REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 03/2004

STATE

and

PROGRESS KENYOKA MUNUMA ACCUSED ONE
SHINE SAMULANDELA SAMULANDELA ACCUSED TWO
MANUEL MANEPELO MAKENDANO ACCUSED THREE
ALEX SINJABATA MUSHAKWA ACCUSED FOUR
FREDERICK ISAKA NTAMBILWA ACCUSED SIX
HOSTER SIMASIKU NTOMBO ACCUSED SEVEN
JOHN MAZILA TEMBWE ACCUSED EIGHT

Neutral citation: *S v Munuma* (CC 03/2004) [2022] NAHCMD 598 (14 October 2024)

Coram: Unengu, AJ
Heard: 19 - 20 August 2024
Delivered: 14 October 2024

Flynote: Criminal Procedure — Sentence — Accused persons charged and convicted of high treason and various offences under the Arms and Ammunition Act 7 of 1996, as amended, and under the Immigration Control Act 7 of 1993, as amended.

Accused are first offenders previously — Convicted and punished for high treason — Served six years of the sentence — Court taking into account mitigating factors of the accused — The circumstances under which the offences were committed — The period spent in detention waiting for the finalization of trial — The nature of the offences convicted of — The interests of society — Sentenced to varying sentences coupled with an order in terms of s 10 (8) read with ss 5 and 6 of the Arms and Ammunition Act 7 of 1996, as declaring the accused unfit to possess an arm for an undetermined period from date of sentencing.

Summary: The accused persons in the proceedings were indicted with various offences, including high treason, offences under the Arms and Ammunition Act 7 of 1996, as amended and offences under the Immigration Control Act 7 of 1993, as amended. They pleaded not guilty to all charges, but after a protracted trial, they were convicted of high treason and offences under the Arms and Ammunition Act 7 of 1993 and under the Immigration Control Act 7 of 1996.

ORDER

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1. Count 1: High treason

Accused 1, Leader: Sentenced to 26 years imprisonment, of which 10 years imprisonment is suspended for a period of 5 years, on condition that accused is not convicted of high treason, murder or attempted murder, committed during the period of suspension.

Accused 2, 4, 6, 7 and 8 Supporters / sympathisers: Each sentenced to 20 years imprisonment, of which 8 years imprisonment is suspended for a period of 5 years on condition that accused is not convicted of high treason, murder or attempted murder, committed during the period of suspension.

Accused 3: Supporter / sympathiser: Sentenced to ten 10 years imprisonment of which 5 years imprisonment is suspended for a period of 5 years on condition that accused is not convicted of high treason, murder or attempted murder, committed during the period of suspension.

2. Counts 4, 5 and 6 : Contravening section 29(1)(*a*) read with s 1 and 8(2)(*a*) of the Arm Ammunition Act 7 of 1996 – Unauthorized imp possession of any Cannon, Recoilless gun, Mortar, Roc Machine rifle and possession of Ammunition. Counts taken as one for purpose of sentencing:

   Accused 1, 2, 3,4,6,7 and 8: Each accused is each sentenced to 5 years imprisonment which sentence is ordered to run concurrently with the sentence imposed on count one.

3. Counts 7, 8, 9 and 10: Contravention of section 2(*c*) read with section 89 (1) (*a*) of the Departure from Namibia Act 34 of 1955 as amended by s 2 of the Departure from Namibia Regulation Act 4 of 1993, as amended and contravening section 6(1)) read with sections 1, 2 and 10 (3) of the Immigration Control Act 7 of 1993, as amended.

   All four counts are taken together as one for purpose of sentencing.

   Each accused (excluding accused 3 and 8 in respect of counts 7and 8) is sentenced to 1 year imprisonment, which sentence is wholly suspended for a period of 5 years on condition that accused is not convicted of contravening section 2(*c*) read with section 89 (1)(*a*) Act, Act 34 of 1955 as amended and contravening s 6(1) read with sections 1,2,and 10(3) of the Immigration Control Act 7 of 1993 as amended, committed during the period of suspension.

4. The court declines to make an order in terms of section 10(7) of the Arms and Ammunition Act 7 of 1996, but declares each accused unfit to possess an arm with

effect from the day of sentencing for an undetermined period in terms of section 10 (8) read with sections 5 and 6 of the Act.

