IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CRIMINAL APPEAL NO. 21 OF 1995

(Being High Court Criminal Case No. 1 of 1995)

THE DIRECTOR OF PUBLIC PROSECUTIONS .....…….....APPELLANT

versus

1. DR HASTINGS KAMUZU BANDA .....…….....1ST RESPONDENT

2. MR JOHN ZENUS UNGAPAKE TEMBO.....…….....2ND RESPONDENT

3. MR AUGUSTINO LESTON LIKAOMBA ……...3RD RESPONDENT

4. MR MACDONALD MOSES KALEMBA.....…….4TH RESPONDENT

5. MR MACWILLIAM LUNGUZI.....…….....5TH RESPONDENT

6. MISS CECILIA TAMANDA KADZAMIRA ……6TH RESPONDENT

BEFORE: THE HONOURABLE MR JUSTICE UNYOLO, JA
THE HONOURABLE MR JUSTICE CHATSIKA, JA
THE HONOURABLE MR JUSTICE MTAMBO, AG. JA

Nyasulu, DPP)
Robertson, QC) for the Appellant
Kadri)

Stanbrook, QC, for Dr Banda

Gustave Kaliwo, for Mr Tembo

George Kaliwo, for Mr Likaomba

Selemani, Law Clerk

Kuseke, Official Recorder

JUDGMENT

Chatsilka, JA

The five respondents whose names appear below were jointly charged in the High Court on a first count with conspiracy to murder, contrary to section 227 of the Penal Code (Cap 7:01). The particulars of the charge in respect of that count averred that Dr Hastings Kamuzu Banda, John Zenus Ungapake Tembo, MacDonald Moses Kalemba, Augustino Leston Likaomba on divers dates between the 1st January 1983 and the 20th May 1983 conspired together and with J Kamwana (deceased) and John Ngwiri (deceased), Miss Cecilia Tamanda Kadzamira and other persons deceased or unknown to murder Dick Tennyson Matenje, Aaron Eliot Gadarna, John Twaibu Sangala and David Donasiano Chiwanga.

In the second count, all the respondents whose names appear in the first count, together with the fifth accused person, MacWilliam Lunguzi, were charged, this time, with a count of conspiracy to defeat justice, contrary to section 109 of the Penal Code. The particulars of this count averred that the six respondents on divers dates in 1983 conspired together and with others unknown to destroy or hide evidence, namely, a Blue Peugeot saloon, Number BF 5343, knowing that the same was in the possession of the Malawi Police Force and was available to be used in evidence in any proceedings for the murder of the deceased persons named in the first count.

The trial duly commenced at the High Court in Blantyre on the 10th July 1995. It was a trial by jury. On the 23rd December 1995, after a trial lasting nearly six months, the jury found each of the respondents not guilty, on each of the two counts and accordingly returned verdicts of "Not Guilty" in respect of each accused and in respect of each count, and accordingly acquitted them. The Director of Public Prosecutions, being dissatisfied., on a point of law, now appeals to this Court against the said acquittals. This, he does, in terms of section 11 (3) of the Supreme Court of Appeal Act (Cap 3:01).

On the 29th December 1995, barely six days after the respondents had been acquitted, the Director of Public Prosecutions filed a notice and grounds of appeal. Between the filing of the original grounds of appeal in December 1995 and the hearing of the appeal in June 1997, several attempts were made by the Appellant to amend or to file additional grounds of appeal. A document entitled "Perfected Grounds of Appeal" was filed at some stage and it was generally assumed that the document contained the final grounds of appeal which were to be argued in support of the appeal.

At the beginning of the hearing of the appeal, on the 30th June 1997, Mr Robertson, QC, who argued the appeal on behalf of the DPP, produced and presented to the Court another document entitled "GROUNDS OF APPEAL". Four grounds of appeal were submitted in this document. These were as follows:

(1) The learned Judge erred in his summing-up in that he failed to give the jury a proper direction in respect of elements of conspiracy.

(2) The learned Judge erred by failing to instruct the jury that the neglect of the 2nd to 6th Respondents to give evidence was a matter that could be taken into account by them in reaching their verdict.

(3) The learned Judge erred in wrongly excluding the evidence of Stack Banda.

(4) The learned Judge summed the evidence up in such a selective and biased fashion as to render his comments defective in law.

Before considering the grounds of appeal, the first impression which is created in one's mind upon reading the indictment, and especially arising from the manner in which the alleged conspirators are grouped is that the plot to murder the four victims was first hatched by Dr Banda, John Tembo, MacDonald Kalemba and Leston Likaomba. The impression continues to develop and tends to show that after these four people had met and conspired to kill the four, they decided to include, may be for the purposes of carrying out the conspiracy effectively, other people and these were Kamwana (now deceased), Ngwiri (also deceased) and Miss Cecilia Kadzamira and other persons deceased or unknown. It would, therefore, in normal parlance, be expected that the evidence establishing the existence of the conspiracy would start with a clandestine meeting attended by Dr Banda, John Tembo, MacDonald Kalemba and Leston Likaomba at which the initial agreement to kill tile four victims was made. One would expect the evidence to proceed and enlarge to show that after the initial meeting by the four people, Kamwana, Ngwiri, Miss Kadzamira and others either deceased or unknown were informed about the conspiracy to kill the four people and that all the conspirators agreed

to the conspiracy.

At law, each of the four persons who initially hatched the plot and agreed to kill the four victims would have committed the crime known as "conspirancy". The crime would be complete as soon as the agreement was reached. The other persons who were invited to this group would only be guilty of conspiracy hatched by the initial group and to act, in respect of the conspiracy, in concert with the initial conspirators. We shall have more to say on this subject later in this judgement.

At the commencement of the hearing of the apeal on the 30th of June 1997, the lerned Director of Public Prosecutions imformed the Court that he did not intend to proceed with the appeals against the 4th Respondent (MacDonald Moses Kalemba), 5th Respondent (McWilliam Lunguzi) and the 6th Respondent (Miss Kadzamira). The appeals against these three Respondents were accordingly dismised and the hearing of the appeal proceeded only against the first three Respondents, Dr Banda, Mr Tembo and Mr Likaomba.

There is very strong evidence that the four victims were brutally murdered at Thambani in the District of Mwanza on the 18t May 1983. The evidence surrounding their murder strongly suggests that their deaths was the result of a conspiracy. The theory initially given by the Director of Public Prosecutions, which seems to be supported by the original charge, was that the order to kill the four victims came originary from what was referred to as the "inner circle". It was suggested that there existed an "inner circle". or a triumvirate and that Dr Banda ruled by or through this triumvirate or "inner circle" consisting of Dr Banda himself, Mr John Tembo and Miss Kadzamira. In his opening address, the DPP, referring to the existence of the "inner circle", had this to say:

"All vital decisions by the State were at this time taken not by Cabinet, but by an "inner circle" headed by the Life President Dr H. Kamuzu Banda and comprising John Z U Tembo and the Official Hostess and loyally aided and abetted by John Ngwiri and Inspector General of Police, Karnwana. It is an inescapable inference that a decision so momentous as to eliminate three Cabinet Ministers and a leading Member of Parliament could only have been taken by the triumvirate; similarly, the decision to deny the assassinated men normal rites of condolence and honoured burial."

The DPP endeavoured to lead evidence to show that the conspiracy to kill the four victims was initially hatched by the triumvirate and that after reaching a decision, Dr Banda pulled Mr Ngwiri and Mr Kamwana into the conspiracy. The Director of Public Prosecutions, in this theory said that after the conspiracy had been agreed, Mr Kamwana, as one of the conspirators and in his capacity as the Inspector General of Police ordered certain members of the Police to carry out the killings. Failure to prove the existence of the triumvirate would make the case against Mr Tembo and Miss Kadzamira, apart from

other evidence which could have come from some source, almost non-existent. The reasons suggested were that the triumvirate wished to eliminate the four victims because they, especially Mr Matenje and Mr Gadama, were aspiring for the position of Dr Banda. It was alleged in this connection that Parliament had rebelled or had shown signs of rebellion against Dr Banda's quality and fashion of leadership. It was to be understood, without putting it in too many words, that the alleged Parliamentary rebellion was led by Matenje and Gadama. It would be necessary, for the purposes of establishing the conspiracy based on this scenario, to prove: (a) that a triumvirate, in fact, existed and that Dr Banda ruled through this triumvirate, and (b) that immediately before the events which led to the deaths of the four victims, Parliament had shown signs of rebellion against Dr Banda.

The Director of Public Prosecutions suggested that there might have been an alternative theory. The alternative theory suggested that Mr Tembo and Mr Ngwiri, the then Secretary to the President and Cabinet and Head of the Civil Service, planned to kill the deceased. It was after they had made the plan that they had sold the idea to Dr Banda. The DPP then suggested yet a third theory. This was that Dr Banda and Ngwiri hatched the plot and sold it to Tembo or that Dr Banda and Tembo hatched the plot and sold it to Ngwiri. There was yet a fourth theory which surfaced from the evidence. It was not quite clear whether the suggestion came from the prosecution or from the defence. This theory suggested that the whole plot was hatched by Ngwiri who was annoyed with the utterances made by the four victims in Parliament relating to the manner in which public funds were handled by civil servants, led by Ngwiri himself, which resulted in gross over-expenditure. It was suggested that Mr Ngwiri was particularly angry with Mr Matenje and Mr Gadama, who, through their utterances in Parliament, suggested that those civil servants found to be responsible for such loss of funds to Government should also suffer the dismissal from the Government service. Such dismissal could have the possible consequences of spending several years in detention or in jail. It was suggested in this possible fourth theory that these utterances annoyed Mr Ngwiri so much that he, and he alone, hatched the plot to eliminate the victims. It was also suggested that he used his powerful position to give orders to Kamwana, making the orders appear as if they had come from Dr Banda and Mr Kamwana, as head of the Police, in turn gave the orders to his men to kill the victims and that, in that way, the plot was successfully carried out.

