



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC13/2010

In the matter between:

THE STATE

and

ALBIUS MOTTO LISELI

ACCUSED

Neutral Citation: *S v Liseli* (CC13/2010) [2017] NAHCNLD 11 (20 February 2017)

Coram: TOMMASI J

Heard: 1 June 2016

Delivered: 20 February 2017

Flynote: Criminal Law — High Treason — So called join-in cases — liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind — An overt act may also be in the form of an omission — Court to consider whether State herein proved overt act and hostile intent beyond reasonable doubt.

Criminal Procedure — 204 — Caution and discharge of witnesses' — Court of the opinion that the witnesses answered questions honestly and frankly.

Summary: The accused was charged with high treason. He returned from Zambia during 2009 and handed himself over to the Police. The State led evidence that the accused was at Sachona Base where the persons present were trained to operate arms and ammunition which were illegally brought into Namibia from Angola to enable them to secede Caprivi from the rest of Namibia by violent means. The State further led evidence that he accused and a group of likeminded people moved from Sachona to Kandiyana and Lyibulyibu to avoid detection by the security forces of Namibia. The military training continued at Lyibulyibu until Falali, one of the persons who escaped from Lyibulyibu was shot. The accused and 91 others crossed into Botswana and were hosted at Dukwe Refugee Camp. It was common cause that a group escaped from Dukwe and that an unlawful armed attack was orchestrated on various locations within the Caprivi region with the aim of violently seceding the Caprivi from the rest of Namibia. The State further led evidence that the accused joined others hereafter and during June – July 2001 who still had the intention to continue fighting for Caprivi to be seceded from the rest of Namibia. He was thereafter, whilst he was hiding at his home village with at least one other person with whom he had returned from Dukwe, requested in writing to join the others to fight. He, without reporting the contents of the missive he received to the Namibian Police or security forces, fled to Zambia. The court rejected his version that he joined the group of 92 on 24 October 1998 at Lyibulyibu as a fabrication. The court held that the State had proven beyond reasonable doubt that the accused actively associated and participated in a common criminal design with the requisite hostile intent; and further more committed an overt act with the necessary hostile intent when he failed to report that there were others who continued with treasonable conduct. The accused was convicted of High Treason.

ORDER

1. The accused is convicted of the offence of High Treason;
2. The witnesses, Oliver Chunga, Witness Y, Michael Nuwe, Oliver Mbulunga and Witness X be discharged from prosecution.

JUDGEMENT

TOMMASI J

[1] The accused was charged with High treason. He pleaded not guilty and gave no plea explanation.

[2] The State's summary of substantial facts includes a brief historical background and synopsis of the events which forms the basis of the charge preferred against the accused. The following salient parts of the summary serve as an introduction:

"Namibia became an independent democratic State during the elections overseen by the United Nations on 21 March 1990. They (Mishak Myongo and his followers) began holding meetings in the Caprivi region where a breakaway from the DTA was propagated as well as the idea of separating the Caprivi Region that is an integral part of Namibia, from the rest of Namibia by violent means.

People in the Caprivi Region were encouraged to flee the Caprivi region to Botswana as part of the attempt to have the Caprivi region separated from the Republic of Namibia. Various meetings were held throughout the Caprivi by a number of people including the accused where the secession was planned and persons influenced and encouraged to join the Caprivi Liberation Army (CLA) with the aim to secede the Caprivi Region with violence from the rest of Namibia.

During 1998 at Kalumba and or Sachona and/or Libulibu, the accused was taught to drill, use firearms and to fight against the Namibian security forces. In one or more of these camps the accused was a section leader.

During 1998 after the death of Mr Victor Falali, a rebel soldier who decided to leave the CLA the remainder of the rebel soldiers of the CLA including the accused left Namibia and crossed the border to Botswana still armed with firearms and/or ammunition which they were not legally entitled to possess. The accused left for Botswana with the aim of seceding Caprivi from Namibia. The accused and the rest of the group handed themselves over to the Botswana authorities. These rebel soldiers of the CLA including the accused were mostly kept at Dukwe refugee camp in Botswana. Some of the CLA rebel soldiers were legally repatriated back to Namibia but some escaped from Dukwe refugee camp to establish rebel bases with the intention to mobilize to overthrow the Government of Namibia in the Caprivi region.

During August 1999 the rebels who were to attack the Namibian Government in the Caprivi region came together at Makanga rebel base. These rebels were in groups and they attacked the Mpacha Base, Katonian Special Field Force Base, Katima Mulilo Police Station, Wenela Border Post, Katima Mulilo Town Center, the NBC and a private residence with a variety of weapons.

During 2001 the accused and others escaped from Dukwe camp and returned to Namibia with the aim to be deployed throughout the Caprivi region. This was done to prolong the existence of the CLA and to continue with its declared purpose namely to secede the Caprivi Region from Namibia in the pursuance of this aim. The accused was part of the group of CLA rebels deployed at Masokotwane and later at Liondokapani Area and later at the Masinda Bush where the group and the accused was provided with uniforms and other necessities. This group also possessed an AK47 assault rifle. The group later during 2001 divided into five groups and the accused was part of the group which was deployed at Kalumba area. When some of these co-rebels were arrested by the Namibian Police, the accused fled Namibia to Zambia. During January 2009 the accused returned to Namibia and voluntarily handed himself over to the Namibian Police.

The accused was born in Namibia and owes his allegiance to the Republic of Namibia. He at all relevant times during the period stated in the indictment shared a common purpose with and associated himself with other rebels and members of the CLA to violently overthrow the Democratically Elected Government of Namibia in the Caprivi Region which is an integral part of Namibia.'

[3] It was common cause that the Republic of Namibia is a sovereign state and that accused owed his allegiance to the Republic of Namibia. What was disputed was whether he had been present at places alleged by the State, whether he had committed an overt act and whether he had the requisite hostile intent.