JUDGMENT

UNENGU AJ:

[1] The accused persons in the matter were indicted before this court on charges of high treason, sedition, murder, public violence and various other offences of possession of arms and ammunition under the Arms and Ammunition Act 7 of 1996, offences under the Departure from Namibia Regulation Act 34 of 1955, as amended by s 2 of Act 4 of 1993, and offences under the Immigration Control Act 7 of 1993, as amended. On the 29 July 2024, after a full trial, I convicted the accused persons on all charges, except for the count of murder, which was disposed of during the application hearing in terms of s 174 of the Criminal Procedure Act 51 of 1977, as amended (the CPA), as well as counts 2 and 3, which I found to be a duplication of count 1, and postponed the matter to 19 August 2024 for pre - sentencing proceedings.

[2] Initially, the accused and others who are no longer part of these proceedings, appeared on similar charges before the late Manyarara AJ, who tried, convicted and sentenced them to varying periods of imprisonment. However, the accused persons appealed against both the conviction and sentence to the Supreme Court, which conviction and sentence were set aside and ordered the trial to start afresh in this Court, before another judge. In the result, the second trial commenced before me on 30 June 2014, after the accused persons served six years imprisonment of the sentence imposed on them by Manyarara AJ.

[3] During the second trial, Mr Wamambo acted on behalf of the prosecution, while Mr Tjombe instructed by legal aid, represented all the accused persons. When asked to plead to the charges against them, the accused persons raised a special plea in terms of the CPA, as amended, challenging the jurisdiction of this Court on the ground that they were kidnapped or abducted by the Namibian Security Forces assisted by the Botswana Police

from Botswana, where they were granted asylum and brought to Namibia illegally. After a full hearing of the special plea, I rejected and dismissed the special plea, but the accused persons appealed against the ruling to the Supreme Court, and the Supreme Court also dismissed the appeal, except for one, Mr Bolster Mubuyaeta Samwele, in respect of whom the Supreme Court ordered a permanent stay of prosecution against him, for offences preferred against him and others in the indictment[1].

[4] When the matter resumed for continuation of trial, Ms Agenbach and Mr Neves, instructed by the directorate of legal aid, represented the accused persons. Accused persons again raised another special plea, alleging that the former Eastern Caprivi Region, now Zambezi Region, was not part of Southwest Africa, presently known as Namibia. Once again, I dismissed the special plea and the petition lodged to the Chief Justice, for permission to appeal the ruling, was similarly rejected. Subsequent to that, the trial which took ten years to hear, started, with unnecessary delays, partly caused by the accused themselves, some as a result of the outbreak of the Covid 19 pandemic, which raged for almost three years, and the ill-health of one of the accused's legal representatives. During the trial, none of the accused were remorseful for the actions perpetrated against their fellow natives who lost their loved ones in that region, in the attack carried out on these innocent people. Nonetheless, the court convicted them of the charges brought against them by the state, but for counts 2 and 3 which the court found to be a duplication of count 1.

[5] Be that as it may, on 19 August 2024, Ms Agenbach and Mr Neves, made submissions on behalf of the accused in mitigation of their sentences, while Mr Campher argued in aggravation on behalf of the prosecution, without proving any record of previous convictions against the accused, which is why, for the purposes of sentencing, the court will treat the accused as first offenders.

[6] Generally, in the assessment of an appropriate sentence, regard must be had, *inter alia*, to the main purposes of punishment, which are deterrent, preventative, reformative

[1] *State v Munuma* (CC 03/2004) [2014] NAHCMD 363 (27 November 2014).

and retributive.[2] It is stated in *R v Swanepoel* [3], that deterrence has been described as the essential, all important, paramount and universally admitted objectives of punishment, while the other objectives are accessory. Meanwhile, in *R v Karg*[4] though, Schreiner JA observed as follows:

> 'While deterrent effect of punishment has remained as important as ever, the retributive aspect has tended to yield ground to the aspects of prevention and correction.'

[7] It follows therefore from the above citation that the three theories of punishment, namely deterrent, preventative and reformative, are the most important aids in the search for an appropriate punishment, because all find their justification in the future, in the good that will be produced as a result of the punishment.

