

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 03/2004

In the matter between:

THE STATE

APPLICANT

and

PROGRESS KENYOKA MUNUMA

1ST RESPONDENT

SHINE SAMULANDELA SAMULANDELA

2ND RESPONDENT

MANUEL MANEPELO MAKENDANO

3RD RESPONDENT

ALEX SINJABATA MUSHAKWA

4TH RESPONDENT

DIAMOND SAMUNZALA SALUFU

5TH RESPONDENT

FREDERICK ISAKA NTAMBILWA

6TH RESPONDENT

HOSTER SIMASIKU NTOMBO

7TH RESPONDENT

JOHN MAZILA TEMBWE

8TH RESPONDENT

Neutral citation: *S v Munuma* (CC 03/2004) [2021] NAHCMD 125 (24 March 2021)

Coram: UNENGU AJ

Heard: 25, 28 September 2018; 09-11, 16-17, 22- 24, 29-31 October 2018; 16, 21, 28, 30 January 2019; 05-06, 11-14, 18-19 February 2019; 06, 11-13, 18-19, 25-26, 28 March 2019; 02-04, 24 April 2019; 07-08, 13, 15-16, May 2019; 18-19, 25, June 2019; 01 July 2019; 05 August 2019, 03-04, 09-10, 30 September 2019; 01-02, 07, 09-10, 16-17, 21-24, 29 October 2019; 04, 11, 14, 18 November 2019; 21, 23, 29-

30, January 2020; 13 February 2020; 12, 17 March 2020; 25 June 2020; 10, 14, 25 August 2020; 22-23, 29 September 2020; 02 November 2020

Delivered: 24 March 2021

Flynote: Criminal Procedure – Application for discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 – The test to be applied at this stage of the proceedings – Not whether the prosecution has proved its case beyond reasonable doubt – But proof of whether the court is of the opinion that there is no evidence that the accused committed the offence in the charge or any other offences of which the accused may be convicted on the charge – The principle applied is whether the prosecution proved a prima facie case – In the instant matter, the court is of the opinion that there is sufficient evidence, if not refuted, the accused may be convicted of the offences in the indictment except for the murder count – Application for discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 except for the count of murder, is dismissed.

Summary: The accused before court are charged with several counts of various offences, including the crimes of high treason and sedition. Initially they were tried before another judge who convicted and punished them on the charges. However, the accused successfully appealed against the whole judgment to the Supreme Court. The matter was thereafter referred by the Supreme Court to the High Court to start de novo before another judge. The accused when called to plead to the charges before me, they tendered two special pleas. In the first instance, they challenged the jurisdiction of the court to try them and in the second special plea, they alleged that the former Caprivi Zipfel was never part of the then Territory of German Southwest Africa. The accused did not succeed in both their attempts.

That being the case, the trial proceeded and the State's case was closed. It is after the State's case was closed that the accused have applied in terms of s 174 of the Criminal Procedure Act, 51 of 1977, to be discharged from the prosecution on the basis that the State did not prove a prima facie case against them.

The court held that at this stage of the proceedings, proof is not proof beyond a reasonable doubt, but proof of a prima facie case against the accused. It is that if in

the opinion of the court there is sufficient evidence before court that the accused committed the offence in the charge or any other offences of which they may be convicted on the charge.

Held further, that the court is of the opinion that there is sufficient evidence on which the court may convict the accused on the charges in the indictment except for the count of murder in respect of accused 1 and 2.

Held furthermore, that the application of the accused to be discharged in terms of s 174 of the Criminal Procedure Act, except for the count of murder, is dismissed.

ORDER

The application of the accused for the discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977, except for the count of murder, is dismissed.

JUDGMENT

UNENGU, AJ

[1] In these proceedings, accused you are applying for a discharge in terms of s 174 of the Criminal Procedure Act,¹ (the CPA). All of you have been indicted on charges of high treason, Sedition, Public Violence and various other offences under the Arms and Ammunition Act, offences under Act 34 of 1955 as amended by section 2 of Act 4 of 1993, offences under the Immigration Control Act 7 of 1993 as amended and a charge of murder in respect of accused 1 and 2.