Meetings and discussions on Secession of Caprivi (2 – 8 October 1998)

[4] The state called Micheal Nuwe, a witness who the court cautioned in terms of Section 204 of the Criminal Procedure Act. He testified that on 3 October 1998 he was picked up by Cledius Puteho at his village in Linyati Constituency to go to a meeting of DTA in Katima Mulilo. This meeting did not take place and they drove to a place in between Makanga and Masida. Here they were informed of the mission i.e that they must fight in order to secede Caprivi from the rest of Namibia. He did not testify that the accused was present at Masida where they were informed of the aim to secede the Caprivi.

[5] Another State witness, Oliver Mbulunga testified that on 3 October 1998 he was picked up at his village by Osbert Likanyi who told him that a DTA meeting would be held in Katima Mulilo. They drove to Masida where they joined others who were already there. They were informed that the meeting will take place there and not in Katima Mulilo. The following day Johnny Samboma informed them to go into Angola and collect fire-arms which were to be used to secede Caprivi from the rest of Namibia. The accused was not present at this time and neither did he testify that the accused was present when they went to Angola to secure Arms and Ammunition.

[6] Micheal Nuwe testified that he was also part of the group which went to Angola to secure weapons for the purpose of secession. He testified that they collected more than 260 bombs, 5 AK47, 2 boxes of ammunition, three rifle grenades, an M26 hand grenade and a chisel mine. They left 4 bombs at Walubita's village in Namibia. Oliver Mbulunga described the weapons in much the same way as Micheal Nuwe but testified that they dug a hole and buried the weapons at the village of Conrad Walubita. He also did not implicate the accused in this venture.

Sachona, Kandiyana and Lyibulyibu (8 – 27 October 1998)

[7] Michael Nuwe testified that they set up a base at Sachona village where the people who were present were taught how to shoot and clean weapons. He spent 6 days with the others and escaped from the camp with 4 others. He made no mention whether the accused was present at this juncture

[8] The only two State witnesses who gave testimony of the accused's presence at Sachona were Oliver Mbulunga and Witness X, a protected witness (hereinafter referred to as Witness X).

[9] Oliver Mbulunga testified that they made Sachona their temporary base. The weapons were brought there and they stayed there for almost a week. The leaders, Johnny Samboma and Progress Munuma, were teaching them how to operate the rifles. He testified that he saw accused for the first time at Sachona. He did not know what his name was and confirmed that he did not speak to him. At Sachona they were learning how to operate the weapons they brought from Angola.

[10] Mbulunga testified that they received a message that the security forces were in the area and they moved from Sachona to Kandiyana where they stayed for a period of about 4 days. The accused was also at this place.

[11] According to Mbulunga they were taken by Chief Mamili to Lyibulyibu and it was here where he got to know the accused well. He indicated that it was at this juncture where he was a section leader and the accused was his second in command. He however during cross-examination indicated that he wanted to make a correction i.e that the accused only became his deputy in Botswana. The accused according to this witness was present at all these places. Here at Lyibulyibu they continued learning how to operate the weapons.

[12] He further testified that, whilst at Lyibulyubu, the camp was stampeded by buffaloes one evening and a lot of the people scattered. They discovered that some escaped and others were sent after them. Those who were sent to follow the others returned the next morning, 27 October 1998 and informed their leader that they had shot one Falali. They were instructed to gather their belongings and to cross the border and go into Botswana. They (a group of 92 persons) gathered the weapons and their

belongings and crossed into Botswana. They reported their presence to the Botswana Defence Force who arrested them and confiscated their weapons. They eventually ended up at Dukwe Refugee Camp in Botswana. According to this witness, the accused was amongst those 92 persons who crossed into Botswana and who ended up in the refugee camp in Botswana. This witness informed the court that despite the death of Falali, the aim of seceding Caprivi by taking up arms, was not abandoned.

[13] Witness, X testified that during 1998 his uncle persuaded him to join the Caprivi Liberation Army whose aim was to secede Caprivi from the rest of Namibia. They were promised that the young ones will not fight but will be able to further their education. He together with two of his best friends on 6 October 1998 joined others. They boarded vehicles and as they passed Liselo School they picked up 8 men. They proceeded to Sabinda and met up with 22 men. They drove to Kalumba and stayed there in the bush for 2-3 days. They thereafter drove to Sachona.

[14] At Sachona they found 64 strong men already there and they had fire-arms. He mentioned a few names inter alia Albius Liseli Motto. He identified the accused in the dock. He explained that he lives in the same neighborhood as the accused and he knows his children well. They are his best friends and they even attend the same school

[15] They were divided into 4 groups and were given chores like drawing water, cooking and watching the camps. In his group the accused was a leader together with Taddeus Mazamai and Albert Mangilazi. They were informed of the purpose of their training i.e that they are taking up arms to fight against the Government (Government of the Republic of Namibia) in order to secede the Caprivi from the rest of Namibia.

[16] Like, Oliver Mubulunga, he testified that they moved from Sachona to Kandiyana. According to him some of the group moved during the night and they later followed. They did not spend much time here. They were taken to Lyibulyibu by Chief Mamili. To Lyibulyibu where they continued training such as marching and how to handle fire-arms.

[17] The accused denied that he was at Sachona and Lyibulyibu. He testified that he has 4 children who were born in Zambia during the period of 2001 – 2009. He testified that the children who were born in Namibia died and that he does not have children

living in Namibia. According to him his children were deceased and it was not possible for the Witness X to have known him through his children.

[18] The accused testified that he was not amongst the group of 92 who crossed into Botswana. According to him Witness X confused him with his younger brother, Visco Liseli, who was amongst the 92 who crossed into Botswana.