It would be necessary, for the purpose of the fourth theory, to establish that Mr Matenje and Mr Gadama, assisted by Mr Sangala and Mr Chiwanga, made utterances in Parliament which criticised the manner in which civil servants controlled Government funds and that the utterances grossly threatened the position of Mr Ngwiri and other civil servants.

So much for the background of the case upon which the Appellant relied in the lower Court.

As it has already been stated at the beginning of this judgment, the learned Director of Public Prosecutions has submitted four grounds of appeal.

In the first ground of appeal, the Appellant states that the Judge to give the jury a proper direction in respect of conspiracy. Mr Robertson submitted that an accurate general direction was necessary, especially in the case of Likaomba, who was a proven member of the death squad and whose case, according to the Appellant's submission, should have been considered from a different footing with that of Dr Banda or Mr Tembo. Mr Robertson submits that the Judge's direction to the jury on the law of conspiracy, and especially as it affected a person like Likaomba, who joined the conspiracy at a later stage after it had already been formed, was erroneous,, Mr Robertson submitted that the Judge should have directed the jury that it is a criminal conspiracy to agree with another or others to commit murder and that the two issues in this case were:

(a) was there an agreement to murder; and

(b) did the defendants agree to participate intending that the murder should be carried out.

It was Mr Robertson's submission that had the Judge in the lower Court directed the jury in this manner, Likaomba should not have been acquitted. Mr Robertson argued the case on this point on the basis that (a) a conspiracy to murder the four victims had been established (b) that there was evidence to the effect that in pursuance of that conspiracy, Likaomba, actually killed Gadama. Mr Robertson concluded that in these circumstances, Likaomba should have been found guilty of conspiracy and ought not to have been acquitted.

Earlier in this judgment, we commented on the manner in which the accused persons were grouped. The charge gave the impression that Dr Banda, John Tembo, MacDonald Kalemba and Leston Likaomba were the initial conspirators who hatched the plot and that later, after the plot had been hatched, they asked John Ngwiri, Kamwana and Miss Kadzamira to join them in the conspiracy. The evidence does not disclose anything similar to that.

In **Director of Public Prosecutions - v - Doot and Others (1973), AC 807 (HL)**, where the facts briefly were that the respondents, American citizens, formed a plan abroad, to import cannabis into the United States by way of England. In pursuance of the plan, two vans with cannabis concealed in them were shipped from Morocco to Southampton. Another van was traced to Liverpool from where the vans were to be shipped to America. The respondents were charged with conspiracy to import dangerous drugs. At the trial, it was contended that the court in England had no jurisdiction to try them, since the conspiracy had been entered into abroad and outside the court's Jurisdiction.

Since the conspiracy had been made and completed outside the jurisdiction and the respondents had been caught in England, it was important to establish whether, at the time of the respondents' arrest in England they could be charged with conspiracy, when the facts showed that at that time the conspiracy had already been completed abroad. On this point, **Lord Pearson** had this to say:

"A conspiracy involves an agreement express or implied. A conspiratorial agreement is not a contract, not legally binding, because it is unlawful. But as an agreement it has its three stages, namely (1) making or formation (2) performance or implementation (3) discharge or termination. When a conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place .... But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."

Viscount Dilhorne, in his judgment cited a passage from **Reg. - v - Murphy (1837) C & P 297**, where **Coleridge, J** had this to say:

"It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty. You are to say, whether, from the acts that have been proved, you are satisfied that these defendants were acting in concert in the matter."

Then, in the same judgment, **Viscount Dilhorne** went on to say:

"The fact that a man who later a conspiracy may be convicted of it shows that although the offence is complete in one sense when the conspiracy is made, it is nonetheless a continuing offence."

The above statement i's correct only if the word "joins" means that the new member who joins the conspiracy is informed about the conspiracy and its nature and he, with full knowledge, agrees to be part of it. In the case of Doot, for example, Doot and Shannahan were the master-brains in the conspiracy to import dangerous drugs from Morocco into the United States by way of England. They invited Loving, Watts and Fay and after telling them about the plan, they decided to be part of the conspiracy and

Loving drove one of the vans with cannabis in it from Southampton to Liverpool, while the other van, also containing cannabis, was driven by Watts and Fay. Since all the conspirators knew the plan and decided to be part of it when they joined it after it had already been hatched, they continued to be conspirators when they were involved in the performance or impremention of the plan although the

conspiracy was complete at the time he agreement was made.

Suppose in **Doot's** case the conspiracy was between Doot and Shannahan; and suppose further that Loving, Watts and Fay were found in Southampton and were hired to drive the two vans from Southampton to Liverpool and were not made aware of the original conspiracy to import cannabis from Morocco into the USA via England, they would not have been guilty of the conspiracy which they knew nothing about.

In the instant case, and starting with the "inner circle" theory, the learned DPPs case, as we have already indicated, was that the original conspiracy to kill the four victims was initially planned and agreed upon by Dr Banda, John Tembo and Miss Kadzamira. After these three people had agreed on the conspiracy, they invited Ngwiri and Karnwana who, after being informed as to what the conspiracy was all about, decided to join it. We hold the view that, if Ngwiri and Kamwana were told about the conspiracy to kill the four victims and they agreed to be pail of it, they were as good conspirators in the conspiracy as were Dr Banda, John Tembo and Miss Kadzamira. The next stage of the conspiracy was its "performance or implementation". For this stage of the conspiracy to succeed, it would have to be established that Kamwana issued some orders to his officers. It was in evidence in the lower Court that the orders issued by Kamwana were issued on a "need to know" basis, i.e. each officer was only told what he had to do but was not told why he had to do it. The evidence of Mr MacPherson Itimu (PW 55), to the effect that Mr Kamwana told him that Dr Banda had ordered that the four victims should be killed and that he (Itimu) had to arrest them in order that they be killed, was not borne out by the evidence.

The version of the evidence, which was accepted, was that the orders, which Kamwana issued, in his capacity as Inspector General of Police, were such as to make the officer do only and exactly what he expected from that officer. For example, he gave orders to Itimu to organise his officers such as Ngwata, Kalemba and Maunde and erect road blocks at Likangala and Mulunguzi and to arrest Matenje, Gadama, Sangala and Chiwanga when they came to the road blocks. Kamwana did not inform Itimu why the four people were to be arrested. As long as Itimu organised his men, mounted the roadblocks, managed to arrest the four people and kept them at the Police Eastern Division, the order, which he had received from his superior officer, was fully performed and completed. It was not open to Itimu, at this stage, to question the justifiability or legality of the order. Later, Kamwana issued another order that these four people should be taken to Mikuyu Prison and to Mikuyu Prison they were indeed taken. On the following day, another order was issued that the victims should be taken to John Abegg

building in Limbe, and this was also followed. In the evening of that day, yet another order was issued that these people should be taken to Thambani in Mwanza. At Thambani in Mwanza, another order was issued to some of the police officers to kill the victims, and this order was also carried out. It was in evidence that one of the police officers who was ordered to kill one of the victims was Leston Likaomba.

It was, therefore, submitted that on the authority of Doot, Leston Likaomba should be deemed to have joined the conspiracy to kill the four victims which had initially been planned by Dr Banda, John Tembo and Miss Kadzamira and that his action in killing one of the victims was the culmination, discharge or termination of the conspiracy which he had joined and should, therefore, have been convicted of conspiracy to murder, as charged.

This submission presupposed that at every moment an order was issued, the officers to whom the order was given were informed of the existing conspiracy allegedly hatched by Dr Banda, John Tembo and Miss Kadzamira. Nowhere in the record do we find anything to suggest that. From the time Kamwana started to give orders to Itimu to arrest the four persons, it was simply orders, and the officers obeyed them without question. It will also be observed that during the early stages of the orders - the order to erect road blocks and arrest the four victims, the order to take the four victims to MikuyLl Prison, the order to take the four victims from Mikuyu Prison to John Abegg - there was no apparent illegality in the orders. It was normal practice, for a police officer to be ordered to arrest a person and no illegality would be implied in such an order, It was normal practice for a police officer to be ordered to take an arrested person to a prison or to take him from a prison to a certain place and no illegality would be implied in that order. It will, therefore, be seen that all the orders given to the police officers regarding the movement of the four victims from the time Kamwana ordered Itimu to arrest them up to the time they were taken to John Abegg building in Limbe, were normal police orders which any policeman would obey without any question and without thinking that there was any illegality in them. We are fortified in coming to this conclusion, because there was no evidence, whatsoever, that at each occasion an order was issued, the officers to whom the order was given were informed of the existing conspiracy and made aware that what they were ordered to do was part of the performance or implementation of the existing conspiracy. In our view, none of the police officers who followed orders without any knowledge of the existing conspiracy the conspiracy to kill the four victims could be said to be a conspirator to the original conspiracy.

We have evidence that Leston Likaomba visited the scene of the killing in the company of other police officers during the morning of the date of the killings. There is, however, no evidence as to what conversation, if any, went on among the officers at that time. There was also no evidence, especially as regards Likaomba, that during this visit he was made aware of the conspiracy charged. His visit to the scene of the murders could not, per se, give rise to the inference that he was aware of the alleged conspiracy by the "inner circle". All that we know from the evidence is that during the evening of that day,

Likaomba, together with several other police officers and the four victims, drove in several vehicles to the place at Thambani which they had inspected earlier in the day and that it was at this place that Likaomba was ordered to kill one of the victims. This order to kill must have been known to him to be an illegal order. Obedience to an illegal order, especially an order to kill, is not a defence. In these circumstances, upon proper and sufficient evidence, Likaomba could be guilty of the offence committed through the obedience to the illegal order. He would not be guilty to the original conspiracy to kill the four victims allegedly initiated by Dr Banda, John Tembo and Miss Kadzamira when he had not been made aware even of its very existence.