[8] In *S v Nkosi*[5], Hefer JA replaced a sentence of 122 years and six months imprisonment, with a sentence of life imprisonment, and held that there exists no catalogue of sentences for crimes and that the court ought to take into account the facts and circumstances of each particular crime. I agree. In the instant matter, the facts thereof and the circumstances under which the crime of high treason was committed, appear more in the main judgment of the matter, which I need not repeat in detail here, but I will do so briefly later, when dealing with the aspect of seriousness of the crime.

[9] Similarly, in *S v Zinn* [6], it was stated amongst others that the sentencing court has to impose an appropriate sentence based on all the circumstances of the case. An appropriate sentence should not be too light nor too heavy, but should reflect severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender. In that context, the court should consider the three general principles consisting of the crime, the offender and interests of society, together with the aims of punishment already pointed out above. Ms Agenbach made reference to *S v Shangase*[7] in her written heads of argument, pointing out

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[2] *S v Whitehead* 1970 (4) SA 424 (A) at 436E—F; *S v Rabie* 1975 (4) SA. 855 (A) at 862.
[3] *R v Swanepoel* 1945 AD 444 at 455.
[4] *R v Karg* 1961 (1) SA 231 (A) at 236A.
[5] 1993 (3) SACR 709 (A).
[6] *S v Zinn* 1969 (2) SA 537 (A)
[7] *S v Shangase* 1972 (A) SA 410 ( ) at 422.

that the passing of punishment involves a judicial discretion, thus judicial officers are charged with an extremely difficult task of attempting to let punishment fit the crime, the criminal and serve the interests of society, in such a manner as to achieve an approximation to the desirable humanization of the deterrent, preventative, reformative and retributive objects of punishment.

[10] The sentiments expressed in para 8 above were also highlighted by Ackermann AJA in *S v Van Wyk*[8] as follows:

> 'As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonize and balance these principles and to apply them to the facts.'

[11] He stated further that:

> 'The duty to harmonize and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to empathize one at the expense of another'.

[12] As already pointed out, both Ms Agenbach and Mr Neves for the defence, addressed the court in mitigation of sentence on behalf of the accused persons, and placed their personal factors and circumstances before court. Ms Agenbach also prepared written heads of argument which she supplemented with oral submissions, but none of her clients chose to take the stand and mitigate under oath for fear of Mr Campher who would cross examine them, they said. Again the accused preferred not to mitigate under oath which in my view is a sign of lack of repentance and remorseful, of their actions leaving the court guessing as to how much weight should be attached to their statements.

[13] Ms Agenbach, in her written heads of argument, discussed the general principles applicable to sentencing, together with relevant case law in support of her submissions for mitigation. She emphasized the points that the crime of high treason the accused persons have been convicted of, is of political nature and urged the court to also have regard to the time spent by the accused persons in detention and that the accused persons effectively served part of their sentence imposed by Manyarara AJ. The advanced ages of the accused and the medical conditions which, according to her, could slightly be described as

[8] *S v Van Wyk* 1992 (1) SACR 147 (NMS) at 165.

dire, as well as the imprisonment sentence on the life expectancy of the accused persons. Consequently, she proposed for alternative sentences, not custodial sentence. In regard to personal factors and circumstances, she argued that some of the accused persons before court were kept in detention since 7 September 2002, while others, since December 2003.

[14] In respect of Progress Kenyoka Munuma, accused 1, she said that he was arrested on 16 May 2003, in Botswana and was kept in detention until his deportation to Namibia when he was tried for high treason, convicted and sentenced to 32 years imprisonment of which he served 6 years thereof. In his written statement handed up in court, on his behalf, Mr Munuma indicated that he suffers from illnesses of hypertension, reflux and gastrointestinal ulcer. Further that he is 64 years old, he has six children and twenty grandchildren and many of his family members had since passed away. He further stated that his children grew up in his absence, without his guidance and love. He wanted to give them love, however, they endured the emotional effect as a result of his absence. Some of the children did not finish Grade 12, due to financial constraints.