[2] Initially, you and others who are not part of these proceedings, appeared before Manyarara, AJ for trial on almost similar charges except for one or two charges added during the instant proceedings. Manyarara, AJ found you guilty, convicted you and sentenced you but on appeal, the Supreme Court set aside the convictions and sentences and referred the matter back to this court for the trial to start *de novo*. On 5 June 2014, this second trial resumed before me and you were

¹Criminal Procedure Act 51 of 1977.

again asked to plead to the charges against you. During these proceedings, Mr Tjombe acted on your behalf while Mr Wamambo acting on behalf of the State.

[3] Accused, when you were asked to plead to the charges, you tendered a special plea in terms of s 106 of the CPA. The hearing of the special plea then commenced on 30 June 2014 until 18 September 2014 and the special plea was dismissed on the 27 November 2014. Thereafter you lodged an appeal against the ruling of the special plea to the Supreme Court but only one of you succeeded and was released from further prosecution but the rest of you were unsuccessful. When we proceeded with the trial, both Mr Wamambo and Mr Tjombe were absent. The court was informed that Mr Wamambo resigned as prosecutor and Mr Tjombe withdrew from record as your legal practitioner because you did not want him to further defend you. The two counsel were replaced by Mr Campher for the State and Ms Agenbach with Mr Neves for your defence.

[4] Ms Agenbach gave notice to raise another special plea of jurisdiction in terms of s 106 based on the grounds that the Republic of Namibia does not possess *majestas* over the territory which was known and described as the Eastern Caprivi Zipfel and by virtue thereof, according to her, the territory did not form part of the national territory of the Independent Republic of Namibia as defined in Article 1(4) of the Namibian Constitution; that you were not Namibian citizens before or during the period you stood indicted for the crimes; that this court does not have jurisdiction in respect of the territory then known and described as the Eastern Caprivi Zipfel; that the High Court Act, has no application in that territory known and described as the Eastern Caprivi Zipfel; that this court has no jurisdiction over you and/or to adjudicate any of the offenses as contained in the indictments preferred against you, allegedly, having been committed in the territory known and described as the Eastern Caprivi Zipfel; that the Arms and Ammunition Act 7 of 1996, and the Police Act 19 of 1990, are not applicable in the territory known and described as Eastern Caprivi Zipfel; that you have not been properly and lawfully arrested in terms of the Police Act; that you have not properly and lawfully been arraigned before this court for lack of jurisdiction on the indictments preferred against you; and that the proceedings are invalid and/or a nullity that you are entitled to be discharged, alternatively be released from further detention as is provided for in Article 12 of the Constitution.

[5] Similarly, I rejected and dismissed this special plea in *Munuma v The State*² and your petition to appeal the ruling was also refused by the Chief Justice on 3 August 2018. The trial then started thereafter with witnesses testifying. I must mention that a period of four months was wasted from 10 April 2018 when the special plea was dismissed by this court until 3 August 2018 when the Chief Justice refused the petition.

[6] Again, the charges were put to you all and you pleaded not guilty to all the charges. Accused 1, you denied all the elements of the charges put you and required the State to prove the elements. However, in amplification of your plea of not guilty, you specifically denied that you are a national of the Republic of Namibia; that you are a citizen of the Republic of Namibia prior to and during the period of September 1998 to 12 December 2003; that you were in the district of Katima Mulilo and/or Caprivi Region during the period 27 October 1998 to 12 December 2003; that you have unlawfully and/or wrongfully and/or intentionally committed any act and/or omission preferred in the indictment against you; and that you made common purpose with any other person to unlawfully and/or wrongfully and/or intentionally commit any act and/or omission preferred in the indictments against you.

[7] Accused 2, 3, 4, 5 and 7 you also tendered the same plea explanations to your plea of not guilty. Meanwhile, you accused 6 and 8 represented by Mr Neves, denied all the elements of the charges preferred against you and elected not to explain why you think you are not guilty of the crimes you are charged with. Accused 6 and 8 it is your right to remain silent after you have pleaded not guilty to the charges brought against you. The court will not draw any adverse inference from your failure to provide a plea explanation. The prosecution bears the *onus* to prove the charges preferred against you in the indictment beyond a reasonable doubt. In fact, you are presumed innocent until proven guilty in accordance with the law;³ and you are also protected from incriminating yourself.⁴

[8] As already pointed out, these proceedings concern an application for your discharge from the prosecutions in terms of s 174 of the CPA after the State's case has closed. At this stage of the proceedings though, the State is not required to prove

² *Munuma v The State* Case no. CC 03/2004) [2018] NAHCMD 87 (10 APRIL 2018).