Even if we take the fourth scenario, which suggests that the plan to kill the four victims was initially hatched by Ngwiri, who was angry with the utterances of the four victims in Parliament and that he conspired with Kamwana to kill them, the end result would be the same. The facts would establish the conspiracy between Ngwiri and Kamwana, but the orders, which would be made by Kamwana to his officers, would be the same as those in the first scenario. The officers to whom the orders were given were not informed of the existing conspiracy between Ngwiri and Kamwana. They were merely ordered to arrest and take the arrested people to a certain place. These were normal police orders and no person would imply any illegality in them. Only the order to kill was blatantly illegal and the person who kills in obedience to the illegal order would be guilty under the fourth scenario of the offence actually committed through his obedience to the illegal order, on the grounds that obedience to illegal orders is not a defence. He would, under no circumstances, be guilty of the original conspiracy which he knew nothing about.

Mr Robertson submitted that any person who does any act, which is deemed to be a performance of an existing conspiracy, must also be deemed to be a party to the conspiracy. He submitted that in the case of Likaomba, since the conspiracy was to kill the four victims and since Likaomba was alleged to have killed one of the victims, he must be deemed to be part of, or to have joined, the conspiracy. This type of logic is an over-simplification of the facts of the case and this cannot be a correct statement of the law. In our view, an element of knowledge of the existence of the conspiracy is required for any person who does an act, which is deemed to be part of the performance of the conspiracy to be said to be one of the conspirators.

No knowledge on the part of Leston Likaomba of the alleged existence of a conspiracy to kill the four victims allegedly initiated by Dr Banda, John Tembo and Miss Kadzamira or by Ngwiri and Kamwana or any of the other two theories, was proved at the trial. Likaomba cannot be a joint conspirator to any of those alleged conspiracies. Likaomba was a mere subordinate police officer that was (wrongly) obeying superior orders.

Although Mr Robertson in this ground of appeal directed his argument mainly on

the failure by the learned Judge to give the jury a proper direction in respect of the law relating to conspiracy, his arguments were directed at the acquittal of Likaomba. It was only at the end of his argument that he said anything about the 1st Respondent (Dr Banda) and the 2nd Respondent (John Tembo). This is what he said:

"So far as Respondent 1 and Respondent 2 are concerned ... the learned judge should have tailored the direction to their position by explaining that the prosecution case rested on inference from established facts. The conclusion the learned DPP asked them to draw from the evidence that no police operation of any significance was mounted by the I.G. without Dr Banda's approval or instigation was that this operation was therefore mounted with Dr Banda's approval and at his instigation. Was there - as the Defence suggested, a reasonable alternative that Ngwiri had ordered Kamwana to kill the M.Ps, without telling Dr Banda? The judge should have directed the jury to take into account all the evidence about the power and position of the First Respondent and the Second Respondent to decide whether they were satisfied that they must have instigated or approved the conspiracy."

We have meticulously gone through the Judge's direction to the jury relating to the evidence tending to implicate Dr Banda. It will be remembered that the witnesses who would have shed any light regarding their source of order to kill the four victims were Ngwiri and Kamwana. Unfortunately, both of them were dead by the time the case commenced and that valuable and vital evidence died with them. The only other witness who tended to implicate Dr Banda was MacPherson Itimu (PW 55)., In his evidence, Itimu told the Court that on the 15th May 1983, he went to Kamwana's house at Bvumbwe to present his security rerport. He stated that after presenting his report, Kamwana asked him to come again to the house in the afternoon. He continued to tell the Court that when he called on Kamwana again that afternoon, Kamwana told him that the President was very angry and that he had given orders that Matenje, Gadama, Sangala and Chiwanga should be arrested. Then the examination went as follows:

"Q. Was anything to be done to them after their arrest?

A. He further informed me that the presidential order was to the effect that after arresting them they should be killed."

Itimu was proved to be a very unreliable witness and after reviewing the rest of the evidence, great doubt was created as to whether Kamwana actually told him that Dr Banda had ordered that the four victims should be killed after their arrest. Several police officers who testified told the Court that their instructions were merely to arrest the four persons and no instructions were given as to what to do with them after their arrest.

It is not possible, on the evidence that was adduced on this point, to accept that Dr Banda ordered Ngwiri and Kamwana to have the four victims arrested and killed. It was suggested that the reasons which angered Dr Banda about the four victims to the extent of planning their deaths was that Parliament was angry about the amount of power which Dr Banda wielded and his style of authority altogether and that the four victims were in the fore-front and vociferous in Parliament about their attack on Dr Banda. There was no evidence, none whatsoever, that there was any debate in Parliament, which attacked Dr Banda. On this score, in so far as an attempt was made to establish as to what would have annoyed Dr Banda to the extent of intending to plan the deaths of the four victims, was a non sequitur. What the evidence established was that during the Budget Session of Parliament in March 1983, the House spoke so bitterly against the civil servants who failed to control the funds in their ministries and as a result incurred very heavy unauthorised overexpenditures. When this matter was brought to the attention of Dr Banda, who was the minister responsible for about four ministries, all of which had incurred heavy over-expenditures Dr Banda merely told the members of the Public Accounts Committee to ask Ngwiri, who was the controller of the funds. It is also true that Matenje and Gadama were in the fore-front and most vociferous in their attack against civil servants, which included Ngwiri, about the manner in which they handled Government funds. They even suggested to Parliament that those responsible should be dismissed. There was more evidence for the proposition that the conspiracy was instigated by Ngwiri because of the utterances by the dead victims in Parliament about the manner in which the civil servants handled Government funds than there was for the proposition that it was Dr Banda together with John Tembo and Miss Kadzamira who were angry with the four victims and instigated their deaths. There is no evidence throughout the record to show the existence of any action or omission perpetrated by Matenje, Gadama, Sangala. and Chiwanga which would have annoyed Dr Banda, John Tembo and Miss Kadzamira to make them instigate their deaths.

Mr Robertson complained that the learned Judge dismissed any inference of the existence of the "inner circle" or the triumvirate and denigrated circumstantial evidence. A closer study of the direction to the jury on this point would quickly show that there is no substance in this complaint.

On the question of the existence of the "inner circle", the learned Judge advised members of the Jury to consider the entire evidence with a view to seeing whether there was any witness who testified that there existed the "inner circle". He also advised the Jury to consider whether important decisions of State were taken to this "inner circle" for decision. He advised the Jury that they were the judges of fact and that the existence or non-existence of the "inner circle" was a question of fact which had to be decided by them. He advised them lastly that any conclusions and inferences had to be based on the evidence. We find nothing objectionable to this direction to justify the complaint by Mr Robertson that the Judge "dismissed" any inference of the "inner circle", In fact, Mr Robertson's complaint is defeated by the evidence of Mr Louis Chimango, Mr Robson Chirwa and Mr Edward Bwanali which was to the effect that each time Dr Banda was presented with a memorandum which needed a decision, he (Dr Banda) made the

decision quickly, and without consulting any one.

Mr Robertson conceded the weakness of the evidence of the existence of the “inner circle”. He stated, for example, that "the prosecution was not bound by any "inner circle" conspiracy. A conspiracy there most certainly was, and the evidence demonstrated beyond any doubt that it extended from at least the Inspector General down. The Inspector General must have received orders from someone. Was it Ngwiri (as the Judge suggested) or was it Dr Banda and/or John Tembo?" This submission by Mr Robertson illustrates the weakness of the case against Dr Banda and John Tembo when at that stage of the development of the case, the prosecution could not be sure whether any conspiracy that there was, was instigated by Dr Banda, John Tembo and Miss Kadzamira or whether it was instigated by John Tembo and John Ngwiri and later sold to Dr Banda or whether it was instigated by Dr Banda and John Ngwiri and later sold to John Tembo or whether it was instigated by John Tembo and Dr Banda and sold to John Ngwiri. All these theories suggest that whatever theory there existed, the conspirators sought the assistance of Kamwana, who was the Inspector General of Police, to assist in its implementation. It is surprising that the prosecution could come to Court with four different theories of which they were not certain as to which theory they could stick to.

With regard to the general direction by the Judge to the Jury on the law of conspiracy, we find nothing on all the areas to which our attention was directed by Mr Robertson on which the direction can be faulted. We, therefore, find no merit in this ground of appeal.

The second ground of appeal states that the learned Judge erred by failing to instruct the jury that the neglect of the 2nd to the 6th Respondents to give evidence was a matter that could be taken into account by them in reaching their verdict.

The procedure to be followed after the prosecution has closed its case is governed by section 314 of the Criminal Procedure and Evidence Code (Cap 8:01), which states:

"314 - (1) The accused or his counsel may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. The accused shall thereupon from the witness box, or such other place as the High Court may direct, and upon oath give evidence and answer any questions, or produce any thing, lawfully put to, or required of, him by the High Court or in cross-examination.

(2) If the accused refuses or neglects to -

(a) Be sworn;

(b) Give evidence;

(c) Answer any question lawfully put to him by the High Court or in cross-examination;

(d) Produce any document or thing, which he is lawfully required to produce;

such refusal or neglect may be commented upon by the prosecution and may be taken into account by the jury in reaching its verdict."

It is to be observed that the section does not begin by giving the accused person the right to remain silent. It starts with direct commands. It commands him to give evidence and to answer any questions, which may lawfully be put to him. It commands him to produce any thing required of him by the High Court or in cross-examination. It is only when the High Court meets a stubborn accused person who refuses or neglects to be sworn or to give evidence or to answer any questions lawfully put to him or to produce any document or thing which he is required to produce and thereby, especially as regards (a), (b) and (c), he remains silent consequent upon his stubbornness that the High Court is given a discretion to comment upon the silence and that the silence may be taken into account by the jury in reaching its verdict.

