



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 32/2001

In the matter between:

**CALVIN LISELI MALUMO AND 108 OTHERS**

**APPLICANTS**

and

**THE STATE**

**RESPONDENT**

*In re:*

***Application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977***

**Neutral citation:** *Malumo v State* (CC 32/2001) [2012] NAHCMD 33  
(11 February 2013)

**Coram:** HOFF, J

**Heard:** 03 – 06 September 2012; 10 – 14 September 2012;  
17 – 18 September 2012; 24 – 27 September 2012;  
01 – 02 October 2012

**Delivered:** 11 February 2013

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**ORDER**

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1. The following accused persons are hereby found not guilty and discharged:

- |     |                                      |                        |
|-----|--------------------------------------|------------------------|
| 1.  | <b>Vasco Inambao Lyonga</b>          | <b>Accused No. 38</b>  |
| 2.  | <b>Jacob Linus Musondeke</b>         | <b>Accused No. 94</b>  |
| 3.  | <b>Chombo Elvin Simon Kauhano</b>    | <b>Accused No. 107</b> |
| 4.  | <b>Stephen Kandela Mashando</b>      | <b>Accused No. 36</b>  |
| 5.  | <b>Linus Kashala Luseso</b>          | <b>Accused No. 45</b>  |
| 6.  | <b>Richwell Kuliselo Mahupelo</b>    | <b>Accused No. 117</b> |
| 7.  | <b>Rosco Matengu Makapa</b>          | <b>Accused No. 108</b> |
| 8.  | <b>Moven Kawana Chombo</b>           | <b>Accused No. 111</b> |
| 9.  | <b>O'Brien Sinkolela Mwananyambe</b> | <b>Accused No. 28</b>  |
| 10. | <b>Joseph Omo Mufuhi</b>             | <b>Accused No. 29</b>  |
| 11. | <b>Boswell Adams Muyumbano</b>       | <b>Accused No. 40</b>  |
| 12. | <b>Calvin Liseli Malumo</b>          | <b>Accused No. 1</b>   |
| 13. | <b>Chris Sitali Mushe</b>            | <b>Accused No. 14</b>  |
| 14. | <b>Tobias Muswabe Kananga</b>        | <b>Accused No. 20</b>  |
| 15. | <b>John Tibiso Masake (Mutalife)</b> | <b>Accused No. 10</b>  |
| 16. | <b>Isaya Shaft Kamwanga</b>          | <b>Accused No. 43</b>  |
| 17. | <b>Phelem Mboози Mutuwangele</b>     | <b>Accused No. 39</b>  |
| 18. | <b>Richard Masupa Mungulike</b>      | <b>Accused No. 34</b>  |
| 19. | <b>Fred Maemelo Ziezo</b>            | <b>Accused No. 25</b>  |
| 20. | <b>Gilbert Kasiyana Poshowe</b>      | <b>Accused No. 51</b>  |
| 21. | <b>Fredrik Kabatondwa Lutuhezi</b>   | <b>Accused No. 22</b>  |
| 22. | <b>Victor Tumoni Lunyandile</b>      | <b>Accused No. 56</b>  |
| 23. | <b>Ernest Lolisa Lifasi</b>          | <b>Accused No. 32</b>  |

24.	<b>Charles Kalipa Samboma</b>	<b>Accused No. 119</b>
25.	<b>Kisko Twaimango Sakusheka</b>	<b>Accused No. 19</b>
26.	<b>Joseph Kabuyana Kabuyana</b>	<b>Accused No. 33</b>
27.	<b>Ernest Salufu Samunzala</b>	<b>Accused No. 41</b>
28.	<b>Thaddeus Sibonwa Mundube</b>	<b>Accused No. 46</b>
29.	<b>Francis Liyemo Mubita</b>	<b>Accused No. 110</b>
30.	<b>Chrispin Saili Samahili</b>	<b>Accused No. 81</b>
31.	<b>Linus Chombo Chombo</b>	<b>Accused No. 82</b>
32.	<b>Stephen Milinga Ntelamo</b>	<b>Accused No. 83</b>
33.	<b>Molicious Simone</b>	<b>Accused No. 85</b>
34.	<b>George Lifumbela Mutanimiye</b>	<b>Accused No. 86</b>
35.	<b>Kennedy Simasiku Chunga</b>	<b>Accused No. 116</b>
36.	<b>Agry Simasiku Muamba</b>	<b>Accused No. 118</b>
37.	<b>Michael Mundia Mubyana</b>	<b>Accused No. 27</b>
38.	<b>Wilson Mutumuswana</b>	<b>Accused No. 42</b>
39.	<b>Oscar Gilson Libuo</b>	<b>Accused No. 52</b>
40.	<b>Richard Likezo Saweke</b>	<b>Accused No. 66</b>
41.	<b>Matengu Elvis Puteho</b>	<b>Accused No. 74</b>
42.	<b>Simon Max Mubita</b>	<b>Accused No. 76</b>
43.	<b>Genese John Kabotana</b>	<b>Accused No. 35 (undefended)</b>