³ Art 12 (d) of the Constitution

⁴ Art 12 (f).

the charges against you beyond a reasonable doubt, but only to establish a *prima facie* case. Section 174 provides as follows:

'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[9] Section 174 employs the words "it may return a verdict of not guilty". It does not instruct or command the court to return a verdict of not guilty but rather leaves it for the court to exercise its own discretion to return or not to return a verdict of not guilty. It is an issue which requires the court to exercise judicial discretion whether or not at this stage of the proceedings to grant a discharge already. It is clear from the authorities⁵ that the concept, "no evidence" provided for in the section does not mean no evidence at all, but rather no evidence on which a reasonable court acting reasonably might convict. In *S v Roux*⁶ this court held that the test was whether there was sufficient evidence upon which a reasonable court can convict. (See also *S v Teek* 2009 (1) NR 127 (SC).

[10] I have been referred to a raft of case law of this jurisdiction and from foreign jurisdictions, in particular South Africa about the test of proof at this stage of the proceedings. A reading of the authorities seems to indicate that there are similarities in the principles applied in the authorities cited by counsel to interpret the provisions of s 174. It is held in some of the authorities that the evidence before court must not only be sufficient but also credible evidence, while in others, it is said that credibility at this stage of the proceedings is not an issue. The assessment and finding of credibility are issues for later in the trial after the defence's case has been closed. Be as it may, before I sum up the evidence presented by the State, first a brief history of the matter I am dealing with.

(11) Accused 1, 2, 3, 4, 5 and 7 in your plea explanation you raised issues such as that you are not nationals and that you were not citizens of Namibia. In that regard, I have to remind you, in case you forgot, that these issues were already adjudicated and decided upon by this court and the Supreme Court during your first special plea on jurisdiction. Both this court and the Supreme Court found that you are nationals

⁵ R v Shein 1925 AD 6; S v Heller and Another (2) 1964 (1) SA 524 (W) at 541; S v Mpetha & Others 1983 (4) SA 262; S v Lubaxa 2001 (2) SACR 703 (SCA); etc ...

⁶ S v Roux 2000 NR 209 (HC).

and citizens of the Republic of Namibia which is why this court refused to decline jurisdiction to try you on charges you are charged with. It follows, therefore, that the court is *functus officio* with regard those issues.

[12] In your appeal matter,⁷ in his judgment, Damaseb, DCJ said following:

[3] The prosecution of the appellants for, amongst other offences, high treason, is a sequel to the events which struck Namibia in 1999. A group of people who either belonged or were sympathetic to the Caprivi Liberation Army attacked several state installations in August 1999 at or around Katima Mulilo. The intention was clear: through a violent insurrection, to secede the then Caprivi Region (now Zambezi Region) from the rest of Namibia.

(4) Several of these people were arrested, detained and prosecuted. Some of them fled Namibia to Botswana in the wake of the secessionist insurrection. Whether or not they participated in the violent attacks is the subject of the prosecution now pending before the High Court. It is to escape that prosecution that they brought the special plea of the lack of jurisdiction which is the subject matter of the present appeal.

(5) All the appellants are Namibian citizens. They left Namibia and entered Botswana in the wake of the secessionist attacks in the Zambezi Region. By entering Botswana, the appellants placed themselves within the jurisdiction of Botswana - an independent sovereign nation not subject to the jurisdiction of the courts of Namibia.'

[13] Accused, from the citation above, it is clear that the highest authority of this country has pronounced itself and found you to be Namibian citizens, therefore, being Namibian citizens, you are also nationals of the Republic of Namibia. That being the case, all of you owe loyalty to the country. Similarly, it is also not in dispute apart from accused 7 and 8 who were deported from Botswana as illegal immigrants and received on 20 September 2002 in Namibia by the Police at the Ngoma Border Post, that accused 1, 2, 3, 4, 5, and 6, you were also deported from the same country on 12 December 2003 for violating conditions of your asylum granted to you by the United Nations High Commissioner for Refugees in Botswana⁸.