It will be seen that the preceding section, section 313 of the Code which, naturally, comes before section 314 which we have commented on above, removes the accused person's right to make a plea that the prosecution has failed to make a prima facie case sufficient for him to enter his defence. Section 313 of the Code proceeds to give orders to the accused person without giving him any choice as to what he should choose to do. It states:

"313. When the case for the prosecution is closed and upon hearing any evidence which the High Court may decide to call at that stage of the trial under section 210, the High Court shall forthwith call on the accused to enter upon his defence."

It will be seen that the cumulative effect of sections 313 and 314 of the Code is to remove the right of the accused person to remain silent at the end of the prosecution case, This removal of the accused person's right to remain silent, which came into our laws in 1968, has its own historical background.

The procedure that was in force before the coming into effect of sections 313 and 314 was as follows: Section 289(l) and (2) of the Criminal Procedure Code, Laws of Nyasaland, (Cap 24):

"289. - (1) When the evidence of the witness for the prosecution has been concluded, and the statement or evidence (if any) of any accused person before the committing court has been given in evidence, the court, if it considers that a case has not been made out against any accused person sufficiently to require him to make a defence, shall, after hearing, if necessary, any arguments which the legal practitioner for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witness for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that a case has been made out against an accused person sufficiently to require him to make a defence, shall inform such accused person of his right to address the court, either personally or by his legal practitioner (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his legal practitioner (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof, the judge shall record the same. If such accused person says that he does not mean to give evidence or make an unsworn statement, or to adduce evidence, then the legal practitioner for the prosecution may sum up the case against such accused person. If such accused person says that he means to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon such accused person to enter upon his defence."

It will be observed from the above citations that before 1968, when the present sections 313 and 314 of the Criminal Procedure and Evidence Code came into effect, an accused person was accorded certain rights at the close of the case for the prosecution. If the prosecution evidence disclosed no case against the accused person sufficiently to require him to enter his defence, the accused was so informed in no uncertain terms.

If, on the other hand, there was evidence sufficiently to require the accused person to enter his defence, he was made aware of all his rights under such circumstances by way of advice. He was, for example, advised of his right to address the court; to give evidence on oath or to make an unsworn statement. He was advised of his right to call witnesses. After receiving all this advice from the court, the accused person would exercise his right, if he so wished, to remain silent and the court would proceed with the case on the evidence so far adduced by the prosecution.

The old Criminal Procedure Code was silent as to whether the Court or Jury or Assessors, as the case may be, could comment upon the accused person's election to

remain silent and take the silence into account in arriving at its verdict. Although the Code was silent on this matter, it may be safely assumed that the Court, in such circumstances, would be directed by the practice that prevailed in other common law jurisdictions or, as was the usual provision, the Court would follow, as nearly as possible the practice and procedure for the time being in force in the courts in England.

This country adopted a new Constitution in 1994. Generally, a new constitution tries to improve, where necessary, on the provisions of the old constitution. It tries to remove any evils to society which existed in the old constitution. In 1968, the Criminal Procedure and Evidence Code removed whatever rights an accused person had at the close of the case for the prosecution. His right to show that the prosecution had failed to make out a case against him sufficiently to require him to make a defence and, therefore, to remain silent was removed by statute. He was required immediately after the close of the case for the prosecution to enter upon his defence.

The Constitution which came into force in May 1994 provides in section 42(2)(f)(iii):

"42 (2) (f) (iii) Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -

to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;"

Sections 313 and 314 of the Criminal Procedure and Evidence Code which require an accused person to enter upon his defence immediately after the close of the case for the prosecution and which deny him the right, inter alia, to remain silent are in conflict with section 42(2)(f)(iii) of the Constitution. This gives an accused person the right to be presumed innocent and to remain silent during proceedings or trial and not testify during trial. It is trite that the Constitution is the supreme law of the land.

Section 5 of the Constitution whose marginal note reads "Supremacy of the Constitution" provides:

"Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."

Having found that sections 313 and 314 of the Criminal Procedure and Evidence Code are inconsistent with the provisions of section 42(2)(f)(iii) of the Constitution, it is

hereby declared that sections 313 and 314 of the Criminal Procedure and Evidence Code are invalid to the extent of the inconsistency.

It follows that, in the instant case, the Respondents exercised their constitutional right by remaining silent at the close of the case for the prosecution. The Court could not, therefore, indirectly denigrate the Respondents' right by putting them at a disadvantage by commenting on their right to remain silent and taken into account in reaching a verdict.

If the prosecution adduces strong evidence against an accused person, including a confession and the accused person elects to remain silent at the close of the case for the prosecution, there would be no need to comment upon his silence, The Court would simply direct the jury on the evidence and, if it was strong, it will lead to a finding of guilty. If, on the other hand, at the end of the case for the prosecution, the evidence is very weak, or there is no evidence at all against the accused and the accused elects to remain silent, there would be no need to comment upon his silence and to use it to reach a verdict. The Court would merely direct the jury on the evidence and if the evidence is weak or non-existent, this would lead to a finding of not guilty. In short, no amount of comment either way is necessary in reaching a verdict when the accused elects to remain silent.

It must be emphasised that the prosecution should never rely on evidence to be given by an accused person in order to secure a conviction by using the evidence of the defence in evidence in-chief or by way of clever cross-examination. The prosecution must prove the case against the accused person by its own evidence. Except in special cases, e.g. theft by public servant or being in possession of property reasonably suspected to have been stolen or unlawfully obtained, where the burden of proof shifts to the accused person by operation of law, the burden of proof in criminal cases lies squarely on the prosecution. It should rely on its own evidence to secure such a conviction.

In Ground 3 of the Appeal, Mr Robertson complained about the learned Judge's ruling which disallowed the evidence of Stack Young Banda, (PW 78). It was Mr Robertson's contention that the learned Judge erred in law in failing to consider that the statement was admissible in evidence in terms of section 173 of the Criminal Procedure and Evidence Code, in that it was relevant to the issues in the case and was made by a person who is now dead and that its contents are against the maker's interest. Mr Robertson further alleged that the learned Judge misinterpreted section 174(4) of the Criminal Procedure and Evidence Code in ruling that Ngwiri's comments, as contained in Stack Banda's statement, were not statements made in reference (sic) to the common intention of the conspirators. Having read Stack Banda's statement, it appears that Mr Robertson is contending that had Stack Banda's statement been admitted in evidence, it would have disclosed that there was, indeed, "an inner circle" or "a triumvirate" and that members of the "inner circle" had conspired to kill the four persons and that at some

stage of the conspiracy, and certainly before its performance, Ngwiri was invited to, and did, in fact join the conspiracy.

Section 173 of the Criminal Procedure and Evidence Code, under which the Mr Robertson submited that Stack Banda's evidence should have been admitted in evidence is a long section comprising eight subsections. Mr Robertson drew our attention to the relevant part of the section, which states:

"A statement, written or verbal, of relevant facts made by a person who is dead ... is itself a relevant fact ... when the statement was against the pecuniary or proprietory interest of the person making it, or when if true, it would expose him to a criminal prosecution or to a suit for damages."

The learned Judge in the lower Court, in disallowing Stack Banda's evidence which would have contained the alleged self-incriminatory statement by Ngwiri, did not do so on the ground that it was not a statement against Ngwiri's penal interest. It was disallowed on the ground that the statement contained hearsay and, in some cases, hearsay upon hearsay. If Mr Ngwiri, in Stack Banda's statement, simply stated: "Dr Banda told me this and I did that; Mr Tembo told me this and I did that", the statement would have, perhaps, satisfied the requirements of section 173 of the Criminal Procedure and Evidence Code and would perhaps have been admissible.

In his statement, Stack Banda stated that some years after the four victims had been killed, Ngwiri came to his house, ostensibly to have a drink with him. In the course of their drinking, Ngwiri told him that some time ago he (Ngwiri), John Tembo and Miss Kadzamira had a meeting at Mtunthama in Lilongwe. He said that the story (or the purpose of the meeting) was about Matenje, Gadama, Sangala and Chiwanga. He went on to state that John Tembo told Ngwiri that the four mentioned people were "opposed to the former President's decision in Parliament of March 1983 which suggested that John Tembo should be Secretary General of the Malawi Congress Party and Miss Kadzamira to be Prime Minister".

Stack Banda did not state in his statement whether the story of the opposition to Dr Banda in Parliament by the four victims was mentioned to him by Ngwiri or whether it was from his own knowledge. Nor did he say whether the story about the proposal to make John Tembo Secretary General of the MCP and Miss Kadzamira Prime Minister were also from John Ngwiri. Stack Banda went on to state that Ngwiri further told him that John Tembo, Miss Kadzamira and Ngwiri himself met again in Blantyre and that it was at the Blantyre meeting that they agreed to kill the four victims. Towards the end of his statement, Stack Banda said:

"I understand that there was a debate in Parliament which sparked the whole affair after the Chairman of the Public Accounts Committee, Mr Mlelemba, presented his report. The four spoke highly opposing … which was led by the late Aaron Gadama and the rest. Another issue was on the proposal made to have the Prime Minister and the post of Secretary General of the Malawi Congress Party sparked fire in Parliament debates by the four who did not wish a public servant to participate actively in politics like John Tembo who was then Governor of the Reserve Bank of Malawi."

In his submission, Mr Robertson argued that the statement should have been admitted in terms of section 173 of the Criminal Procedure and Evidence Code on the grounds that: (i) it contained relevant facts to the case; (ii) it was made by a person who was dead; and (iii) it was against the maker's penal interest, in that it would possibly expose him to criminal prosecution:

In disallowing the statement, the learned Judge said.

"in his statement to the police, Banda (Stack Banda) does not say in what year he had the conversation with Ngwiri, but it is very clear that it was after the death. If, therefore, Ngwiri was a conspirator, it cannot validly be said in telling whatever he told Banda he was acting in furtherance or in pursuance of the common design. The rule seems to be that the acts or declarations of one conspirator can only be evidence against the others if what was done or said was in furtherance or pursuance of the common design."