[19] He testified that he, on 25 October left his village to buy relish at a certain shop called "Deli" and he had started drinking with his friend. A gentleman by the name of Como joined him and bought him beers. He then enticed him to go to Botswana to receive training. He was overwhelmed and agreed to go to Botswana partly because the idea appealed to him and partly because he was drunk.

[20] The accused and his friend, Base Feliso, drove with Como and one other person whom he did not know, up to Linyanti. Here Como informed them that his colleague will take them to the place where they would receive training. They walked from this point onwards. They crossed the river known as Sampies at Linyanti. They overnighted under a tree until the next morning 26 October 1998.

[21] They continued walking until they met up with others persons who were also just sitting there. The person who led them, informed him that this was the place where he was supposed to take them to. The accused became upset and he asked him what these people were doing there. It was at this point that he was informed that they are people who want to secede Caprivi from the rest of Namibia. The unknown person pointed out to him that the persons are being trained with arms. He wanted to leave but was advised not to leave as the people there will do something to him. He was annoyed at being deceived. He later learned that this place was Lyibulyibu. He suggested that this is probably why Mbulunga said he was there and that he was part of the 92 as he might have seen him there that day.

[22] The next morning, 27 October 1998, he was informed that some of the people tried to escape and others were sent to follow them. When those men returned around 07H00 they informed them that they fired shots at Linyanti and the security forces would soon be in the area. They crossed into Botswana and they were loaded by the Police

and taken to Kasani. The accused admitted during cross-examination that he was amongst the group of 92 men that crossed the Namibian border into Botswana on 26 October 1998.

Botswana & Dukwe Refugee Camp (27 October – April 2001)

[23] Oliver Chunga, a witness cautioned in terms of s 204 of the Criminal Procedure Act, testified that he went to Botswana during January 1999 to further his education. He left Namibia without a passport and in the company of Jameson Mushe and Wamunima Witness Y (hereinafter referred to as Witness Y). He ended up at Dukwe refugee camp in Botswana. He returned to Namibia during June 1999 as he successfully applied for voluntary repatriation. He testified that he met the accused only once during November 2001 and the court must infer that he did not see the accused at Dukwe. He testified that political activity at Dukwe was not allowed.

[24] Witness Y was also cautioned in terms of s 204 of the Criminal Procedure Act prior to his testimony. The State applied in terms of s153 of the Criminal Procedure Act that the court direct that no information relating to his testimony be published. This application was opposed by Mr Hengari. I ordered that the identity of this witness should not be revealed/published. I undertook to give reasons for my ruling in this judgment.

[25] The witness testified he feared that his life may come to an end if his name is published in the media. According to him there is an understanding when he explains his involvement with the police officers to the 'people from the village' but the moment they read about it in the newspapers there will be no understanding by the family members of the accused persons. Although he testified already in Windhoek he was similarly protected. I have considered the nature of the charges, the media wide coverage this case enjoys; and the fact that this witness has to return to a community where families, not only of the accused, but also the other accused in the main trial, live. This persuaded me that it would be in the interest of the administration of justice to grant the State's application and to afford the witness the protection he requires to testify before this court.

[26] Witness X testified that he was informed of opportunities for employment in Botswana. Those who were illiterate were promised employment in the construction and carpentry industry. He left for Botswana with Jomo Mushe and Oliver Chunga. When they crossed the border they informed the authorities that they are going to Dukwe. At Dukwe he discovered they were lied to as they did not find employment. He was separated from his companions and placed in a group where the leader was Micheal Nuwe. He returned to Namibia having successfully applied for voluntary repatriation.

[27] Michael Nuwe, after he escaped from Sachona went to his village. He testified that, during (7) December 1998, he fled to Botswana with his two brothers. They were not forced to go to Botswana. They wanted to go and stay there as others were already there. They were picked up by the police in Botswana and he ended up at Dukwe. They were 50 people who were taken to Dukwe. His reason for going to Dukwe was not clearly stated until pressed during cross-examination. This is when he frankly admitted that he wanted to join others who wanted to pursue the cessation of Caprivi from the rest of Namibia.

[28] He testified that at Dukwe supervisors were appointed to deal with problems of their group. They were however not allowed to have political discussions or meetings. He later stated that the Caprivi Liberation Army was established at Dukwe. He was however unable to say whether the accused had any leadership role.

[29] Oliver Mbulunga testified that once they arrived at Dukwe Refugee Camp a committee was appointed to deal with complaints and grievances. The leader was Muzamayi seconded by Progress Munuma and the secretary was Charles Mushakwa. Religious studies were handled by Matthews Mushandikwe. They regrouped in sections in order to ensure that nobody escaped. He was again grouped with the accused in group 1. They were 52 in that group. He was the leader of the group and accused was the 2nd in command. They only concerned themselves with issues such as clothing, foodstuffs, etc.

[30] Witness X testified that their leader, Muyongo, called a meeting and appointed the group leaders. Taddeus Muzamayi was the overall leader, Progress Munuma

Postrik Mwinga, Mushadikwe were the names he could recall. They were warned by the people in charge of Dukwe that there were no political activities allowed at the camp. Sometimes when they were having their meetings and discussions the people in charge of the camp would stop them as political activities were not allowed. They would discuss that they should escape in small groups so as not to raise suspicion and return to Namibia. According to him the accused was part of these clandestine meetings. He also maintained that the accused remained a section leader reporting to Taddeus Muzamai and Klassen Kawana at Dukwe as well.

[31] He returned to Namibia on 24 June 1999 after he successfully applied for voluntary repatriation. He completed his education and during 2000 he was placed in protective custody and he admitted that he receives financial assistance for subsistence as a protected witness.

[32] The accused acknowledged that he met witness X at Dukwe. The accused also admitted that he was in the group of Oliver Mbulunga. He however denied being second in command and averred that one Moses Kayoka was second in command in the group of Oliver Mbulunga. He further denied being part of any political discussion in Dukwe as this was not allowed.