[14] On behalf of the State, Mr Campher called several witnesses who testified against you in the matter. The court also conducted two trials within-a-trial. The first concerned the admissibility of warning statements of some of you which I ruled inadmissible and refused to be admitted as evidence into record. Meanwhile, the

⁷ Case No: SA 37/2015; delivered on 22 August 2016.

⁸ Note Verbale No 36/03 EA 6/4XLIII (59) E6].

second trial within-a-trial was about confessions of accused 6 and 8 made before Ms Sakala, a then retired magistrate for the district of Katima Mulilo. The court ruled the confessions admissible and admitted them into record as evidence.

(15) In its summary of substantial facts, the State, amongst others, informed you that Mr Mishake Muyongo before the Independence of the country was the Vice President of the SWAPO Party. He thereafter left SWAPO and joined the DTA and was head of the Government of National Unity before Independence. He stood as the head of the DTA for President of Namibia. According to the summary of facts, it is history that SWAPO won the elections and Mishake Muyongo ended up as leader of the opposition in Parliament.

[16] The summary further indicates that during 1998 several political meetings were held in the then Caprivi of which one thereof was held at Makanga area where Mishake Mnyonggo was the main speaker. In that meeting, Mr Muyonggo informed the gathering that he left Parliament and intended seceding Caprivi from Namibia. Subsequently, clandestine meetings were held during which meetings the Caprivi Liberation Army (CLA) was created with the aim to provide soldiers to fight the Namibian security forces to secede the then Caprivi from Namibia. Further, during September to October 1998 persons were recruited to fight the so-called liberation of the Caprivi and Manuel Manepelo Makendano (accused 3) was one of the people recruiting people for the CLA.

[17] Furthermore, the summary indicates that during 2 October 1998, Osbert Likanyi and others were transported to a meeting from where they proceeded to Masida bush where numerous other people were found. John Samboma and accused 3 arrived later at the location and those present were told by John Samboma to proceed to Singalamwe area to cross into Angola to get fire-arms from UNITA for the intended fight to secede Caprivi from Namibia. Accused 3 assisted with the transportation of those present to Sesheke-Singalamwe area with John Samboma as commander and Progress Kenyoka Munuma (accused 1) his second in command while accused 2, 4, 5, and 7 also formed part of the group who crossed into Angola.

[18] At this stage, John Samboma had a fire-arm with him and Shine Samulandela Samulandela (accused 2) carried a G3 automatic fire-arm. They returned from Angola, the following day. John Samboma, John Mazila Tembwe accused 8 and another went back to Angola leaving accused 2 in command of the group which remained behind in Namibia. On their return from Angola to Namibia, they brought with them 81 mm mortar pipes with bombs, 60 mm pipes with bombs, five Ak 47 assault rifles 2 boxes of ammunition, two G3 rifles with 2 magazines, rifle grenades 2 bombs, one (chees) landline and two MG 26 grenades of which some of these weapons were hidden.

[19] As already pointed out, various witnesses were called by the State to testify in the matter. Mr Michael Maswabi Nuwe testified that he was from Sangwali village in the Zambezi Region and that he served in the then SWATF as a soldier for about seven years after which he worked, amongst others, as a security guard. He testified that on 3 October 1998 he was approached and invited to attend a DTA meeting at Katima Mulilo. Arriving at Katima Mulilo, he realized that there was no meeting. At about midnight, he and others were loaded into a vehicle and taken to a destination he did not know - probably in Angola. Coming back from there, they were taken to Sachona rebel base from where he and friends escaped.

[20] Mr Nuwe further testified that after a month or so, he and two of his friends left for Botswana following Mr Muyongo and other people who fled to Botswana. He further testified that in Botswana, they were taken to Dukwe refugee camp where Tadius Muzambayi and accused 1 acted as leaders of the group. Mr Nuwe knew accused 1 as one who assisted John Samboma; that accused 1 took care and supervision of firearms when Mr Samboma went to UNITA camp in Angola to look for other weapons. The witness identified accused 1 in court when asked to identify him. Contrary to what Ms Agenbach argues in her written heads of argument that the witness was assisted by Mr Campher and the court to point out accused 1 in the dock, Mr Nuwe identified accused 1 in court without assistance.