What the learned Judge was saying was that, at the time Ngwiri is alleged to have said what Stack Banda says he said, the common design, which was the killing of the four victims, had already been accomplished. The learned Judge in disallowing the statement cited a passage from **Queen - v - Tyre (1884), 6 QBq 126 at 135:**

"But what one party may have been heard to say at some other time as to the share which some of the others had in the execution of the common design or as to the object of the conspiracy cannot, it is conceived, be admitted in evidence to affect them on the trial for the same offence."

Then the Judge continued and went on to say:

"This is precisely what happened in the instant case. Ngwiri who is said to be one of the conspirators told Stack Banda what roles some of the alleged conspirators are said to have played in the execution of the common design. This took place some time after the execution of the common design. On the strength of the authorities cited, such a narrative cannot be admitted in evidence against the other alleged conspirators."

It should be observed, as we have said earlier, that lack of "furtherance or in pursuance of common design" in the statement of Ngwiri was not the only ground upon which Stack Banda's statement was disallowed. The statement was disallowed, inter alia, because it did not comprise what Ngwiri knew of his own knowledge, but rather what Ngwiri was told by other people. The statement contained hearsay evidence and in some cases, hearsay upon hearsay evidence. The Judge went on to say:

"it appears to me that a relevant fact must be proved by admissible evidence so that what Ngwiri said may be relevant, but it is not admissible because it was said in the absence of the alleged conspirators; it was not in furtherance of the common purpose and it was said long after the object of the alleged conspiracy. In any case, Ngwiri was narrating to Banda what others had told him. It is not that Ngwiri was telling Banda what he himself had done or said."

Let us assume, for the sake of argument, that Stack Banda was allowed to give evidence and that the basis of his evidence was the statement made by him to the Police, which was disallowed in the lower Court. And let us also assume that the defence counsel would have been ready to object to any part of his evidence which would have been inadmissible. Although it would be Stack Banda who would be giving evidence on what is in the statement, we should imagine that it is Ngwiri who is giving the evidence and that the normal objections would be taken by defence counsel when Ngwiri tries to say what is inadmissible. For example, Stack Banda said in his statement that John Ngwiri told him that John Tembo went to Dr Banda and told him that the four victims were against him, whereby Dr Banda said: "If they are against me, eliminate them." Then Stack Banda went on to narrate a conversation, apparently between Dr Banda and John Tembo, which was made in Ngwiri's absence, which Ngwiri must have been told by someone. It is observed that what Dr Banda said to Tembo was said in Ngwiri's absence and Ngwiri must have been told by somebody. Such evidence is inadmissible. As we have already said above, Stack Banda said Dr Banda told John Tembo that if the four victims were against him, they must be eliminated. This, again, was said in Ngwiri's absence. It was, therefore, hearsay and, therefore, inadmissible. Stack Banda, in his statement, went on to recount a conversation between Dr Banda and Mac Kamwana, in which he stated that Dr Banda told Kamwana to do anything that John Tembo, told him. There is no evidence that Ngwiri was present when this alleged conversation took place. It is, therefore, hearsay and inadmissible.

The first ground upon which the Judge in the lower Court disallowed Banda's statement was because it offended evidential rules relating to hearsay. When we examine the statement as a whole, it is impossible to escape the conclusion that it is a figment of Banda's imagination. What he stated as to what happened in Parliament, is not borne out by the evidence. He said, for example, that John Tembo told John Ngwiri that the above-mentioned Cabinet Ministers and an MP for Chikwawa were opposed to the former

President's decision in Parliament which was convened in March 1983, where there was a suggestion that John Tembo should be made Secretary General of the MCP and Mama Cecilia Kadzamira Prime Minister. The report of the proceedings of the March Parliament formed part of the evidence at the trial. The Hansards relating to that session of Parliament were exhibited in Court. There is nothing in them to suggest that there was a suggestion of this nature. As a matter of fact, it would seem to us that appointments to these offices would not have been made in this manner.

Stack Banda further says that that session of Parliament was strongly against Dr Banda. Again, an examination of the proceedings of that Parliament does not show anything to that effect. What it shows was that the Members were angry about the manner in which the civil servants, led by Ngwiri, handled public funds, which resulted in gross over-expenditure in a number of ministries. The entire statement by Stack Banda contained hearsay, and as we have already stated in certain cases, hearsay upon hearsay. There is no way in which this evidence would have been admitted in the evidence. Stack Banda could not be allowed to say it and expect it to be said as the truth simply because John Ngwiri was dead. What John Ngwiri could not have been allowed to say if he were alive, let nobody say it on his behalf now that he is dead.

Mr Robertson submitted that the statement should have been admitted, at least, as a statement against interest. He further submitted that the statement raised a strong inference that he (John Ngwiri) was a member of the conspiracy and was, prima facie, open to prosecution for neglect to prevent a felony. It is to be observed, as an elementary principle of the law of evidence, that all irrelevant evidence is inadmissible but not all relevant evidence is admissible. The statement was rendered inadmissible on grounds of hearsay and could not have been admitted just because certain parts of it were relevant.

After examining the contents of the statement made by Stack Banda, which was supposed to contain what John Ngwiri is alleged to have told him, and after examing the reasons given by the learned Judge in the lower Court for disallowing that evidence, we are satisfied that the statement was properly disallowed, and we are satisfied further that even if it were allowed, its probative value would have been minimal and would not have enhanced the prosecution case, since it would have been proved to contain inaccuracies.

This ground of appeal cannot succeed.

This brings us to the fourth ground of appeal. As we have already shown, the appellant's contention on this ground is that the Judge summed up the evidence in such a selective and biased fashion as to render his comments defective in law.

Mr Stanbrook, QC, raised an issue on this point which we would do well to deal

with straightaway before we proceed any further. Learned Senior Counsel submitted that this ground of appeal raises factual matters only and that it must, therefore, fail without further ado, since under sections 11 (3) and 12 of the Supreme Court of Appeal Act, the DPP may appeal only on points of law.

The approach which a trial judge takes of the evidence in summingup must be correct in law to ensure that the jury has a full and fair view of the case before the court. Authority for this proposition is to be found in the case of Berrada (1989), 91 Cr. App. R. 131. And, as was correctly stated in R -v- Lawrence (11982)5 AC 510, a Judge has a legal duty to be fair, and perceived to be fair, to both sides. Put differently, in directing a jury, a judge should avoid making the summing-up fundamentally unbalanced or blatantly in favour of one side only'. see Mears -v- R (1993)9 1 WLR 818. On these considerations, an acquittal based on selective and biased summing-up must, therefore, constitute a question of law. We hold, therefore, that this ground of appeal does constitute a point of law.

The appellant has criticised the Judge heavily. Mr Robertson contended that the summing-up, read as a whole, weighed the scales so heavily against the prosecution that the Judge failed to discharge his legal duty to be fair. Learned Senior Counsel contended that the prosecution case was never summarised or put and that the Judge's emphasis was all on evidence which was said to support the defence, or on inferences which might support the defence. He submitted that, in fact, the summing-up turned out as an incitement to the jury to acquit the respondents. In support of these contentions, learned Senior Counsel referred the Court to several passages in the summing-up.

To start with, the appellant complained about the manner in which the Judge dealt with the evidence of PW 97, Mr Joseph Roderick Mielemba. The relevant passages complained of appear at pages 397 and 418 of the summingup. At page 397, the Judge stated:

"Now, members of the jury, that meeting at Sanjika was not only attended by Mr Mlelemba. If indeed as Mr Mlelemba claims Dr Banda suddenly made an outburst accusing Messrs Gadarna, Matenje and Bwanali of aspiring for his position, then one would have thought that anybody who attended that meeting could not forget such a serious accusation coming from the Head of State. Mr Robinson (sic) Chirwa and Mr Nelson Khonje who accompanied Mr Mlelemba made no reference to that incident and they made no reference to the serious accusation by Dr Banda. Perhaps as you remember there was no attempt from prosecuting counsel to get that sort of evidence from Mr Chirwa or Mr Khonje. Mr Mlelemba therefore remains unsupported in this serious alleaation. However, what he said, that is Mr Mlelemba, is purely a question of fact. I will come back to this matter later in my address."

Then, he continued and said,.

"Subsequently, Dr Banda went to close Parliament. Among other things he told ministers and members of Parliament that their deeds must match their words. You heard the tape played in this court and perhaps you could tell from his voice as to whether he said those words 'in an angry mood or not. The prosecution made much out of these words and tried to connect that speech with the allegation made by Mr Mlelernba that Dr Banda accused Matenje, Gadama and Bwanali of aspiring for his position. The prosecution would want you to conclude that in telling the House that their deeds must match their words Dr Banda had Mr Matenje, Gadama and Bwanali in mind.

Members of the jury, the prosecution and the defence are perfectly entitled to ask you to draw certain inferences and conclusions from the evidence. But you are not bound to follow what they think should be inferred from the evidence. Dr Banda was Life President of this country for many years and by 1983 he had been in that position for some 19 years. In those years he made several public speeches. Would you then reasonably draw the inference that when he was telling the House to match their words and deeds he was referring to Matenje, Bwanali and Gadarna? As for the accusations which Mr Mlelemba mentioned, it's up to you to believe him or not. If upon considering the whole evidence you conclude that in his speech in Parliament, Dr Banda was referring to Messrs. Matenje, Gadarna and Bwanali, would you then conclude further that he was laying the foundation for a conspiracy to have them killed as the prosecution would want you to do? Perhaps let me remind you that according to the

evidence Dr Banda was not too sure. Even if, you believe Mr Mlelemba, you will remember that when Matenje and Gadama protested that they were not aspiring for his position, he replied that he did not know whether they were telling the truth or not but he would watch them."

Finally, at page 418, the Judge observed:

"Coming to Mr Mlelemba, you should look at this statement suspiciously. You will remember that he was very bitter when he lost his parliamentary seat that year Although his name came first at the nomination, he was not presented with a certificate and he believed that Mr Tembo who led the election team to Mulanje was responsible for that." (The underlining is ours).