Attack on Katima Mulilo and other locations in Caprivi Region (2 August 1999)

[33] It was not disputed that some of the persons who crossed the Namibian border on 27 October 1998 and who were accommodated at Dukwe Refugee Camp escaped and returned to Namibia to continue with their aim of seceding Caprivi from the rest of Namibia by violent means and that others remained at Dukwe. It was further not disputed that the accused was at Dukwe Refugee camp on 2 August 1999 when Katounyana Speical Field Force Base, Katima Mulilo police station, Wenela border post, Katima Mulilo town center, the Namibian Broadcasting Corporation in Katima Mulilo were attacked with motars and fire-arms. It was furthermore not disputed that the attack which was launched on these targets constituted high treason.

Voluntary Repatriation of the accused – The year 2000

[34] The accused testified that he did not apply for repatriation during June 1999 following the visit by the then Minister of Home Affairs, He was cautious not to fall for the trickery once again. He applied for voluntary repatriation during the year 2000 but he was advised not to pursue his application. He was also discouraged by rumors that people who returned were not treated well. He left Dukwe on 17 March 2001.

Makwatale (17 January or 17 March – 26 November 2001)

[35] Michael Nuwe testified that he returned to Namibia during April 2001 he escaped from Botswana and returned to Namibia. The aim was to fight the Wambos in order to secede Caprivi from the rest of Namibia. He testified that he was given instructions to return to Namibia and to pursue the aim of secession.

[36] He was in the company of others and they did not do anything of “vital importance”. Only two persons were armed with AK47 rifles which they met at a place called Masokowatani. According to him they were about 14 people. They were given food by the Induna. He mentioned that he was in the company of Ernest Meki, Keshasi Pelkelo, Hoster Ntombo, Fredrick Ntamibla, Oliver Mbulunga and Alex Siswani whom they found at Masekotwani. Ernest Meki and Hosbet Likanyi were the only ones who were armed. According to him all of them discussed how they were to continue the fight and they all had common goal. He however conceded that they lacked any concrete plan as they did not have enough weapons.

[37] After some time they all shifted to Kapani to Lyondo with the intention of getting food from the villages of Hosbert Likanya Oliver and Shine Samulandela. Here they lived from crops. They were told to shift as the police had become aware of their presence.

[38] They moved to Masida and it was during June 2001. From here they walked to a place called Makwatale. Here they were provided with food by Brenden Muyanda. Brenden arrived there one evening (date not specified) with the accused and Albert Mangilazi. According to him the accused came from Masida and was just carrying his clothes when he arrived there. They stayed there until 4 July 2001 as Brenden stopped

providing them with food. He and 3 others separated from the group of 14 and they went to Zoti where he was arrested on 17 July 2001

[39] Oliver Mbulunga testified that during April he noticed that the accused escaped. He escaped on 9 April 2001. He was not alone. He came with some of his friends namely Osbet Likanyi, Rafael Matengu, Alex Mafwila Frederick Tambilwa, John Mtembwe and Ernest Meki Casius Pereko. Osbet Likanyi was the leader and Ernest Meki was the second in command. They were offloaded at Masokotwane. Johnny Ntembwe knew the place well. They met with an Induna by the name of Hatema. They requested him to call Immanuel Makendano who was to supply them with weapons. Before he came they were joined by others namely Rosco Shweke, Bosta Samwel Rafael Matengu Micheal Nuwe, Diamond Salufu, Shine Samulandela and Alex Mushakwa.

[40] They left for Lyibulyibu and from there proceeded to Liyondo where they camped. They stayed at Liyondo for almost a month. Osbet went to Masida to liase Immanuel Mekendano to arrange a place to stay. They were not doing anything there but merely sitting under a tree. There were thereafter taken to a place called Mwakatale. This was during June or July 2001.

[41] It was during this period that they were joined by the accused and Albert Mangilazi. Their clothes were in rags so they asked Immanuel to get clothes for them. Makendano brought them uniform, blankets as well as a medical bag with medicines. They did not wear the clothes he brought because it was uniforms. Their food supply became a problem. They had a discussion with Immanuel for them to be allowed to go to their own places. He agreed that he was no longer able to support them as he also has school going children. They separated from the group and went close to their homes. He went with Micheal Nuwe Shile Samulandela and Alex to Zyoti. Alex returned to his village and they were just 3 left. He was arrested with Micheal Nuwe. Shine went into the river and he did not see him again.

[42] According to the accused he escaped from Dukwe on 17 March 2001. He admitted that he came from Dukwe with Albert Mangilazi and Makawi George.

[43] During the pointing out he informed Chief Inspector Burger that: he escaped from Dukwe on 17 January 2001 and he traveled by means of private transport to Mabele passed through Liambezi to Masokotwane; from Masokotwane he moved to Kalumba area to his village to meet his parents; he found that his father passed away; he couldn't get a meeting with the Kuta via the mother; and the presence of the police and the fear to be arrested moved him to go to Zambia on 20 January 1999. (This was clearly an error).

[44] He testified that the police's presence around his home village intensified during June, July 2001 and his mother encouraged him to leave his village since she feared that someone will see him and report him to the authorities. He first testified that he left 26 October 2001 to Zambia but later corrected it to be 26 November 2001. He denied that he met two witnesses or any other persons at Mwakatale.

Kalumba Village (November 2001)

[45] Oliver Chunga testified that he returned to Namibia during June 1999 as he had successfully applied for voluntary repatriation. During November 2001, although he was not sure of the date, he was directed to go and see the parents of the accused. He found accused there in the company of three other men whom he did not know. He later indicated that he came to deliver a letter.

[46] He found the accused at a village in his family's ploughing fields. The accused informed him that he needed foodstuffs. This was the only time he saw the accused and he was not able to positively identify the accused although he remembered that he spoke to Albius Motto Liseli. He testified that when he returned for the second time he attended some ritual but testified that the accused did not form part of the ritual.