[21] Mr Nuwe testified that he knew accused 1 while in Namibia when accused 1 assisted John Samboma and in Dukwe when he was the second in charge. The court did not tell the witness who accused 1 was but merely indicated the reference to him as accused 1 while sitting in the dock. He identified Mr Munuma as accused 1

without any assistance whatsoever. Therefore, the argument by counsel that the witness identified accused 1 with the assistance from the court and the prosecutor is hollow and without substance.

[22] The witness was cross-examined by both Ms Agenbach and Mr Neves, extensively, but, the cross-examination of counsel centered around his testimony in previous trials before other judges and about statements he made before the Police. The cross-examination did not destroy his evidence in chief that I could come to the conclusion at this stage of the proceedings that there is no credible evidence before me or that Mr Nuwe lied under oath to reject his evidence. His version about the identification of accused 1 and co-accused who were part of the group which were at Sachona and Singalamwe-Sesheke, with whom John Samboma went into Zambia and Angola to look for weapons, is intact.

[23] Similarly, there is no reason to reject his evidence about the identity of people who escaped with him from Dukwe in Botswana to return to Namibia at this stage because it is the only version the court has. Those whom he said escaped with him from Dukwe and returned to Namibia did not only include accused 2, 4 and 5, but also other people which is, in my view, an indication that accused 2,4 and 5 were not wrongly and falsely implicated. The same applies to accused 6, 7 and others whom he joined with in the forests of Masokotwane.

[24] In his evidence, Mr Nuwe implicated Progress Kenyoka Munuma, Shine Samulandela Samulandela, Alex Sinjabata Mushakwa, Diamond Samunzala Salufu, Frederick Isaka Ntambilwa and Hoster Simasiku Ntombo. He knew these people well. Accused 1 was with him in SWATF and a vice chairperson in Dukwe refugee camp while accused 6 and 7 were from Lusu village in Zambezi Region. His evidence was corroborated by the testimony of Oliver Munyandi Mbulunga and the testimony of Alfred Kupulo Kupulo in certain respects. Both Mbulunga and Kupulo mentioned accused 1 and 2 in their testimony and stated that the reason why they crossed into Botswana is because of the killing of Victor Falali, who escaped with other people from the camp. However, it is not clear from their testimonies who were the three guys sent by Mr Samboma to follow and bring back Falali.

[25] Another witness who positively identified and implicated accused 1 is Walter Mwezi Sikochi. Mr Sikochi testified that he was convinced by others to flee to Botswana on 13 November 1998. He was taken to Dukwe refugee camp where he met up with others and where he was informed about the reason for going to Botswana. He testified that he was taken to Makanga village where he found many people of whom some were armed. He recognized accused 1 who was also armed. Ms Agenbach has attempted to persuade the court at this stage of the proceedings to discredit the witness. Counsel does not want to accept the evidence of the witness even though she does not have yet an alternative version from the accused persons to refute the evidence of the witness.

[26] The fact that the witness could not remember in this trial the person who wrote his name on the list but in the previous trial, said his name was written on the list by Classen Kawana, does not mean he has told the court a lie. This could be as a result of many reasons. One such reason could be that the witness might not have had sufficient time to refresh his memory before being called to testify. The same applies to the deviation from his previous testimonies. In fact, the witness testified that there is a marriage relations among his family and that of the accused, hence in cross examination Ms Agenbach put it to him that accused 1 would testify that he knows about the marriage between their relations but he personally never met the witness before.

[27] What is important in the witness testimony is the fact that he was one of the people who were instructed by Shadrack Chanda to go and attack and kill security guards in Katima Mulilo and were deployed at places like Mpacha base, Katounyana, Katima Mulilo Police Station, Wenela Border Post, Katima Mulilo Town Centre and other places. According to Mr Sikochi he and others were deployed at the Mpacha Base where Bennet Mutuso cut the fence, went in the Base when two of his co-attackers, namely Hansmeyer Tungulo and George Mutoiwa shot at the soldiers. The soldiers fired back injuring Tungulo on the palm of his right hand.

[28] Mr Oliver Munyandi Mbulunga also testified on behalf of the prosecution. He confirmed what Michael Nuwe said in his testimony about how they went to the forest of Singalamwe and Sesheke and crossed into Zambia and Angola to procure weapons. According to him, weapons were brought from Angola which they

temporarily hid in the bush and identified accused 1 whom he knew well from Lizauli as one who acted as the leader of the group. He further testified that his group moved from one camp in the bush to another. He testified that these weapons were sourced from UNITA for use to secede Caprivi from the rest of Namibia. When shown exhibit "O" (a photograph taken by witness Philander), the witness told the court that exhibit "O" depicted their temporary camp at Libu Libu. He testified that his group left the camp for Botswana after it was reported that Victor Falali, one of those who escaped from the camp, was killed.