[15] The court will consider these personal mitigating factors and circumstances together with all other competing interests. The court is required to take into account, in determining an appropriate sentence, for example; the nature and the seriousness of the crime and other offences he has been convicted of; his participation and the role he played in the commission of the crime of high treason; the interests of society, which includes the consideration of the maintenance of peace and tranquillity of the Namibian society, in general and for those in the Zambezi region in particular. In any event, the fact that his children could not obtain Grade 12 because he was not there for them and grew up without his love and guidance as well as the emotional effects they had to endure due to his absence, are of Mr Munuma's own creation. It is himself to blame for the suffering of his children and grandchildren because he left them alone at home, in pursuit of other interests. Had he considered the wellbeing of his family and children more important, the suffering could have been prevented or avoided. He willingly decided to abandon them, leaving them behind alone, without care and protection, which in my view is a form of ill-treatment of children. However, I would disagree with the submission of counsel that imprisonment sentence in the present case would not be an appropriate punishment. In

my opinion, a prison sentence is the only appropriate punishment for the crime of high treason.

[16] Shine Samulandela Samulandela accused 2 was arrested on 16 May 2003, in Botswana and remained in detention until his deportation to Namibia in December 2003 .He was also tried together with his co-accused for high treason before Manyarara AJ. He was convicted and sentenced to 32 years imprisonment of which he served 6 years thereof. He is a first offender as the state did not prove any previous convictions against him. While in custody, Mr Samulandela obtained certificates in religious studies and pleaded, amongst others, for mercy and to be afforded a second chance in view of his progressive age, being 59 years old. He further indicated that his wife passed on whilst he was in custody, leaving behind his six children and thirteen grandchildren who were all born in his absence, without care as none of them works. Mr Samulandela also did not mitigate under oath, for fear of being cross examined by the prosecutor and also for the court to ask questions for purposes of clarification.

[17] Manuel Manepelo Makendano is the third accused in the matter who also opted not to mitigate under oath, but submitted a handwritten statement in which he asked the court to consider his advance age of 78 years; his family and the period he spent in custody awaiting his trial, including the 6 years imprisonment he served from the punishment imposed on him by Manyarara, AJ after he was convicted of the crime of high treason. In addition, he states in his statement that he is suffering from different illnesses, such as high blood pressure, glaucoma in his left eye, as the right eye is now blind and that his jaw broke when he was involved in an accident with police vehicle en route to the hospital for treatment, together with Isaka Frederick Ntambilwa, accused 4. Mr Makendano also submitted similar certificates obtained while in custody.

[18] On his part, Alex Sinjabata Mushakwa, accused 4, is 62 years old. In his statement submitted on his behalf by his counsel, he implored the court to consider the period he spent in custody, in Botswana and in Namibia awaiting his trial and that he has been diagnosed with tuberculosis (TB) in prison. Further, he also handed up, through Ms Agenbach, copies of certificates he obtained in religious studies while in custody. The

accused however, did not indicate whether he was married or single, nor did he indicate whether he has children, which is why it is very important to mitigate under oath, for the court to ask him about this facts. The same applies to the time that he spent in custody, which he said is 21 years, but failed to say whether he was also convicted and sentenced for high treason by Manyarara, AJ of which he would have served a portion thereof like his co-accused.

[19] It is even worst in the case of Hoster Simasiku Ntombo, accused 7, who elected to remain silent. Why this happened while represented by a legal practitioner in the person of Ms Agenbach, is beyond my comprehension. Only she who knows why she allowed this to happen. If at least his personal factors and circumstances were placed before court, for it to consider, but nothing, not even his age. Whether this was done deliberately and purposefully, I really do not know. Nevertheless, it is his right to remain silent, however, in my view, this is not the stage of the proceedings were an accused person would elect to remain silent.

[20] Meanwhile, Mr Neves counsel for accused 6 and 8 also did not advice his clients to mitigate under oath, but submitted from the bar that his clients are sacrificed by somebody who is sitting elsewhere enjoying the freedom of those countries. He said his clients were poor, uneducated and illiterate. He asked the court to blend their sentences with mercy because their wives might not accept them, while their children do not know them anymore. According to Mr Neves, sending his clients to prison for 20 years, would be tantamount to say that they would not be rehabilitated. In that regard, Mr Neves proceeded to place mitigating factors in respect of Frederick Isaka Ntambilwa on record and he said that Mr Ntambilwa did not attend school due to poverty; has six children and seven grandchildren; that he is 62 years old, a father who did not have the pleasure and opportunity to observe his children growing and exercising his duties as a father and grandfather.