Several points were taken by Mr Robertson. First, learned Senior Counsel submitted that the Judge seriously undermined the evidence of Mr Mlelemba in saying that the witness was not supported in his evidence. He said that the Judge further undermined Mr Mlelemba's evidence when he said: "Even if you believe Mr Mlelemba...". Learned Senior Counsel observed that Mr Mlelernba was a very important prosecution witness and that the comments made by the Judge on this aspect had an

adverse effect on the prosecution's case. Mr Robertson also submitted that the Judge's comment was legally flawed, as it suggested that corroboration of Mr Mlelemba's evidence was required in law, when that was not the case. Further, Mr Robertson criticised the Judge's direction to the Jury to view Mr Mielemba's evidence, "suspiciously", in that the witness was allegedly bitter against the 2nd Respondent, when there was no evidence to support this allegation.

In reply, Mr Stanbrook, learned Leading Counsel for the Respondents, defended the Judge's remarks, saying that what the Judge was doing on this aspect of the summing-up was merely to test Mr Mlelemba's evidence, and not to undermine it. Learned Senior Counsel submitted that, in actual fact, what the Judge said was supported by the evidence before the Court.

The first observation to be made is that, as a general principle, in the absence of some specific rule to the contrary, corroboration is not required at common law. Mr Mlelemba was just like any other ordinary witness, and we would agree that his evidence was not required by law to be corroborated. However, reading the summing-up on this aspect, as a whole, we do not think that the Judge was saying, as contended by Mr Robertson, that Mr Mlelemba's evidence required corroboration. In saying that Mr Mlelemba was "not supported" and that his evidence should be looked at "suspiciously" we think that the Judge was merely advising the Jury to consider the matter with due caution. In this context, it is to be noted that indeed there was evidence to the effect that Mr Mlelemba was bitter when he lost his parliamentary seat in Mulanje and that he believed that the 2nd Respondent was responsible for this mishap. Authority abounds for the proposition that a trial Judge should advise the jury some degree of caution with respect to the evidence of any witness who might appear to have an axe to grind, even if a full corroboration warning were not required: see, for example, **Wilkins (1985), Cr. App. R. 222**. All in all, we are unable to fault the Judge in his summing-up on this aspect.

What we have just said is, to a great extent, also true of the Judge's comments in his summing-up on the evidence in relation to PW 105, Mr Edward Chitsulo Isaac Bwanali. With respect, we do not think that the remarks made by the Judge in his summing-up there were unfair comments, undermining the witness.

The other criticism made by the Appellant was that the Judge slanted the evidence to create the impression that the 1st Respondent was fed up with the civil servants and that it was the Secretary to the President and Cabinet, the late Mr John Ngwiri, and not the 1st Respondent, who was under threat. Mr Robertson contended that this was meant to support the "defence theory" that it must have been the late Mr Ngwiri who ordered the murders in this case. The passages complained of appear at pages 399400 of, the summing-up. Firstly, the Judge said:

"it was the controlling officers who were criticised for disregarding the expenditure limits set by Parliament. Those controlling officers were headed by Mr Ngwiri, who was the head of the Civil Service. When Mr Mlelemba. went to seek approval, he told him that he was not the controlling officer. He told Mr Mlelemba to go back to Mr Ngwiri and his boys and ask him why it was like that. The evidence seems to suggest that even Dr Banda was fed up with the Civil Servants' attitude."

Then, later, the Judge had this to say:

"in view of the criticism to Civil Servants and Controlling Officers and in view of the words and approval of Dr Banda, who would be threatened in his position? Would it be Dr Banda or would it be Mr Ngwiri? In answering these questions, as to who between Dr Banda and Mr Ngwiri would be threatened, you must bear in mind that Mr Mlelemba had described Mr Ngwiri as arrogant as he never attended Public Accounts Committee meetings."

In order to fully appreciate what the Judge said in these passages, one has to consider the other evidence on this point. The actual evidence concerned what the late Mr Dick Matenje, then Secretary General of the Malawi Congress Party, said in his address during the Budget Session of the Malawi Parliament. He said, and there was no dispute on this point:

"The Chairman of the Public Accounts Committee is being awaited at State House. The minute the names of these useless scraps in the civil service are brought to him, that is Dr Banda, dismissal."

Then, later, the late Mr Dick Matenje told the House that the 1st Respondent had told him:

"Well, we have talked too much, we have warned these civil servants, General Managers and what not for a long time. Matenje time has come for us for action."

When all this evidence is considered together, we find it difficult to accept the Appellant's contention that the Judge slanted the evidence.

In our view, the comment made by the Judge to the effect that the 1st Respondent was fed up with the civil servants and that it was the late Mr Ngwiri who was under threat, was fully borne out by the evidence just referred to.

It is also to be observed that when the evidence is examined critically, it was not a defence proposition as such that it must have been the late Mr Ngwiri who ordered the murders. What we see is that this was an alternative hypothesis that emerged and developed in the course of the trial of the case during cross-examination. Be that as it may, it is a well-recognised principle of law that an alternative theory put forward by the defence, which is consistent with the evidence ought not to be ignored in the judge's summingup: see **R -v- Turkington (1930), 22 Cr. App. R. 91**. The Appellant's argument on this aspect, therefore, must fail.

The Appellant also, complained that the Judge made biased comments which undermined the prosecution case against the 2nd Respondent when the Judge told the Jury to bear in mind that the 2nd Respondent was not criticised in the debate in Parliament, and that although the 2nd Respondent might have been a powerful man politically, that fact alone (i.e. power alone), would not be evidence of a crime.

We have looked at the evidence. What the Judge said was true. There was no evidence, absolutely none, that the 2nd Respondent was ever criticised during the debate in Parliament. The Judge also put it correctly, in our view, when he informed the Jury that the mere fact that a person was powerful politically, economically or otherwise, could not, without further facts, form the basis of a criminal offence. Perhaps we should add that this was a complicated case. It had its own features and problems and the summing-up had to be related to those features and problems. All in all, we are unable to agree that the comments made by the Judge on this point were biased or inappropriate.

The other criticism relates to the Judge's summing-up of the evidence of PW 55, MacPherson Bervy Itimu. The relevant part of the summing-up on this point is long, but it is necessary and useful to reproduce it. It is as follows:

"I now come to the evidence of Mr Itimu, who you may remember was the Head of the Special Branch. He told this Court that on 15th May, 1983 he was called by the then Inspector General of Police, Mr Kamwana. You will recall that Mr Itimu told you that he had been told by Mr Kamwana that Dr Banda was angry and had ordered that the four politicians be killed.

Now, I direct you to approach this piece of evidence with the greatest caution, because Mr Kamwana who is alleged to have received the order from Dr Banda is no longer in this world so that there is no one to cross-examine on the alleged order. There is no way of verifying whether Mr Itimu was telling the truth. But you should decide as to whether Mr Itimu came to the witness box to tell the truth or merely to implicate Dr Banda. You will remember that he seized any opportunity to say that it was Dr Banda who had killed them.

In the final analysis it is your duty to decide whether you take Mr Itimu as a truthful witness or not.

In order to decide whether or not he was a truthful witness, you will have to examine critically his other pieces of evidence and his behaviour in the witness box. You may remember, that he gave his evidence in a dramatic fashion and this Court had to remind him on a number of occasions to stick to the question put to him. You may also have noticed that he was evasive in the extreme in answering questions put to him by the defence. But as judges of fact it is your duty to decide whether to believe him or not. If you think that he was a reliable witness, then you should act on his evidence. On the other hand, if you decide that he was an unreliable witness then of course you should disregard those matters you think he was lying.

Mr Itimu's role in the affair was to effect the arrests. On his part he detailed his juniors and these included Mr Ngwata, Mr Kalemba and Mr Maunde. He said, he told them of the Presidential Order that the four be arrested and killed. But you will remember, that in his evidence, Mr Ngwata said Mr Itimu only told them of the order to arrest and not to kill. An order to kill three ministers and a member of Parliament is no simple matter and in order to get to the truth of the matter, Mr Mganga arranged a confrontation between Mr Itimu, Mr Ngwata and Mr Kalemba. At the end of the confrontation the three of them agreed that Mr Itimu had not told Mr Ngwata and Mr Kalemba that there was an order to kill. When pressed in cross-examination all Mr Itimu could say was that he could not remember if he had told Mr Ngwata and Mr Kalemba that the four be killed.

In this Court, Mr Itimu said it was he, who gave instructions to Mr Kalemba. And yet he told the Commission of Inquiry that Kalemba got orders from Kamwana. On another occasion, he told the Commission that he did not know who gave orders to Kalemba. In yet another breath he told the Commission that if Kalemba was involved then he reported to Mr Ngwata or Mr Maunde. It would appear that the Commission had a very poor impression of him. You might remember, that the Commission was clearly of the view that he was telling lies. Indeed on more than two occasions he was threatened with perjury, Indeed he was sent outside the Commission room to reflect on the charge of perjury.

You will remember that he denied being at Likangala Road Block, when a number of witnesses said they saw him there." (The underlining is ours).”

Several points were taken by Mr Robertson. First, learned Senior Counsel contended that the Judge was unfair in the summing-up, by saying that there was no way of verifying whether Mr Itimu was truthful in his evidence in relation to the 1st Respondent without ever mentioning that he was actually corroborated by PW 63, Mr Aaron Beyard Mlaviwa. Mr Robertson contended further that, in his summing-up, the

Judge usurped the Jury's function by directing the jury that Mr Itimu was "evasive in the extreme". Finally, Mr Robertson argued that the Judge was unfair in the summing-up by telling the Jury that the Commission of Inquiry was of the view that Mr Itimu was a liar. He said that this was inadmissible hearsay evidence and should not have been recited to the Jury.

