THE STATE
versus
LOVEMORE KUROTWI
and
DOMINIC MUBAIWA

HIGH COURT OF ZIMBABWE
BHUNU J.
Harare, 16 February 2011 and 17 February 2011.

Mrs. *Ziyambi and* Mr. *Mutangadura,* for the State
Mr. *Chikumbirike,* for the first accused.
Mr. *Uriri* and M*r. Sakhe,* for the second accused

BHUNU J: The accused were indicted to the High Court for trial on a charge of fraud on 10 January 2011. They were initially jointly charged with 3 others whose charges have since been withdrawn before plea. The state intends to use them as state witnesses against their erstwhile co-accused persons. It has now applied to amend the original charge before plea to incorporate this development.

The defence has however vigorously objected to the application being made before plea they insisted that the application can only be made after plea. They argued that the original charge can only be said to be formally before the Court after the charge has been put and the accused have pleaded to the charge. It was their argument that the Court cannot amend a charge which is not formerly before it.

It will be remembered that on 15 February 2011 relying on the dictum in the case of *Mukuze & Another 2005 (1) ZLR 6* I held that this matter is pending before this Court in terms of s 137 of the Criminal Procedure and Evidence Act [*Cap 9:07*]. In that Judgment I had occasion to remark at p 3 of my cyclostyled Judgment that:

> "The natural effect of section 137 is that once the High Court is seized with the matter pending before it, all procedures relating to the trial of the accused are firmly under the direction and control of the Court This explains why although the state is *dominus litis* it had to apply for an order for the withdrawal of charges against the accused's co-accused before plea. It would have been grossly irregular for the State to simply drop charges against the accused's co-accused without first obtaining a Court order to that effect.

> The situation cannot be different when it comes to the amendment of the charge before plea. Once an accused person has been served with an indictment and committed to the High Court for trial he is entitled as of right to demand that he be tried on that charge. The state is not at large at that stage to alter, amend or substitute the charge without the Court's permission."

In my view it would be pretentious and devious for this Court to turn a blind eye and hold that the original charge is not before it when at the committal proceedings both the Court and the accused received formal notice of the charge and the Court formerly took possession of the charge sheet once it was lodged with the Registrar.

It is trite and a matter of elementary law that generally speaking a party is entitled to make an amendment at any time before judgment provided there is no prejudice to the other party. In this case, the defence has not been able to point to any prejudice and indeed, I am unable to perceive any prejudice to the accused which cannot be cured by an adjournment to enable them to prepare their defence in light of the intended application.

In any case having already ruled that the state can apply to Court for the amendment of the charge before plea I am bound by that ruling The Court is *functos officio* it cannot revisit that issue.

In the final analysis the objection is unsustainable. It is accordingly ordered:

1. That the objection be and is hereby overruled.
2. That the matter be and is hereby postponed for 10 days to enable the defence to prepare their response to the application for amendment of the charge before plea.

The Attorney-General's Office, the State, Legal Practitioners.
Chikumbirike and Associates, the first defendant's Legal Practitioners.
Kantor and Immerman, the second defendant's Legal Practitioners.