[29] In Botswana, they were taken to Kasane and thereafter to Dukwe where he stayed for two years until he and others on 9 April 2001 when they escaped back to Namibia. He identified Frederick Isaka Ntambilwa (accused 6), Hoster Simasiku Ntombo (accused 7) and John Tembwe (accused 8) amongst those who escaped with him whom he pointed out in court during his testimony. He said at Masokotwane in Namibia he joined the group of Michael Nuwe, Osbert Likanyi, Shine Samulandela (accused 2), Diamond Salufu (accused 5), Rafael Matengu, Boster Samwele, Roseanne Shaweke and Ernst Meki.

[30] Mr Mbulunga further testified that they moved from Masokotwane bush to Zoti Island in the Malengalenga area after a certain Immanuel Makendano said that they did not have enough food to eat. It is here at Zoti Island where the witness and Michael Nuwe were arrested while Alex Mushakwa (accused 4) was away to his village and Shine Samulandela (accused 2) escaped by diving into the river. It is apparent from the evidence of Mr Mbulunga that all the eight accused were involved in one or the other way to secede or had assisted in furthering the idea of seceding the then Caprivi Region from the rest of Namibia. His evidence corroborates the evidence of Michael Nuwe in many material respects. They formed part of the people who went into hiding in the forests of Singalamwe and Sesheke, a section of whom crossed into Zambia and Angola to acquire weapons and ammunition to be used in the fight against the lawful government of the Republic of Namibia.

[31] Similarly, they camped in the bush in various areas of the then Caprivi Region preparing for the attack on public installations such as Mpacha, Katounyana Military Bases and more other public institutions. Their intention to attack these installations is very clear from their conduct from the day they have been recruited. They acted in

concert with the hostile intention to overthrow the legitimate government from the then Eastern Caprivi Zipfel. After obtaining the weapons and ammunition which were used to murder a certain Victor Falali, they fled Namibia to Botswana, a foreign country illegally at an undesignated port of entry. These testimonies are corroborated by the testimony of Richard Suva Mutumba.

[32] All of you took part in these activities as testified to by witnesses called by the prosecution. You had a duty to report to the authority the activities of what was going on, but failed to do so. Instead, you either assisted or took part yourselves in carrying out these covert and overt acts. It cannot be denied at this stage that it is common knowledge that certain public institutions such as the Mpacha Military Base, the Katima Mulilo Police Station and the NBC at the time SWABC, were attacked, people injured and killed in the attack. It is also common knowledge that there was a fight between members of the Namibian Defence Force and members of the Caprivi Liberation Army in which a few of the so-called CLA members were shot and killed on an Island where the Police found firearms, ammunition, spent cartridges, cooking pots, clothes, shoes, etc used by your colleagues which items were handed into court as exhibits.

[33] It was testified against you during the special plea on jurisdiction that you violated the conditions of your asylum by sneaking out from Dukwe Refugee Camp you were kept back to Namibia to commit crimes and returned to Botswana. That is the reason why some of you were deported back to Namibia. It is also common cause that some witnesses called by the State to testify, for convenience sake or reasons only known to them, refused to identify you, as their family members and husbands among your co-accused in the dock. Weak eye sights and long periods of time passed by without seeing one another were some of the reasons advanced for not recognizing you, their own kith and kin in the dock even though you were there.

[34] In any event, accused you were seen in Namibia and in Dukwe Botswana by several witnesses who testified and identified you positively in the dock during the trial. Mr Progress Munuma, apart from what other witnesses said about you, your own biological young brother put you on the spot. You even showed respect to him as his big brother by giving instruction to your counsel not to cross-examine him. That being the case, his evidence against you, is unchallenged. The same goes to

accused 3, Mr Manuel Manepelo Makendano. Your own father's brother, Mr Hamson Mutambo testified against you and his evidence if not rebutted, may become conclusive evidence against you and those whom he had implicated.