Taking the first point first, it may be argued that the Judge was not quite right in saying that there was no way of verifying whether Mr Itimu was telling the truth in his evidence that the late Mr Kamwana told him it was the 1st Respondent who had ordered the murders. But, of course, it must be appreciated that Mr Itimu's evidence on this point was hearsay. It is also significant that Mr Mlaviwa, like Mr Itimu, was an accomplice in this case. In fact, Mr Mlaviwa. was one of the police officers who actually carried out the horrible murders. A warning as to the danger of acting on the evidence of such a witness was clearly not out of place. We have looked at Mr Mlaviwa's evidence. With respect, we do not think that it unequivocally supported Mr Itimu's evidence on this aspect. At page 39 of Volume Three of the court record appears the text of the evidence which Mr Mlaviwa gave before the Commission of Inquiry in response to a question as to whether the late Mr Kamwana mentioned the person or persons who gave him the instructions to have the four politicians killed. Mr Mlaviwa agreed in the Court below to have told the Commission of Inquiry as follows:

“I think you are going to make me tell a lie. Here when I stated that Mr. Kamwana was saying that the Government has sent him I didn't say that it was the President who had sent him. Or that the President sent somebody to go and order him because when Mr. Kamwana goes to visit the President I didn't even know that he is doing so. I don't want here to add certain things just because Mr. Kamwana is dead I believe in God if I know that if I tell a lie, I'll be punished in one way or another by God,”

Since Mr Mlaviwa agreed in the lower Court that the contents of the above-quoted passage was what he told the Commission of Inquiry, then what he told the Commission of Inquiry on that point became part of his evidence at the trial. This evidence, in our view, cannot be said to have corroborated Mr Itimu. It is also significant that the Judge made it clear to the Jury that in the final analysis, it was up to them whether to believe Mr Itimu or not, and that was really the hub of the matter.

We now pass to the second point. As earlier indicated, the appellant contends on this point that the Judge usurped the function of the Jury by directing them that Mr Itimu was "evasive in the extreme". Just by way of comment, the court record shows graphically that Mr itimu was indeed a very evasive witness. We can tell this simply by reading the record and we can imagine how it was, live, in the Court below. All the same, we would agree that the question whether a witness was evasive, was a factual matter for the Jury. Referring to the present case, we do not think that the Judge's comments caused any failure of justice, since the Judge, as we have already pointed out, told the Jury, more

than once as a matter of fact, that the right of deciding on the facts was solely theirs.

This brings us to the third point, where the appellant complained that the Judge unfairly destroyed Mr Itimu's evidence by telling the Jury that the Commission of Inquiry was of the view that Mr Itimu was a liar, which was inadmissible hearsay evidence. With respect, the appellant seems to be oversimplifying the matter. It is to be noted that the defence cross-examined Mr Itimu at great length on what he told the Commission of Inquiry and what happened there. Through that crossexamination, most of the things that were said at the Commission of Inquiry became part of the evidence in this case. As we see it, what the Judge was doing was simply reviewing the evidence to the Jury, which he was required to do. All in all, we are unable to fault the Judge.

The Judge was next criticised as to the way he summed up the evidence in relation to what the prosecution referred to as "the inner circle". This was said to be a triumvirate that handled all matters of State in this country at the material time. Concerning the said "inner circle", again we reproduce what the learned DPP in his opening address said:

"All vital decisions by the State were at this time taken not by Cabinet, but by an "inner circle" headed by the Life President Dr H. Kamuzu Banda and comprising John Z U Tembo and the Official Hostess and loyally aided and abetted by John Ngwiri and Inspector General of Police, Kamwana. It is an inescapable inference that a decision so momentous as to eliminate three Cabinet Ministers and a leading Member of Parliament could only have been taken by the triumvirate; similarly, the decision to deny the assassinated men normal rites of condolence and honoured burial."

In the summing-Lip on this aspect, the Judge said:

"Now, members of the jury you have been sitting in this Court for months listening to a huge number of witnesses. Was there a single witness who told you of the existence of an inner circle? Was there a single witness who said that all vital decisions of State were taken by the inner circle? Would you remember any witness giving examples of vital decisions of State being made by the inner circle? The existence or absence of the inner circle is a question of fact and not law. You alone can decide whether there was an inner circle or not, and you must base your decision on the evidence from witnesses. You must decide issues on the basis of evidence and not speculation or conjecture. No doubt you are entitled to draw conclusions and inferences but those conclusions and inferences must be based on the evidence.

Looking at the evidence as a whole would you say that there is evidence from which you can reasonably conclude or infer that there was an inner circle which took all vital decisions of state? The witnesses who would have told you of the inner circle were the

ministers who knew the machinery of government from inside. These were Mr Chimango, Mr Chirwa, Mr Bwanali, Mr Katopola and of course the Speaker, Mr Khonje. You will remember Mr Chimango, Mr Chirwa and Mr Bwanali said they sent their memos to Dr Banda for decisions. They all said Dr Banda was reputed for making quick and decisive decisions. Mr Chimango said Dr Banda made his decision there and then. He said he could not remember an occasion where Dr Banda deferred his decision."

The appellant contended that here the Judge derided the prosecution case. The appellant also charged that the Judge should have explained to the Jury that the alternative to the "inner circle", on the evidence, was a direct decision by the 1st Respondent.

In response, Mr Stanbrook submitted that on this issue of the "inner circle", like on several other issues, the learned DPP was simply jumping from one stage to another without supporting evidence. Learned Senior Counsel submitted that in the circumstances, it was necessary for the Judge to be extremely careful in analysing the overall evidence so as to assist the Jury. He said that there was no unfairness at all in the summing-up.

It is to be observed that the learned DPP focussed on the "inner circle" theory in both his opening and closing speeches. It was, therefore, necessary for the Judge to deal with the matter fully and carefully in the summing-up, firstly in order to make it clear to the Jury that suggestions made either in the opening or the closing speech did not in themselves amount to evidence, and, secondly to recount the evidence itself to enable the Jury to decide whether or not there was any evidence in support of such suggestions. In our view, this was exactly what the Judge was doing in the summing-up on this aspect. With respect, we are unable to agree with Mr Robertson that this part of the summing-up derided the prosecution case on the question of the "inner circle". Indeed, it is significant that in the summing-up complained of, the Judge put it clearly to the Jury that the question of the existence or nonexistence of the "inner circle" was a factual matter for them, and them alone, to decide.

As stated above, the other complaint was that the Judge should have explained to the Jury that the alternative to the "inner circle" was a direct decision by the 1st Respondent. We don't understand this; not when the learned DPP's assertion, as we have seen, was positively that all vital decisions were only taken by the triumvirate. Put shortly, we are unable to find any merit in this complaint.

Next, the appellant complained that the Judge in the summing-up denigrated the rest of the evidence against the 1st Respondent as licircumstantial". Mr Robertson submitted that the Judge should have also told the Jury that circumstantial evidence was often the best evidence. It was contended that no attempt was made by the Judge to

present a balanced picture of the evidence adduced, including, for example, the evidence that no attempt was made to conceal the abduction of the four politicians from party workers at the Malawi Congress Party Headquarters; evidence that the four were driven in a convoy; and evidence that no official mention was ever made of the dead men again, other than in a negative context, for example, the 1st Respondent's posthumous criticisms in cabinet and in public of the late Mr Aaron Gadama.

The passages complained of appear at page 415 of the summingup, where, after reviewing the evidence of Mr Itimu and Mr Mlaviwa, the Judge said:

“Apart from the evidence of Itimu and Mlaviwa which I have directed you to approach with the greatest caution, everything else is circumstantial evidence."

With respect, the appellant's complaint here seems to overlook what the Judge also said elsewhere in the summing-up. Of direct relevance is what the Judge said at page 410 of the summing-up:

"The prosecution must satisfy you so that you are sure that there was indeed an agreement to kill. Agreements to commit crimes are usually done in secrecy, so that it is rare for a jury to find direct evidence. In the absence of direct evidence you must consider the whole evidence of the case. You must consider all the circumstances under which the alleged offence was committed. You must also consider the behaviour of the defendants before, during and after the alleged offence was committed. Such is referred to as circumstantial evidence."

And then the Judge went on:

"It is from this evidence of a general nature that you must find the defendants guilty or not guilty. For such evidence to justify an inference of guilt, the facts must be incompatible or inconsistent with the innocence of the accused and incapable of any other reasonable explanation. The only conclusion to be drawn from such evidence must of necessity be the guilt of the accused. Before you can convict on such evidence you must be satisfied so as to be sure that the facts only lead to the inescapable inference of guilt and nothing else."

It will be seen from the foregoing that what the Appellant alleges does not seem to be supported by what the Judge said in the passages just reproduced. In our view, by telling the Jury that it was rare to find direct evidence in cases of conspiracy, considering that the agreements in such cases are usually made in secrecy, the Judge was actually saying that the best evidence in such cases was circumstantial evidence. Significantly, he

advised the Jury the approach which they had to take in the circumstances, namely, to consider the whole of the evidence and all the circumstances of the case. The Judge cannot be flawed in this, neither can the Judge be faulted for having put to the Jury the relevant principles of law relating to circumstantial evidence, when he stated that for circumstantial evidence to justify an inference of guilt, the facts had to be incompatible or inconsistent with the innocence of the respondents and incapable of any other reasonable explanation. And the Judge was quite right when he went on to say that before the Jury could properly find the Respondents guilty on the basis of circumstantial evidence, they had to be satisfied so as to be sure that the facts only led to the inescapable inference of guilt and nothing else. Authority for these principles of law is legion: see **Jailosi - v - Republic, 4 ALR (M) 494; Moyo - v Republic, 4 ALR (M) 440 and Nyamizinga - v - Republic, 4 ALR (M) 258,** to mention only a few.

For the foregoing reasons, we are unable to accept the Appellant's contention that the Judge denigrated the evidence.