[47] Witness Y testified that after he returned to his village he was woken up during the night and summoned to the house of one Jomo Mushe. He did not indicate the date but it occurred after the armed attack on the Caprivi region on 2 August 1999. There he met with some people who had water containers. He recalled one of the persons as Johnny Tembwe. They were reluctant to tell them where they were staying. He inferred that they did not trust those who returned legally to Namibia.

[48] After three months Oliver Chunga woke him up one evening and insisted that they had to accompany the people somewhere. He declined and Oliver Chunga left. Later that same evening John Ntembwe instructed him to accompany them. After a discussion with Oliver Chunga he learnt that they were going to Kalumba and that he should go if he did not want something bad to happen to him.

[49] They (approximately 18 people) walked throughout the night. They left the people outside the village and they proceeded into the courtyard. Oliver spoke to some of the ladies. He wanted to return to his village but Oliver informed him that they should wait for a vehicle. As they were seated a small child summoned Oliver Chunga. When Oliver returned he informed him that Musipi was outside the village. He later learnt that the vehicle had broken down and they had to overnight there. At 4H00 in the morning they were woken and they were instructed to perform a ritual.

[50] He found the accused at this village and he was not able to identify him clearly when they arrived but was able to identify him at the ceremony. He recognize him as he had seen in Dukwe but he was unable to say with accuracy how many times he had seen the accused. He later mentioned that he had seen him once at a soccer match in Dukwe.

[51] The accused recalled the visit of Oliver Chunga on 2 November 2001. He confirmed during cross-examination that he was with Albert Mangelazi at the time. According to him he came with Albert from Botswana. He testified as follow: "I highlighted to him the problem that I had since I did not report myself to the authorities so I informed him everything as there were a lot of movements by the security forces." The accused testified further that Olivier Chunga brought a letter from Oliver Mubulunga & Others. He testified that: "...the letter which he brought on the 2nd of November the information which was contained there was that there were others who were in the bush who wanted to come and fight so they can secede Caprivi. So I was informed that I must go there and join them." After he learned of the contents of the letter, he left and went to Zambia. By the time of the second visit the accused had already left for Zambia and did not meet with Chunga again.

[52] The accused called Albert Mangilazi to testify in his defense. This witness denies that he knew the accused or that he had been with him at Kalumba. Taddeus Ndala, a witness called by the defence equally testified that he did not know the accused. The accused called Willson Mutumushwana who testified that he applied for voluntary repatriation but was arrested on his return, tried and acquitted of all charges._

General

[53] The Defense called Inspector Simasiku to introduce into evidence a notebook found in possession of the late Shadreck Chaidon. This document appears to be a journal of the planning of the attack on the various sites in the Caprivi Region prior to August 1999. The State objected for this document to be handed into evidence. The certified copy of this document and the translation of the parts which is not in the official language were not handed into evidence because of an administrative omission.

[54] The author of this journal is deceased and as such this document has no real evidential value. There was no evidence adduced by the State that the accused had been amongst the people who perpetrated the attacks on the various institutions on 2 August 1999 nor has there been any evidence adduced by the State that the accused had any part in the planning of this event.

[55] The confession, taken down by learned magistrate, was ruled by the court to be admissible. Counsel for the accused submitted that the court ought to exclude it from the evidence as inadmissible. I am not persuaded that the confession ought to be inadmissible. The fact however that the learned magistrate failed to have the declarant (the accused) affix his signature/fingerprint to each page of the annexure and to the deletions and insertions renders the content of this confession nugatory.

[56] Mr Shileka, counsel for the State, submitted that the court should re-consider the admission of the admission made by the accused. I am of the considered view that there is no sound reason for the court to change the ruling already made in this regard.

In *S v Shipanga and Another* 2015 (1) NR 141 (SC), page 166 the following is stated:

'The authorities above correctly articulate the position of our law on confessions and pointings-out. In the circumstances of this case, where the appellant voluntarily indicated his readiness to offer a confession and pointing-out, the police's obligation was to warn him again of his right to legal representation, which they did, and ensure that if he waived his right to legal representation, he knew and understood what he was doing. The latter is a question of fact and has to be established. *S v Shipanga and Another* 2015 (1) NR 141 (SC), page 166' [my emphasis]

[57] In *S v Van Wyk and Another* 2015 (4) NR 1085 (SC) the court held:

' that a cautionary rule of practice required a court to be aware of the inherent danger in the evidence of an accomplice. There ought to be some safeguards reducing the risk of a wrong conviction such as corroboration or the absence of evidence contradicting that of the accomplice. Ultimately what was required was the determination of the question whether, in the light of all the evidence, the guilt of the appellants had been proved beyond reasonable doubt. In the process of scrutinising and weighing the evidence of accomplices generally, the exercise of caution should not be allowed to displace the exercise of common sense.'¹

[58] Bearing in mind the above need for caution the court, having considered the evidence adduced by the State conclude that there is no evidence to support a finding that the accused attended meetings where the secession of the Caprivi was discussed. There is also no evidence adduced that the accused was part of the group of persons who went to Angola to secure weapons.

Sachona – Lyibulyibu

[59] The question is whether the State proved that the accused was present at Sachona, Kandiyana and Lyibulyibu.

[60] Oliver Mbulunga indicated that he knew the accused. During cross-examination Oliver Mbulunga was questioned about a person by the name of Bosta Liseli. Oliver

¹ See *S v Malumo* paragraph 135 where Hoff J, as he then was, refers to the principles to applied to the evidence of an accomplice as set out in *S v Masuku* 1969 (2) SA 375 (N.P.D).

however described Bosta as a person who is light in complexion and who is blind in one eye. It was further put to him that Visco Liseli was in his group. The witness could not recall whether the accused's brother was in the group but did not dispute that it was possible. The accused in fact confirmed that he was in the group of Oliver Mbulunga in Dukwe Refugee Camp in Botswana. It may safely be concluded that this witness knew the accused and it was not a case of mistaken identity. There are some discrepancies in the testimony of this witness in that he only mentioned the accused when he was prompted by the police to tell them about the participation of the accused. It however does not detract from the fact that he knew the accused well enough to have recognized him.

