pleading, Evidence and Practice* para 1301 under the rubric "False statement made by the prisoner". It states:

"A false statement made by the prisoner to the police or before the commencement of proceedings is not necessarily corroboration, but may be so. Whether it is or is not capable of affording corroboration must depend on all the circumstances of the particular case. A lie may afford corroboration if it gives to a proved opportunity a different complexion from that which such opportunity would otherwise have borne: Vide *Credland v Knowler* (1951) 35 Cr App R 48 approving dicta in *Jones v Thomas* (1934) 1 KB 323 at 327."

The learned trial judge was no doubt charging the jury to reject the evidence of the 1st appellant as not being wholly reliable in view of the fact that he had made a statement previously to the police that did not corroborate the evidence on oath. I do not think he assisted the jury by the direction he gave them. I must say, with respect to the learned trial judge, it took me some time to unravel the passage. No doubt the 1st appellant had made voluntary statements to the police implicating other co-accused persons.

When he testified on oath, he varied his story regarding some co-accused person. It was the duty of the judge to direct the jury that the statement implicating the co-accused was not evidence against them but only the evidence on oath ought to be considered. Regrettably the judge's direction to the jury was not only a mouthful, but it was clearly a misdirection.

"Here is the 1st accused who said in his statement to the police what the alleged 5th accused said during that conversation in furtherance of the common design to overthrow the Government of Sierra Leone. After he had been with the 5th accused and after they have been

coming to court it would appear that he decided to pick out a few words out of that conversation and testified in that witness box that that was all that the 5th accused said. In doing so he offered no explanation for the clear contradiction. When you read exhibit JJJJ you will see that he picked out only one sentence out of that statement and gave evidence about that only. Why did he leave these out when testifying? What then is the inference you can draw from that behaviour gentlemen of the jury?"

This charge to the jury was rather unfortunate. The passage is fraught with flaws. I say unfortunate, because it is a basic principle of evidence that unsworn statements made by an accused implicating a co-accused in his absence is not admissible against the co-accused nor is it evidence against him. Here was the learned trial judge charging the jury in clear unmistakable language to consider such statement in its entirety, to wit, Exhibit JJJJ when he gave evidence on oath. This is clearly a misdirection which mitigates against the 5th appellant, not the 1st appellant, be that as it may, it is a misdirection.

"It was the 1st accused you will recall … He has told you in his statement what part some of the sixteen accused men played in the preparation to overthrow the Government of Sierra Leone. All that he has told you is part of the prosecution's case, which if you believe beyond reasonable doubt, could lend you to consider a verdict of guilty against those of whom you are satisfied took part in their common design".

The learned trial judge, in his attempt to emphasize the common design of the sixteen appellants, fell into error by charging the jury that what the 1st appellant said in his unsworn statement implicating the other fifteen appellants was evidence against them. This was only evidence against himself. This is another case of a misdirection.

"This is a situation which I find myself unable to understand, if someone is being investigated regarding an offence and he confesses to that offence how can he then be made a prosecution witness; who then will be made the accused? … Having ruled that all these statements are admissible at law and they have been admitted as evidence, they form part of the evidence in this case".

With respect to the learned trial Judge, I find the opening statement incredible. I think the learned trial judge may have been unaware of a long line of cases, more particularly cases involving the offence of conspiracy where one of the conspirators had been given immunity from prosecution and used as a prosecution witness, and also where someone had been convicted and subsequently used as prosecution witness. Two cases are aptly in point here – *Turner and Others* (supra) where Smalls was made a witness for the Crown where he had confessed to being part of the bank robbery; and the case of *Shamwana v The People* (1985) ZR 41, decided in Zambia on 2 April 1985.

In the latter case, the principal witness for the prosecution was Major General Christopher Kabwe, PW5, who was at the material time, head of the Zambia Air Force (ZAF) in his capacity as Chief of Staff. PW5 had jointly been arraigned with the appellants but was later granted immunity against prosecution. A nolle prosequi was entered in his favour and he became a State witness. He was rightly presented by the prosecution as an accomplice witness and so support for his evidence became necessary. There is also the Supreme Court decision in *Venn v The State* [1974-1982] 1 SLBAR 172 (SC App 2/77, 14 December 1977) where the principal witness for the State was one Kpake, who was an accomplice. He had earlier been convicted and sentenced to a term of imprisonment.

The learned trial judge, having ruled that the statements were admissible at law and therefore formed part of the evidence in the case, was in duty bound to warn the jury that what one accused said against a co-accused in his statement was not evidence against the co-accused.

I lament that this passage is also a misdirection.

"That the 1st accused told them that the weapons were delivered to him at the garage of the 12th accused at Banana Water and he had the weapons loaded into his car and he drove off with the weapons to his Spur Road Residence, that subsequently Jaward sent more weapons to

him by the same Arabic agent whom the 12th accused accompanied to his residence and at about mid-night he instructed the 12th accused to take the weapons to his residence at 42B Waterloo Street and he called the 11th accused to escort the 12th accused to Waterloo Street … Why the 1st accused did not wait until day-break? Why, what was the untold urgency for three bags of rice to have been transferred from Spur Road to Waterloo. Street at that time of the night? Could it have been three bags full of something else?"