The Judge was also criticised as having been unfair in his summing-up, when he characterised the propositions which the learned DPP put to the Jury in the closing speech, regarding the genesis of the plot to kill the four politicians as being "too speculative". What the learned DPP said appears at page 416 of the summing-up. We have already reproduced this passage elsewhere earlier in our judgment, but for the purposes of emphasis, we again reproduce it:

"I will start with a very bold statement which I will ask you to keep in mind through out the time of reviewing the evidence of Tembo. This is the statement; Mr Tembo and Mr Ngwiri planned to kill the deceased. It was after they had made a plan that they had sold it to Dr Banda. That can be the only possibility. The other possibility would have been too complicated which is that either Dr Banda and Ngwiri agreed then afterwards told Tembo or that Tembo and Dr Banda agreed and then told Ngwiri."

This was the postulation which the Judge said was too speculative. It is to be noted that here the learned DPP put forward to the Jury three different scenarios as to how the plot to kill the four politicians was hatched. He said these were possibilities. It was, however, not indicated how he came up with those scenarios except by way of speculation. With respect, we are unable to differ with the view taken by the Judge on this point. However, the Judge, strictly speaking, should riot have made the comment here, rather he should have left it to the Jury to make their own finding. But all said, we do not think that the remark occasioned any miscarriage of justice. As we have said, it was too obvious that what the learned DPP said here was indeed too speculative. We do not think that the Jury would have found differently.

A further criticism concerns the summing-up in relation to what happened after

the four men were killed. Mr Robertson submitted that the Judge erred in passing over the dishonouring of the bodies of the deceased and the denial of decent burials, without inviting the Jury to draw adverse conclusions against the 1st Respondent who must have approved this. Learned Senior Counsel said that the Judge should have reminded the Jury of the overwhelming evidence that absence of funeral honours, in the case of high-ranking politicians was unheard of. Finally, Mr Robertson submitted that the Judge misled the Jury by suggesting to them explanations for police harrassment at the funerals of the killed politicians and for the 1st Respondent's condemnation of the late Mr Gadama as a confusionist.

We have looked at the summing-up. In our view, the Judge dealt with all the matters the Appellant is complaining about on this subject. The Judge summed-up the evidence in a manner that must have left the Jury in no doubt as to what the prosecution case was all about and what inferences were sought to be made. Having done this, he advised the Jury, after giving the usual caution, that all in all, the matters here were factual, solely for them to determine. It is noted that here and there the Judge did express his opinion on the evidence. It is, however, trite that a Judge may express his opinion in a proper case, provided he leaves the factual issues to the jury: see R - v - Cohen and Bateman, 2 Cr. App. R. 197. See also section 320 of the Criminal Procedure and Evidence Code. In short, we are unable to fault the Judge in his summing-up on this aspect. Accordingly, the Appellant's submission must fail.

In relation to the second count, the Appellant contended that the Judge summed-up the evidence in such a way as to suggest to the Jury that Inspector General Lunguzi, the 5th Respondent, would himself decide on what matters he would refer to the 1st Respondent for directions, when the evidence was compelling that on security matters, his predecessor, Inspector General Kamwana, did seek directions from the 1st Respondent even on the most trivial of matters. The Appellant relied upon the memoranda that were tendered at the trial from Inspector General Kamwana to the 1st Respondent which, according to the Appellant, showed that Inspector General Kamwana was in the habit of obtaining directions from the 1st Respondent on all matters of State security.

The Judge's summing-up is very clear. The Judge reviewed the relevant evidence and explained to the Jury the purpose the memoranda were produced in evidence, namely, to show that since former Inspector General Kamwana was in the habit of seeking directions from the 1st Respondent, the 5th Respondent must have been ordered by the 1st Respondent to destroy the car which would have been used as evidence in this case. It is noted that before leaving the matter, he made it quite clear to the Jury that in the final analysis it was up to them to say whether they were satisfied that the 1st Respondent gave instructions to the 5th Respondent to destroy the car. On these facts, we don't think that the summing-up, read as a whole, can be faulted.

To conclude, we think that what we have said so far deals with the other complaints made by the appellant on this ground of appeal. Perhaps we should mention that, in general, a Judge is given considerable leeway in commenting upon the evidence, even if that be in a manner adverse to either side. It is only when the Judge goes out of bounds, crosses the line, as it were, into blatant unfairness and apparent bias, that he may be flawed: see **R -v- O'Driscoll (1968), 1 OB 83% at p844**: see also **Canny (11 945)q 30 Cr. App. R. 143**. We are satisfied that the summing-up in this case, considered as a whole, cannot be faulted for having been biased in favour of the defence.

Put briefly, the fourth ground of appeal must fail. This was the final ground of appeal, and it will be recalled that the other three grounds of appeal have also failed. This means, therefore, that the whole appeal fails, and it is dismissed in its entirety.

Another issue that has been raised in this appeal relates to costs.

Mr Stanbrook asked the Court to make an order for costs in favour of Miss Kadzamira, the 6th Respondent. As we have earlier seen, shortly before the hearing of the appeal commenced, the learned DPP abandoned the appeal as regards this Respondent and two other Respondents, now dead. It is to be observed that in accordance with the relevant law and practice, the Court thereupon dismissed the appeal in respect of these three Respondents.

Mr Stanbrook asked the Court to award the 6th Respondent not only her costs of the abandoned appeal, but also of the trial in the Court below. Learned Senior Counsel submitted that it is only fair, just and appropriate that the 6th Respondent be awarded these costs because she should not have been prosecuted for the offences in this case, as the prosecution's evidence was hopeless right from the beginning. It was contended that in the circumstances, the 6th Respondent was treated unfairly and unjustly, having been made to incur expenses to defend herself and having been made to sit for months on end listening to evidence that had nothing to do with her.

In his response on this issue, the learned DPP conceded that it was appropriate for the State to pay the costs of the 6th Respondent, but only as regards to the appeal, given the prosecution's decision not to pursue the appeal in relation to her.

Learned DPP submitted that the the Court has, however, no power to make an order against a public prosecutor or the DPP to pay the costs of trial of an accused person. He said that an order for costs in favour of an accused relating to trial can only be made against a private prosecutor. He cited section 142(2) of the Criminal Procedure and Evidence Code in support of his contention. The section provides:

"142 (2) It shall be lawful for a judge or a magistrate who acquits or discharges a person accused of an offence, if the prosecution for such offence was originally instituted on a summons or warrant issued by a court on the application of a private prosecutor to pay to the accused such reasonable costs as to the judge or magistrate may seem fit:

Provided that such costs shall not exceed fifty pounds in the case of an acquittal by a subordinate court:

Provided further that no such order shall be made if the judge or magistrate shall consider that the private prosecutor had reasonable grounds for making the complaint."

In short, the learned DPP resisted the order sought by Mr Stanbrook in relation to costs of the 6th Respondent's trial in the Court below. We will come back to this point later.

We have looked at both the Supreme Court of Appeal Act and the Courts Act (Caps. 3:01 and 3:02) respectively, of the Laws of Malawi, but we have not been able to find any express provision for the payment of costs in criminal proceedings. The proviso to section 8 of the Supreme Court of Appeal Act is, however, instructive. It provides that where the Act or any rules of Court made thereunder, do not make any provision for any particular point of practice and procedure, then the practice and procedure of the Court shall, in relation to criminal cases, be as nearly as may be in accordance with the law and practice for the time being observed by the Court of Criminal Appeal in England.

In England, courts, including the Court of Criminal Appeal, have powers to award costs in criminal proceedings. These powers are primarily contained in Part 11 of the Prosecution of Offences Act'(1985) and in Regulations made under sections 19, 19A and 20 of that Act ant in Costs of Criminal Cases (General) (Amendment) Regulations, 1991

These provide that where, at any time, during criminal proceedings, a court, i.e. a magistrate's court, a crown court or the Court of Criminal Appeal is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper act or omission by or on behalf of another party to the proceedings, the Court may, after hearing the parties, order that all or part of the costs so incurred by that party shall be paid to him or her by the other party. Regulation 3 refers.

The English practice is that where a Court makes an order for costs in favour of an accused person, the order will normally be for such amount as the Court considers reasonably sufficient to compensate the party for the expenses which have been incurred by him or her 'in the proceedings and are directly related to the proceedings. Such costs

may also include the costs incurred in the lower courts, unless, for good reason, the Court directs that the same shall not be included in the order.

Referring to the present case, there does not seem to be any real problem regarding the costs of the 6th Respondent in relation to the appeal prior to abandonment of the same. Courts in England, as we have seen, have power to award the accused person costs in such a situation. It is also to be noted that the prosecution conceded in the instant case that the case against the 6th Respondent was hopeless. It was, therefore, inappropriate to pursue the appeal against the 6th Respondent and withdraw it only at the eleventh hour, when the 6th Respondent must have incurred unnecessary expenses in preparation for the appeal. Indeed, as we have already indicated, the learned DPP conceded before this Court that it was appropriate for the State to pay the costs of the 6th Respondent in so far as the appeal was concerned.

As regards the costs of the trial in the Court below, we think that the position in England is qualified by the provisions of section 142(2) of the Criminal Procedure and Evidence Code which was cited to us by the learned DPP. As we have seen, that provision only allows costs as against a private prosecutor as opposed to a public prosecutor or the DPP

After due consideration of the matter, we think that Mr Stanbrook has made out a case for costs of the appeal, but not costs of the trial in the Court below. Accordingly, we make an order that the State pays the costs of the 6th Respondent in relation to the appeal. It is further ordered that in the absence of an agreement between the parties, the costs are to be assessed by the Registrar of this Court.

DELIVERED in open Court this 31st day of July 1997, at Blantyre.

Sgd: .....

L E UNYOLO,JA

Sgd: .....

L A CHATSIKA, JA

Sgd: .....

I J MTAMBO, AG., JA