2. The remainder of the accused persons' application for discharge is hereby refused.

3. The accused persons mentioned in this judgment whose applications for discharge are successful together with the one undefended accused whom this court has discharged *mero motu* are found not guilty in respect of all the charges preferred against them.

4. In respect of those applicants whose applications are unsuccessful, if not mentioned when I dealt with the individual applications, are refused in respect of all the charges preferred against them.

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## JUDGMENT

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HOFF J:

### **Introduction**

[1] This is an application in terms of the provisions of section 174 of the Criminal Procedure Act (51 of 1977) (hereinafter referred to as the Act) by counsel appearing on behalf of 81 accused persons for the discharge of all their clients on the basis that at the closure of the State's case on 7<sup>th</sup> of February 2012 there was no evidence against the accused persons which required a reply from them.

[2] The 29 accused persons who were at the closure of the State's case without any legal representation did not bring any application in terms of section 174. The Director of Legal Aid Mr Verikomba Ezekia Mbahuurua subsequently instructed Mr C Kavendjii, of the law firm Hengari, Kanguuehi & Kavendjii Inc, to argue this application in respect of five of the undefended accused and Mr Muluti, of Muluti & Partners to argue the application on behalf of six undefended accused persons.

[3] The legal practitioners Messers P Kauta, P McNally, V Kachaka, G Nyoni, J Neves, H Kruger, J Samukange and Mr C Dube who were involved in this case from its inception appear on behalf of 81 accused in this application.

[4] Messers H January, T July and N Lakay as well as the late Ms C Barnard appeared on behalf of the State from the beginning of this trial. Mr A Adams subsequently joined the prosecution team.

[5] Seventeen accused persons are presently not before court. Two accused persons passed away subsequent to the closure of the State's case.

[6] I requested Mr January when dealing with the answering submissions by the State to present argument why this court should not *mero motu* discharge the remaining undefended accused persons.

[7] I must at this stage state that in considering the various applications I gave attention to the relevant evidence presented against each applicant, however during the preparation of this judgment, you will agree, that it would have been impractical and time consuming to reproduce even summaries of all the witnesses' testimonies. It is for this reason that I do not deal with the testimonies of all the evidence presented against a particular applicant. I dealt with the evidence which I considered sufficient to enable me to make a finding in respect of a specific applicant.

[8] I must also state that I have considered the heads of argument as well as the submissions by counsel but could for the same reason mentioned (*supra*) not refer to all of it, not even in summary form. I wish to express my gratitude to all counsel appearing on behalf of the applicants for their very useful heads of argument which assisted me greatly in considering the applications of their respective clients. I wish also to thank counsel appearing on behalf of the State for their contribution in this regard.

[9] On 15 March 2004, 278 charges were put to the accused persons who at that stage were all legally represented. The accused persons pleaded not guilty to all the charges, except 13 accused persons in respect of whom the court entered a plea of not guilty on their behalf in terms of the provisions of section 109 of the Act on 23 August 2003. No plea explanation in terms of section 115 of the Act was provided

by any one of the accused on any of the charges preferred against them. The State was required to prove each and every one of the 278 charges against the accused.

[10] The accused are arraigned on the following charges:

Count 1: High Treason

Count 2: Sedition

Alternative count to count 2: Demonstrations near court buildings in contravention of sections 3(a), 3(b), 3(c) or 3(d) of Demonstration in or near Court Building Prohibition Act 71 of 1982

Count 3: Public violence

Count 4: Public violence

Alternative to count 4: Contravening section 1(1)(b) of Proclamation 24 of 1989 – unlawfully acting in a manner that persons fear for own safety

Counts 5 – 13: Murder (9 counts)

Counts 14 – 16: Robbery (with aggravating circumstances)

Count 17: Contravening section 29(1)(a) of the Arms and Ammunition Act 7 of 1996 – unauthorised importation, supply or possession of any canon, recoilless gun, mortar, rocket launcher, machine gun or machine rifle (27 x AK 47 assault rifles, 3 x G3 assault rifles, 3 x R1 assault rifles, 1 x R5 assault rifle, 4 x RPG rocket launchers)

Count 18: Contravening section 29(1)(e) of the Arms and Ammunition Act 7 of 1996 – unauthorised importation, supply or possession of ammunition of a machine gun or machine rifle or any similar armament or ammunition designed or adapted to

explode on or immediately before impact (477 x AK 47 rounds, 340 x Rimi 7.62 mm rounds, 144 x R5 rounds).