I will repeat that what the 1st appellant told PW1 about the 12th and 11th appellants was not evidence against them and the judge should have warned the jury accordingly. This was a misdirection to put this bit of evidence to them for their consideration. As far as the last portion is concerned, it was a valid comment.

Having considered the various passages complained of, I will now address the issue of the several misdirections.

In my opinion, they amount to a miscarriage of justice. Ought the appeal to be allowed as a result? I do not think so. Counsel contended that such miscarriage of justice deprived the 1st appellant of the chance of an acquittal.

Let me say, it is a principle in an appellate court that it is for the appellant in a criminal appeal to satisfy the court that a substantial miscarriage of justice has occurred for the court to allow the appeal.

I draw support for my opinion by referring to s 58(2) of Courts Act No 31 of 1965, as amended by Act No 3 of 1976. It provides the following:

"(2) On an appeal against conviction the Court of Appeal, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, may (a) either dismiss the appeal, or (b) order the appellant to be retried by a court of competent jurisdiction, if they consider that no substantial miscarriage of justice has actually occurred".

I do not think the jury, by their verdict, were in any doubt as to the conclusiveness of the totality of the evidence against the 1st appellant. I do not think there was any substantial miscarriage of justice to justify the reversal of the judgment of the court below.

I will adopt the ratio decidendi in the case of *R v Wann* (1912) 7 Cr App R 135 at 138 and 139, in support of my view. In that case the Lord Chief Justice, Lord Alverstone had this to say:

"In a summing-up the facts may not be stated fully or may be stated incorrectly, without any misdirection on any question of law. A mere misstatement is clearly not a misdirection on any question of law. A mere misstatement is clearly not a misdirection when the case has been fully heard by the jury, and as to omission, he must be satisfied that it is such that it is reasonable and probable that the jury was misled, in which case there might be a miscarriage of justice. But as I said in delivering the judgment of this Court, "One has to be very careful in dealing with a case of alleged misdirection to appreciate the lines on which a case is conducted as omission to direct the jury on a point which was not taken at the trial if no injustice is done" (*R v Meyer* (1908) 1 Cr App R 10 at 11). The effect of the case on this subject is stated in *Ross on the Court of Criminal Appeal* at p 113 as follows: "To have any effect in itself the misstatement of the evidence must be such as to make it reasonably possible that the jury would not have returned their verdict of guilty if there had been no misstatements." With the alteration of the one word "possible" to "probable", we think that the statement is correct."

The statement of Lord Alverstone, in the judgment, is as valid today as it was in 1908 and 1912.

The sum total of counsel's complaint is that the learned trial judge failed to direct the jury properly or at all. I do not think the jury were misled as a result. In my view, they appreciated the case against the 1st appellant and would have returned the same verdict had there been a proper direction.

Mr Berewa, counsel for the 5th appellant has also complained about certain passages in the summing-up which he submitted were misdirections by the learned trial judge.

I have gone through the passages and I find that these passages dealt with statements made by the 1st appellant against the 5th appellant. I agree with counsel that the learned trial judge failed to warn the jury that these statements were not evidence against the 5th appellant. However, these were complaints made by counsel in the court below. Counsel has urged on this court that the Court of Appeal erred in law in upholding the convictions of the 5th appellants in spite of these misdirections. Counsel has referred to the judgments of Thompson-Davis JA and Johnson J to support his contention.

It seems to me that the Court of Appeal addressed the issue of common design within the context of the proof of criminal conspiracy vis a vis the acts and declarations of one accused as they affect the involvement of a co-accused.

In the judgment of Thomson-Davies JA on this point, the learned judge had this to say:

> "However it is well settled principle of our laws that a man's confession or admission is evidence against himself and not against his co-prisoner, unless he makes the statement his own. It is also well settled in law that "a statement made in the absence of an accused person by one of his co-prisoners is not and cannot be evidence for all purposes of the case. *Archbold* [36th Ed] para 1127 p 421; *R v Rudd* (1948) 32 Cr App R 138 explaining *R v Meredith and Others* (1943) 29 Cr App R 40. So too statements of conspirators are not admissible against another, unless they be in furtherance of the conspiracy, *R v Frank Pepper and Annie Ellen Platt* [1921] 3 KB 167. I must also have recourse to para 869 of *Halsbury* [3rd Ed] Vol 10 p 475, which reads: 'Statements made, like the acts done, by one of several accomplices or co-conspirators in pursuance of the common design, are evidence against the others' – *R v Blake* [1844] 6 QB 126, and *R v Besman* [1868] 11 Cox CC, but statements which are not made in pursuance of the common design are not evidence against the others".
>
> In *Archbold* 35th [Ed] paragraph 4074, we find as follows:
>
> 'Before evidence can be given of the acts of one conspirator against another the existence of the conspiracy must be proved and also the fact that the parties were members of the same conspiracy and that the act in question was done in furtherance of the common design'.
>
> Once the conspiracy has been fairly established by the evidence whatever is said or done by either of the accused person in pursuance of the common design, is both in law and common sense to be considered as the act of all the conspirators".