[21] In respect of accused 8, Mr Neves argued that the mother and two brothers passed away in 2002, 2009 and 2011 respectively; that he has two grandchildren but the wife also passed away in 2003. According to him, accused 8 is 57 years old, went up to Grade 7 with nothing to rebuild his life again, because he lost everything he had before he went to

Botswana. But, he could ask the Khuta to allocate him a piece of land to plant something for himself to eat. In addition, Mr Neves requested the court to take into consideration the time his clients spent in custody awaiting trial. Accused 6 was arrested on 6 August 2002 while accused 8 was arrested on 20 September 2002, and they have been in custody since the dates of their arrests. He submitted that his clients did not participate in the actual planning of the crime of high treason, as well as in the attacks carried out by the other accused. He referred the court to the Supreme Court case of *Lifumbela v S*[9] where the Court divided the accused into groups of supporters and those who actively participated in the planning and the actual attacks.

[22] According to him, the court will fail in its duty and extension of forgiveness if a sentence of imprisonment is imposed and asked for a suspended sentence which will hang over the two accuseds' heads, reminding them that they have been offered a second opportunity and that, should they not comply with the conditions thereof, they will face the consequences. Further, Mr Neves argued that his clients showed remorse; that they were afraid of Mr Campher, to mitigate under oath and referred to them as pawns in the game of chess, used by the King for his benefit. I disagree. The so called King might have convinced them to do what they did, but they themselves willingly participated in and supported the secession attempt. Both accused 6 and 8 did not show remorse and did not assure the court under oath that they will not, in any circumstances, repeat what they did.

[23] Meanwhile, Mr Campher counsel for the prosecution argued that the accused did not show genuine remorse because they failed to tell the court that under oath instead indicated that they respect the judgment of the court. Respect the judgment of the court per se means nothing, he told the court. He submitted further that they preferred not to mitigate under oath because they are hiding something they do not want the court to hear and know about, in particular, the fact of what will happen after their release from the cells. On the argument submitted by Ms Agenbach on behalf of her clients, that high treason is a political crime, Mr Campher disagreed and referred to the judgment of *Lifumbela v S* (supra) where the following was said:

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[9] *Lifumbela v S* (SA 25/2016) [2021] NAS 56 (22 December 2021).

'(348) The trial judge considered whether the offence of which the appellants were convicted of are political or relative political offences, a matter raised by Ms Agenbach before us .The judge stated, following of Tebbut JP in the Botswana Court of Appeal in ' Republic of Namibia v Alfred and others' that high treason, committed in the case before us, is a purely political offence and that the murders and attempted murders are relative political offences. He however fell short of showing how this classification of the offence impact on the sentence. Ms Agenbach submitted that the political nature of the offences calls for a light or very light sentence. We do not agree. As we have already shown high treason is the most serious offence against the State and that killings and injury caused to innocent citizens in the course of committing high treason are all very serious offences. Deterrence must play a very significant part in sentencing convicted persons in this case.'

[24] Again, I agree with and support the submission by Mr Campher that high treason is not only a political offence, but also an offence against an independent state and its citizens. In this instance, on 2 August 1999 many people were killed and some sustained serious bodily injuries while damages were caused to public institutions. Ms Agenbach is aware of the definition of the common law crime of high treason which I do not need to repeat here in the judgement. More so, she is aware of what the Supreme Court ruled in *Lifumbela v S* with regard to whether or not the offence of high treason is a political offence, or is an offence against the State, committed with a hostile intent manifesting itself in a variety of forms. In this matter, some of the accused together with others, were tried, convicted and punished by this Court for this offence and other related offences, on the evidence that the accused with others, secretly held gatherings where plans were hatched to overthrow the legitimate government in the Zambezi Region through violence measures, while in the case of some, as sympathizers and supporters of the idea of seceding the Region from the rest of Namibia. They did all these because they were not prepared to engage in open conflict with the government[10]. It was said in *S v Lubusisi* supra that the appellants, nursed grievances and that they were motivated by their ideals for the future. The gravamen of the case against them is that they are in fact assassins who are not prepared to engage in an open conflict with the authorities, but who are prepared and would prefer to kill innocent persons by assassination and a design to achieve their

[10] *S v Lubusisi* 1982 (3) SA 113 (A) at 124 G

objective by assassination, a factor which in the discretion of the trial judge, may tip the scales against the consideration in mitigation in the case.