[61] Witness X was less clear on this subject of how he recognized the accused. He knew where the accused was staying as they were neighbors and he knew the children of he accused well although he only knew the name of one. It was put to him that his friend Simon was a younger brother of the accused but he insisted that he was the son of the accused. The possibility that he witness may have been wrong about the relationship between the accused and his friend cannot be ruled out. The fact remains however that the witness was acquainted with a close relative of the accused and lived in the same neighborhood as the accused. I am satisfied that this witness knew the accused.

[62] A further fact which strengthens the identification of the accused is the fact that this witness already listed the accused during 2000 i.e before the arrest of the accused. This witness however ascribed a leadership position to the accused which he failed to mention in his statement. His testimony in this regard also contradicts that of Oliver Mbulunga who testified that the accused was not allocated a leadership position. The evidence of this witness that the accused was present at Sachona, Kandiyana and Lyibulyibu is however corroborated by Oliver Mbulunga.

[63] The accused first put it to Oliver Mbulunga that he left Namibia in November 1998 with George Makave. He however testified that he left on 25 October 1998 with Base Feliso. He furthermore contradicted himself by denying that he was at Lyibulyibu or part of the group of 92 who crossed over into Botswana. The accused however later

admitted that he was part of the group of 92. The accused's version of his impromptu departure at nighttime for training; leaving without notifying his parents that he will be traveling to another country, in view of the contradictions, appears improbable and I am of the view that this is a fabrication.

[64] I am satisfied that the Oliver Mbulunga correctly identified the accused and that his version that the accused was present at Sachona, Kandiyane and Lyibulyibu may safely be accepted as satisfactory. I am not however persuaded that the accused was appointed a leader of any section at Sachona or Lyibulyibu.

[65] Having concluded that the accused indeed was at these places the court need to determine what he was doing at these places particularly Sachona and Lyibulyibu Both Oliver and Witness X testified that they were taught how to handle fire-arms. It would be reasonable to infer that the accused was taught how to handle the fire-arms. Accused chose to deny his presence. The court, in light of this, cannot infer that he was one of the persons who were detained against his will.

Mwakatale

[66] The next question is whether the accused arrived at Mwakatale during June, July 2001. Here once again the accused was recognized by Oliver Mbulunga who knows him, the accused. Micheal Nuwe gave an almost identical version of how the accused arrived with Alfred Mangilazi. The accused's testimony was that he had left Dukwe with Albert Mangilazi during March 2001. It was further his testimony that he fled his own village when the presence of the police became problematic for his mother during or about June - July 2001 i.e the same period Oliver Mbulunga testified he arrived there with Alfred Mangilazi. According to the accused he left for Zambia but this did not happen until November 2001. It is further significant that, according Oliver Mbulunga and Micheal Nuwe arrived at Mwakatale with Albert Mangilazi who escaped with the accused from Dukwe.

[67] I am satisfied that the state had proven that the accused indeed joined the other persons who escaped from Dukwe at Mwakatale during July 2001.

[65] It was the testimony of those who identified the accused that two of their members were armed but that they were mostly sitting around and were supplied with food. They decided to go back to their own villages when the food provisions were no longer forthcoming. It was however testified that they were having discussions as to how they can continue with the aim of seceding Caprivi from the rest of Namibia but that they were constrained due to lack of weapons. It would be reasonable for this court to infer that the aim was abandoned.

Kalumbu

[66] Mr Hengari submitted that Oliver Chunga testified that he did not know the accused. Mr Hengari also put it to this witness that it was his instructions that the accused does not really know you nor has he met him. The witness admitted that he only saw the accused once and he was unable to say whether accused was the person whom he met when he went to Kalumba. Mr Hengari however omitted to mention that the accused in fact recalled the visit and testified that he was in the company of Albert Mangalazi on 2 November 2001 when Oliver Chunga came to his village to deliver a letter.

[67] The testimony of Witness Y who visited Kalumba clearly relate to a different occasion from the first visit when Oliver Chunga delivered the letter. This witness was illiterate and was unable to say when he visited Kalumba. The fact that there is no date given and that his testimony contradicts that of Oliver Chunga makes it unsafe for the court to rely on his evidence.

[68] This court, given the corroboration by the accused may safely conclude that Oliver Chunga indeed met the accused in Kalumba on 2 November 2001, that he delivered a letter; and that the accused had knowledge of the contents of the letter. Mr Shileka during cross-examination put it that it was not possible for Oliver Mbulunga to have written the letter as he was arrested during July 2001. The accused first stated that the letter was sent by someone who testified and when probed answered: 'Mbulunga and others'.

[69] The accused, for a period of 8 months spent most of his time indoors and was concerned that people in the area would report him to the authorities. Common sense dictates that the accused was in hiding. The accused, by his own admission was not alone but was in the company of Albert Mangilazi. Although Albert Mangilazi denied any connection with the accused, it was the testimony of Micheal Nuwe that he was one of the persons who entered Angola to collect weapons. They were both invited to join the fight to secede the Caprivi. The accused opted not to join the fight but to go to Zambia.

[70] The law has been extensively set out in the case of *S v Malumo* (CC 32-2001) delivered on 7-11, 14 September 2015, and I shall for the sake of brevity not repeat same in here save to set out the elements which the State had to prove beyond reasonable doubt. In *S v Malumo, supra* Hoff J, as he then was, stated at page 16 para 11 & 12, as follow:

“In *S v Banda*², at 479C-E where Friedman J defined high treason as ‘any overt act committed by a person, within or without the State, who, owing allegiance to the State, having *majestas*, with the intention of:

- ‘(1) unlawfully impairing, violating, threatening or endangering the existence, independence or security of the State;
- (2) unlawfully overthrowing the government of the State’
- (3) unlawfully changing the constitutional structure of the State; or
- (4) unlawfully coercing by violence the government of the State into any action or into refraining from any action.’