[35] The evidence of the witnesses aforesaid is supported by documentary evidence handed up in the proceedings as exhibits. That there was a conspiracy or common purpose to commit the offences, is clear from your conduct and from both direct and circumstantial evidence placed before court. Surely all of you agreed to fight the government whom you regarded as an intruder in your perceived country and as such acted in cohorts to drive this perceived enemy from there. Remember, in your special pleas, in particular the second special plea, you testified amongst others that the then Caprivi Zipfel, the region on the eastern side of the Kwando river, was never part or did not form part of the then German South West Africa which is today the Republic of Namibia. Since the start of the hearing of this trial, none of you denied being a member or a sympathizer of the Caprivi Liberation Army which attacked the various installations in and around Katima Mulilo with the intention to secede the said Eastern Caprivi Zipfel from the rest of Namibia through violent rebellion and insurrection.

[36] There is no evidence placed before court by the witnesses who testified that any of you were forced, coerced or cheated in taking part in the fight. The contrary is that all of you took part voluntarily, hence your refusal to participate in the voluntary repatriation from Botswana after the then Minister of Home Affairs and Immigration, the Honourable Jerry Ekandjo addressed you in Dukwe Refugee Camp. In your case, accused 6 and 8, you had the opportunity to tell Magistrate Sakala your relationship with the conduct of the other participants in the insurrection when she took down your confessions. You did not make use of this opportunity to distance yourself from these illegal and treasonous activities which were going on which is a sign of you conspiring with your co-accused to commit the crimes preferred against you by the State.

[37] Ms Agenbach, your counsel, accused 1, 2, 3, 4, 5 and 7, argued on your behalf that you were not willing participants to meetings which took place here in Namibia neither has it been proven by the State that you participated in meetings in the Dukwe Refugee Camp or that you conspired to commit the crimes preferred

against you. I disagree with this bare denial by counsel. Counsel did not specify in respect of which accused she represents or in relation to which offence the State has not managed to implicate you in the commission of the crime. The allegations detailed against you in count 1 (high treason) are very wide. The same applies to counts 2 and 3.

[38] It has not been denied or rebutted that weapons or arms and ammunition have been procured from Angola via Zambia and from Angola to Namibia during the period September 1998 and December 2003 which were supplied to members of the CLA after being imported into Namibia. The same goes to the allegations in counts 7 and 8. It is also common knowledge and is evidence before court that a group of people and some of the accused before court left Namibia and proceeded to Zambia, Angola and thereafter into Botswana and returned to Namibia from these foreign countries without permits issued to them by the Minister, which is a contravention of the provisions of the Immigration Control Act of 1993 and other Immigration Control laws forming part of the charges preferred against you. You were all aware of these incursions by your co-accused into the foreign countries aforesaid.

[39] However, I am not satisfied that the State did manage to establish a *prima facie* case in respect of the count of murder in respect of the death of Victor Falali. The State presented evidence to the effect that Victor Falali was killed and his body was found in his hut at his village, that, because of his death, you and many others for fear of being arrested by the Police, fled to Botswana. But the evidence fell short of establishing the cause of his death and the main perpetrator as being one of you. It would also seem from the evidence that Falali did not die as a result of shootings by means of fire-arms but rather from a rocket. That being the case, you have not been implicated with the murder charge and as such. I find you accused 1 and 2 not guilty and discharge you on this count at this stage of the proceedings.

[40] In conclusion, I reiterate that, the test of proof at this stage of the proceedings, is not proof beyond a reasonable doubt, but proof of whether in the opinion of the court there is sufficient evidence presented before court by the prosecution for the court to convict you of the charges charged with or any other charges. In my opinion, yes, there is sufficient evidence before me upon which I may convict you on the other charges in the indictment if not rebutted. Put differently, the State proved a *prima*

facie case against you on all the charges preferred against you except for the count of murder which I found accused 1 and 2 not guilty and discharged them.

[41] In the result and for the reasons stated above, the application for a discharge in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977, except in respect of the count of murder, is dismissed.

E P UNENGU
Acting Judge

APPEARANCES:

APPLICANT:

L Campher

Office of the Prosecutor-General, Windhoek

RESPONDENT 1-5 & 7:

E Agenbach

Instructed by Directorate of Legal Aid, Windhoek

RESPONDENT 6 & 8:

J Neves

Instructed by Directorate of Legal Aid, Windhoek