[25] Generally, I gather from the submissions presented by all counsel that while both counsel for the defence are pleading with the court to show mercy on the accused and consider their personal circumstances, the period spent in jail waiting for the trial and a portion of the imprisonment sentence served from the punishment meted on them by Manyarara, AJ, as mitigating factors in their favour. Mr Campher, on behalf of the prosecution though, is asking for a severe punishment for the accused. He submitted inter alia that, even though there is no direct evidence against the accused, except for accused 1, that they were actively involved in the attack of 2 August 1999, but that they were aware of what happened on that particular day and associated themselves with the actions of those who carried out the attack. He said that accused 3 provided assistance to those who came back from Botswana with fire-arms they used to kill innocent people in Namibia. He however, conceded and agreed with his two counterparts that the period spent in jail waiting for the trial to be finalized and the portion of the sentence served imposed on them after they were convicted and sentenced for the same offence of high treason in the first trial, be considered as mitigating factors.

[26] Mr Campher further expressed his displeasure and disappointment about the attitude displayed by the accused and counsel during the trial as they did not show a sign of reconciliation between them and the people of Namibia. According to him, the accused brought nothing before court as they preferred not to mitigate under oath to declare that they were sorrowful about what happened and that they will not repeat what they had done. The indication that they accepted the judgment of the court does not mean that they were sorrowful about their actions, and countered that bemoaning, the suffering of their children and families due to their absence from home, is a situation the accused themselves created. He said that the government offered them an opportunity to be repatriated back home if they so wished, but they opted to stay behind and to come back into the country at illegal points of entry to attack.

[27] In the end, Mr Campher urged the court to consider a longer period of direct imprisonment and referred the court to the judgment of *Lifumbela v S*[11], in which judgment the Supreme Court stated that the sentence imposed by the trial judge for high treason and each count of murder and attempted murder on the leaders, for example, was premised on a number of factors, all are legitimate in the circumstances which included the planning or premeditation that was involved ; the failure of the majority of the appellants to give evidence in mitigation, the fact that the convicted persons opted to use violence without at all trying to negotiate with government about the grievances they might have had, absence of contrition, the primacy in the circumstances of deterrence and retribution with personal circumstances receding to the background and the roles and moral blameworthiness of each of them. The quotation above is in point, and appropriately fit in with the circumstances of this matter. These accused persons did exactly what the appellants in the Lifumbela matter did, they also opted to use violence instead of attempting to negotiate with the government about their grievances. Again failed to mitigate under oath to confess contrition as already stated.

[28] Be that as it may, the court will consider the personal mitigating factors and circumstances of all the accused persons, the period of imprisonment served from the sentence imposed by Manyarara, AJ, the time spent in jail waiting for the trial to be concluded, even though they also contributed to the delay and the fact that they are first offenders. However, the court has a duty to also consider the seriousness of the crime of high treason and other offences they are convicted of and the interests of the society in order to pass a sentence which would fit the accused persons, as well as the crime, to be fair to society and be blended with measure of mercy. In the instance matter, the crime of high treason is without doubt a serious crime which calls for a severe punishment. The same applies to possession and import of arms and ammunition, in particular those arms of war which had potential destructive effects on Zambezi as a region, its people and their properties.

[29] The court will also take into account the interests of society, including interests to protect society against the accused persons and other potential offenders as well as the maintenance of peace and tranquillity in society, as pointed out above. In that regard, I

[11] Supra p175 para 345

abide by what the Supreme Court said in *Lifumbela v S*, quoting from the judgment of *S v Naidel*[12], where Damaseb, JP said that a judge may blend his or her sentence with mercy, however in certain instances there are cases that may well not be possible in view of the seriousness of the offence and the interests of society, which require deterrent treatment of the offender. In the end, therefore and following what has been stated above, the submissions in mitigation and aggravation of sentence, I have come to the conclusion that for purpose of sentencing in this matter, principles of both deterrence and retribution should take the centre stage. That is to deter the accused persons and those who are harbouring intentions to commit the same crimes at present and in future.