Snyman³ at 301 stated in respect of the word *maiestas* that ‘though somewhat vague, denoted in principle the idea of supreme power or sovereignty’. The writer is of the view that in a sovereign independent State which does not acknowledge any higher authority the requirement of *maiestas* is no longer necessary.’

² 1990 (3) SA 466.

³ Synam CR. 2014. *Criminal Law* (6th Edition). Durban: LexisNexis,

[71] The accused admitted that he is a citizen of the Republic of Namibia which is a sovereign state and that he owed allegiance to the Republic of Namibia. This court has to determine whether the State proved beyond reasonable doubt that the accused committed an overt act with the hostile intent to overthrow or coerce the Government of the Republic of Namibia to secede the Caprivi Region from the rest of Namibia.

[72] Mr Hengari reminded the court that a mere discussion of the possibility of acts of treason, not resulting in any agreement, nor including any mutual incitement, does not amount to high treason.⁴

[73] In Friedman J in *Banda* at 500J-501F explained the concept of common purpose as follows:

'It is a convenient and useful descriptive appellation of a concept, that, if one or more persons agree or conspire to achieve a collective unlawful purpose, the acts of each one of them in execution of this purpose are attributed to the others. The essential requirement is that the parties thereto must have and did in fact have the same purpose – that is a common purpose.

"The basis of this doctrine is the idea that such member of the plot or conspiracy gave the other an implied mandate to execute the unlawful criminal act." (Snyman (op cit at 212). There need not necessarily be a conspiracy. On principle, it is sufficient if collaboration or association commenced without premeditation and spontaneously as in the so-called "join-in" cases. The courts held "that association in the common design makes the act of the principal offender the act of all". Furthermore, the association need not be express, but may also be implied and inferred from conduct. I need not for the purpose of this case concern myself with the controversy surrounding the issue of causality, nor analyse the conflicting judgments relating thereto. Although this doctrine has been criticised by *Snyman* and *Rabie* who is critical of an approach that does not take into account the causal contribution of each participant in a common purpose, I nevertheless believe that the doctrine of common purpose is a useful and practical method of determining liability or innocence where more than one person is involved in a joint unlawful activity pursuant to their common design and objective, subject, however, to

⁴ See *Banda*, *Supra*, at 474F.

certain stringent conditions. An accused cannot be found guilty of sharing a common purpose with other accused by a process of osmosis. In the absence of a prior agreement or conspiracy, the doctrine of common purpose may not be used as a method or technique to subsume the guilt of all the accused without anything more. It cannot operate as a dragnet operation systematically to draw all the accused. Association by way of participation, and the *mens rea* of each accused person involved, are necessary and essential requirements.”⁵

[74] Mr Hengari submitted that the State failed to meet the minimum threshold test embodied in the crime of high treason. He further submitted that the evidence adduced fails to establish that the accused took part in any activity whose sole intention was the violent overthrow of the Namibian State. According to his submission the evidence does not show that the accused took part in a plan (the overt act) to commit high treason nor that he was part of such an agreement,

[75] In *S v Thebus and Another*⁵ the Constitutional Court in South Africa had the following to say:

‘The reliability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, expressed or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.’[my emphasis]

[76] Oliver Mbulunga, Micheal Nuwe and Witness X all testified that they were informed of the intention to take up arms in order to secede Caprivi from the rest of Namibia. They in essence admitted to having committed high treason when they joined-in with the leadership in this objective. Although Oliver and Micheal Nuwe were misled initially they, once they were informed of the mission, they nevertheless joined in despite not having been part of the plan to secede the Caprivi from the rest of Namibia by means of taking up arms. They actively associated by way of participation, i.e

⁵ 2003 (2) SACR 319(CC).

carrying weapons from Angola to Namibia and setting up a base at Sachona where military training was given.

[77] Whilst the State did not prove that the accused formed part of the planning to secede Caprivi by violent means, neither was there direct evidence that he agreed or conspired to do so. The question is whether his mere presence at Sachona means that he knew why the people there were given military training. Did he know that they were fleeing from the security forces of the Republic of Namibia when they shifted base from Sachona to Lyibulyibu? There is no direct evidence that the accused participated and neither is there direct evidence that the accused knew why military training was given. This court already concluded that the accused was at Sachona Base and that he, like the others, participated in the military training.

[78] The accused was untruthful about how he joined the other persons at Lyibulyibu. He told this court an elaborate and improbable story of how he in his drunken state, at nighttime, without a passport and without informing his parents decided to study in a foreign country. He falsely denied having been at Sachona. He does not apply for voluntary repatriation when the first opportunity presents itself but makes a half-hearted attempt to do so during 2000.⁶ He escapes from Dukwe and enters Namibia illegally. He does not report his absence and reasons for same to the Namibian Authorities. He instead hides together with other escapees from the Namibian Police at his village for almost 8 months.

[79] 'Hostile intent' is a subjective, and not an objective element of the offence of high treason. In *R v Leibbrandt* (supra at 284) Watermeyer J stated:

'Now, clearly intention is something subjective, a state of mind which is incapable of direct proof by witnesses. It can only be proved by inference from the acts and expressions from the accused and from the surrounding circumstances.'

⁶ See *S v Malumo*, supra at page paragraph 36 it is stated: "Disassociation may be raised as a defence in respect of a criminal charge and in *S v Ndebu and Another* the court, as per McNally JA, expressed itself as follows at 135F: 'It would seem clear that English law requires more than a simple last minute withdrawal to enable a participant to escape a verdict of guilty on the main offence'

[80] I am of the view that, given the above, this court may infer that the accused had the requisite hostile intent. I am satisfied that the State had proven beyond reasonable doubt that the accused fully associated by way of active participation in military training and that he had the requisite hostile intent when he so participated.