Thompson-Davies JA then referred to two other cases in support of his opinion and said, "There is no merit in the complaint".

It seems to me that the point which had been argued in this court, had been dealt with the Court of Appeal.

However, in my opinion the totality of the evidence justifies the conviction of the 5th appellant. I agree with Thompson-Davies JA, there is no merit in the complaint.

In my opinion, I do not think the Court of Appeal considered that a substantial miscarriage of justice had actually occurred in spite of the misdirections by the learned trial judge to the jury, consequently, the Court of Appeal dismissed the appeals. I do not think so either. I draw support for my opinion from the case, of the *R v Henry Beecham* [1921] 3 KB 464 at 471.

In that case the defendant was charged with manslaughter, it being by driving his motor car at an excessive speed he ran down and killed a boy. The defendant in cross-examination was repeatedly asked and pressed to answer the question whether he did not buy the motor car because it was capable of being driven at high speed, and he at last replied, "It did not appeal to me for that reason because I do not care for driving at high rate of speed myself". The Prosecution treating that statement given by the defendant of his good character as a driver, then asked him whether he had not been, repeatedly convicted of driving to the public danger, and the defendant, being required by the judge to reply, admitted that was so. The defendant was convicted. On appeal:—

> "Held, that the method of cross-examination by which the defendant was led to make the above-quoted statement could not be approved, that by being led to make the above-quoted statement in the circumstances he could not be taken to have given evidence of his "good character" within the meaning of the Criminal Evidence Act 1898 s 1(f)(ii) and therefore he ought not to have been asked or required to answer the question as to his previous conviction and that his evidence regarding them was inadmissible. Held, however, that under the Criminal Appeal Act, 1907 s 4(1) proviso, notwithstanding that the above point ought to be decided in favour of the defendant, the appeal should be dismissed, in as much as, having regard to the other evidence given at the trial no substantial miscarriage of justice had actually occurred".

A number of contentions which can be described as jury points were advanced in support of the appeals. These included criticisms of the summing-up for failure to remind the jury of some of the arguments advanced on behalf of the appellants. It is not proposed to deal with all of them again in detail. The learned trial judge was not required to do any in my judgment and he dealt adequately in his summing-up of the case for and against the appellants.

Conclusion

The summing-up of the case by the learned trial judge may not be impeccable, and certainly is not.

However, we must take into account the length of the trial, the number of accused persons, the several objections of counsel for the number of accused persons, the several objections of counsel for the defence, some warranted and some absolutely unwarranted, and the advantage the judge and jury had to see and hear the several witnesses both for the prosecution and the defence, to restrict this court from being minutely critical. Nevertheless, the Court of Appeal made a determined and critical scrutiny of the whole proceedings. We, on our part, had had our burden lightened by the work of the Court of Appeal. Where there are lacunae, we have endeavoured in the circumstance to fill the lacunae.

I do not propose to examine in detail again the course of the trial as counsel for the appellants have urged, nor the summing-up by the learned trial judge even though counsel for the appellants have covered it with a large blanket of submissions under misdirections and bias. But having read through the whole proceedings, I have come to the clear conclusion that the learned trial judge's summing-up is not open to the charge of bias. There are passages in it which are open to criticisms, these, we have dealt with. But the summing-up must be viewed as a whole, and upon this view of it, I am satisfied that the several appellants were guilty of the offences, as charged.

In support of what I have said about the summing-up, I will refer to the case of *R v Linzee and R v O'Driscoll* [1956] 3 All ER 980 at p 982 where Lord Goddard succinctly stated the functions of the Court of Criminal Appeal. He said:—

> "We have to see that the summing-up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the facts for the prosecution and states fairly the nature and evidence of the defence. It is not necessary to go into the evidence of every witness. The Court has to be reminded to the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. it is not our function to retry the case because we do not see the witness, and no Court of Appeal does re-try the case in the sense of substituting themselves either for a jury in a civil case or for a court martial in the case of one of the services".

The notes of the summing-up furnished to the Court of Appeal and to this court, show that the learned trial judge fairly put the salient points to the jury. He referred to the defence of alibi put forward by the 5th and 12th appellants and rightly pointed out that the burden of disproving the alibi is on the prosecution.

It is therefore a matter of regret that the charge of bias should be made against the trial judge. An accused must have a fair trial, and in my view the appellants had a fair trial.

The appeals of the appellants are therefore dismissed. I have had the opportunity of reading the judgment of the Learned Chief Justice and I entirely agree with the conclusions and the reasons leading to these conclusions

Reported by Anthony P Kinnear