[30] With the view of the similarities of facts in the above Lifumbela matter, and the present matter in mind, the accused persons have been convicted of almost the same offences, committed under the same circumstances, at the same time together with those punished in the Lifumbela matter. For the sake of consistency in sentencing, sentences to be imposed in this matter should not be startlingly at variance with sentences imposed in that matter, but not losing sight of the principle of individualization of sentences and the personal mitigating factors of each accused person. The difference is, in this case, the accused persons were tried, convicted and sentenced to imprisonment, sentences of which the accused persons served six years thereof, before the convictions and sentences were set aside by the Supreme Court. The accused persons served those sentences, therefore, the period served has to be discounted from the sentences to be imposed afresh. However, Ms Agenbach's argument to backdate the sentences to the date the accused were sentenced by Manyarara, AJ, is wrong. The request will not be entertained as the composition of this court is different from the one presided on by the late Manyarara AJ. Also, the trial started de novo before me. Even if the second trial was conducted by the late Manyarara AJ, the convictions and sentences were set aside by the Supreme Court, these court in its capacity as a court of first instance, does not have the power to backdate its own sentence.

[31] Similarly, the period spent in detention by the accused waiting for the trial of the matter to be finalized will be considered. I must also add that the delays which occurred

[12] *S v Naidel* (CC 21/ 2006) NHC (21 November 2011) (unreported).

during the trial, were caused by various factors; some like the outbreak of the Covid 19 disease which lasted almost three years, was beyond the control of the court and not to forget the double barrel special pleas the accused persons launched against the jurisdiction of the Court to adjudicate on the matter, and the attack against the authority of the Prosecutor General to indict them for offences listed in the indictment alleging that the Zambezi Region previously known as Eastern Caprivi Zipfel was not part of Namibia then German Southwest Africa .

[32] In the result, taking into account all factors, the circumstances under which the offences were committed, the failure of the accused to show remorse and penitence under oath, the court is of the view that the sentence listed hereunder is appropriate in the circumstances of this matter, therefore, I will proceed accordingly:

1. Count 1: High treason

Accused 1, Leader:	Sentenced to 26 years imprisonment, of which 10 years imprisonment is suspended for a period of 5 years, on condition that accused is not convicted of high treason, murder or attempted murder, committed during the period of suspension.
Accused 2, 4, 6, 7 and 8	Supporters / sympathisers: Each sentenced to 20 years imprisonment, of which 8 years imprisonment is suspended for a period of 5 years on condition that accused is not convicted of high treason, murder or attempted murder, committed during the period of suspension.
Accused 3:	Supporter / sympathiser: Sentenced to ten 10 years imprisonment of which 5 years imprisonment is suspended for a period of 5 years on condition that accused is not convicted of high treason, murder or attempted murder, committed during the period of suspension.

2. Counts 4, 5 and 6 : Contravening section 29(1)(*a*) read with s 1 and 8(2)(*a*) of the Arm Ammunition Act 7 of 1996 – Unauthorized imp possession of any Cannon, Recoilless gun, Mortar, Roc Machine rifle and possession of Ammunition. Counts taken as one for purpose of sentencing:

   Accused 1, 2, 3,4,6,7 and 8: Each accused is sentenced to 5 years imprisonment which sentence is ordered to run concurrently with the sentence imposed on count one.

3. Counts 7, 8, 9 and 10: Contravention of section 2(*c*) read with section 89 (1) (*a*) of the Departure from Namibia Act 34 of 1955 as amended by s 2 of the Departure from Namibia Regulation Act 4 of 1993, as amended and contravening section 6(1)) read with sections 1, 2 and 10 (3) of the Immigration Control Act 7 of 1993, as amended.

   All four counts are taken together as one for purpose of sentencing.

   Each accused (excluding accused 3 and 8 in respect of counts 7and 8) is sentenced to 1 year imprisonment, which sentence is wholly suspended for a period of 5 years on condition that accused is not convicted of contravening section 2(*c*) read with section 89 (1)(*a*) Act, Act 34 of 1955 as amended and contravening s 6(1) read with sections 1,2,and 10(3) of the Immigration Control Act 7 of 1993 as amended, committed during the period of suspension.

4. The court declines to make an order in terms of section 10(7) of the Arms and Ammunition Act 7 of 1996, but declares each accused unfit to possess an arm with effect from the day of sentencing for an undetermined period in terms of section 10 (8) read with sections 5 and 6 of the Act.

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E P UNENGU

Acting Judge

APPEARANCES:

STATE:	L Campher Of Office of the Prosecutor General, Windhoek
ACCUSED 1- 4 & 7	I Agenbach Of Agenbach Legal Practitioners, Windhoek
ACCUSED 6 & 8	G Neves Of Neves Legal Practitioners, Windhoek