[81] In addition to the above the accused, by his own admission, knew that a group invited him and Albert Mangilazi to fight in order to secede Caprivi from Namibia during November 2001. He, as a citizen of the Republic of Namibia, owing allegiance to the Republic of Namibia had a duty to report the contents of the letter to the Namibian Police i.e that there were plans underfoot to continue with the unlawful fight to secede Caprivi from the rest of Namibia, yet he failed to do.

[82] In *S v Malumo*, supra, Hoff J as he then was, at page 19 para 17 stated as follows:

'An overt act may also be in the form of an omission. Friedman J in *S v Banda* at 572A-B states the following:

'According to the authorities that I have cited the crime of treason provides an exception to the rule as to mere non-disclosure. It seems clear that anyone who, knowing of the commission of this crime, refrains from giving information to the authorities must by reason of this mere non-disclosure be regarded as having taken part in treasonable conduct. Even bare knowledge of its attempt or commencement without disclosure of the same to the authorities may render a person liable, even though the person has in no way taken part in the plans of the principal offender. The afore-mentioned must apply with greater force to a member of the armed forces, who has sworn an oath of allegiance to the State.'

[83] The accused, on his mere omission to report his knowledge of treasonable conduct, can be considered as being complicit.

[84] In light of the above conclusions I am of the view that the State has proven beyond reasonable doubt that the accused is guilty of the offence of High Treason.

[85] In the result the accused is convicted of the offence of High treason.

[86] I now turn to the issue of the four witnesses who were warned in terms of s 204 of the Criminal Procedure Act. This court has to consider whether, in this court's opinion, the witnesses warned in terms of s 204 of the Criminal Procedure Act, testified honestly and frankly. In *Mahomed v Attorney - General of Natal and Others* 1998 (1) SACR 73 (N), Hurt J at page 82 H, states as follows: 'The situation envisaged in s 204(2) is not one in which the presiding officer is called upon to exercise a discretion as to whether the witness should be granted a discharge from prosecution: if he holds the opinion that the witness has answered all questions, frankly and honestly, the presiding officer is obliged to grant the discharge.'

[87] At the outset I have to acknowledge that there has been considerable passage of time from the time the events occurred to the date all of these witnesses testified (between 10 – 12 years). In *S v Heidenreich* 1998 NR 229 (HC) Hannah J, at page G, made the following remarks at page:

' Important practical advantages flow from an expeditious resolution of the charges, the nature of which can be stated no more eloquently than in the words of Cory J in *R v Askov* (1991) 49 CRR 1 (Supreme Court of Canada) at 20:

'There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time but there is bound to be an erosion of the witnesses themselves. ...Witnesses, too, are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs in the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.'

The strain on these witnesses were clearly visible at times during their testimony. This is to be viewed in light of the circumstances of this case.

[88] I am also mindful of the fact that they had made themselves guilty of the very same offence the accused had been charged with and they testified in the hope that they would earn their discharge from prosecution at the end of the trial.

[89] I now turn to consider each of the witnesses. Oliver Chunga's submitted that he had answered all questions frankly and honestly. I have mentioned elsewhere that his evidence was reliable particularly in view that it was confirmed by the testimony of the accused. I am satisfied that he answered all the questions frankly and honestly.

[90] Witness Y at the outset indicated to the court that his memory of the events was sketchy as a result of the passage of time. This was clearly evident as there were some discrepancies between his statement and his prior testimony in *S v Malumo*, supra (the 'main trial'). The most important discrepancy is his failure to mention the name of the accused before testifying before this court. He testified that he was not able to identify the accused clearly during the night but he clearly identified him the next day. He had seen the accused in Dukwe but was unable to say with accuracy how many times he had seen the accused.

[91] The court is mindful of the fact that the fight to secede Caprivi from the rest of Namibia did not stop after the initial attack on 2 August 1999 and that there was a large number of people who participated in the offence. This necessitated a continued investigation i.e that it was necessary for the police to return to witnesses. The modus operandi strained the witnesses whose memories of people and events were fading. No identification parade was held for this witness to identify the accused. The court found the identification by this witness was not satisfactory. Given the effluxion of time and the number of persons involved, makes it easy for persons not to identify persons properly. I accordingly am of the view that his mistaken identity was not born out of a desire to give false evidence but a question of mistaken identity.

[92] Micheal Nuwe's evidence was consistent and confirmed to a large extent by Oliver Mbulunga and I am satisfied that he answered the questions frankly and honestly.

[93] The court relied on the testimony of Oliver Mbulunga. The court found his testimony to be safe to rely on, despite some discrepancies. I am satisfied that he answered questions frankly and honestly.

[94] Witness X was 16 years old when he joined the group of men who decided to secede the Caprivi by violent means. The memory of person's names became engraved in his memory as they were called out day after day during roll call at Dukwe Refugee Camp. His failure however to record the role the accused played and the fact that his testimony about the leadership role of the accused caused his testimony in this regard to be unreliable. The court however bearing in mind the effluxion of time and the effect that it may have had on the memory of this witness, did not form the opinion that this witness did not answer the questions frankly and honestly.

[95] I am of the opinion that the abovementioned witnesses be discharged from prosecution.

[96] In the result the following order is made:

1. The accused is convicted of the offence of High Treason;
2. The witnesses, Oliver Chunga, Witness Y, Micheal Nuwe, Oliver Mbulunga and Witness X be discharged from prosecution;

MA Tommasi

Judge

Appearance

For the State:

Mr R. Shileka

Prosecutor General –Oshakati

For the Accused:

Mr Hengari

Instructed by Legal Aid