Count 19: Contravening section 29(1)(b) of the Arms and Ammunition Act 7 of 1996 – unauthorised importation, supply or possession of any projectile or rocket intended to be discharged from a canon, recoilless gun or mortar or rocket launcher (6 x 600 mm mortars, 1 x 3-79-9373 mortar, 3 x TNT hand grenades, 1 x 81 mm practise mortar, 2 x 81 mm lighting mortars).

Count 20: Contravening section 2 of Arms and Ammunition Act 7 of 1996 – possession of a fire-arm without a licence (4 shotguns and 2 pistols)

Count 21: Contravening section 33 of Arms and Ammunition Act 7 of 1996 – unlawful possession of ammunition (49 x 9mm rounds)

Counts 22 - 31: Malicious damage to property (10 counts)

Counts 32 – 98: Attempted murder

Counts 99 – 269: Attempted murder

Counts 270: Theft of diesel

Counts 271: Theft of 2 x R5 rifles

Counts 272 – 273: Contravening section 6(1) of Departure from Namibia Regulation Act 34 of 1955 (Departure from Union Regulation Act) as amended by section 2 of Act 4 of 1993 (Departure from Union Regulation Act) – Illegal exit from Namibia

Counts 274 – 275: Contravening section 6(1) of the Immigration Control Act 7 of 1993 – Illegal entry into Namibia

Count 276: Contravening section 8(1) of the General Law Amendment Ordinance 12 of 1956 – Use of motor vehicle without the consent of the owner

Count 277: Attempted Murder

Count 278: Contravening section 8(1) of the General Law Amendment Ordinance 12 of 1956 – Use of motor vehicle without the consent of the owner

[11] I do not deem it necessary for the purpose of this application to reproduce all 278 charges as they appear in the charge sheet, except count 1, which reads as follows:

‘That the accused are guilty of the crime of **HIGH TREASON**.

Whereas the Republic of Namibia at all relevant times was and still is a Sovereign State;

**And Whereas** the accused at all relevant times were citizens of the Republic of Namibia and/or were domiciled in the Republic of Namibia and/or were resident in the Republic of Namibia and thus owed allegiance to the Republic of Namibia (hereinafter referred to as the State);

**And Whereas** the accused between **JANUARY 1992 AND 06 December 2002** conspired together with each other and with other persons at different places in the **CAPRIVI REGION** and on dates, the exact particulars of which are unknown to the State, to overthrow or undermine the authority of the State, take over the authority of the State, coercing the State into action or inaction, violating or threatening the existence, independence or security of the Government and/or changing the Constitutional structure in the **Caprivi Region**;

**And Whereas** the Central committee of the United Democratic Party (UDP) of the Caprivi Zipfel resolved to create the Caprivi Liberation Army as the fighting wing of the Party.

**And Whereas** the accused jointly or severally and with other persons grouped themselves into an organization that was named the CAPRIVI LIBERATION MOVEMENT/ARMY, abbreviated CLA/CLM, in pursuance of the abovementioned conspiracy; which organization had as its objectives;

1. To organize an army to liberate the Caprivi Zipfel from the present foreign dominated regime of Namibia.



2. To create the nucleus of an independent country's army.
3. To organized and purchase (where possible) arms and equipments that are to be used for the liberation struggle.
4. To recruit all able bodied Caprivians into the army without any discrimination on the basis of sex, religion and tribe.
5. To be the instrument for liberty, freedom and democracy.
6. To help in upholding the principles of liberty and respect of basic human rights.
7. To be a better organized, trained and disciplined military force.
8. To protect the freedom and territorial integrity of the Caprivi Zipfel.
9. To help the police in maintaining law and order of the country.
10. To serve the people, country and government of the Caprivi Zipfel.

**And Whereas** the accused and/or other persons after they became aware of the aims and objectives of the conspiracy and/or purpose, aims and objectives of the CLM/CLA, joined in and associated themselves with the conspiracy and/or the CLM/CLA and/or remained a member thereof and/or furthered and supported the aims and objectives thereof;

**And Whereas,** the accused in pursuance to the conspiracy committed one or other of the overt acts as stated in paragraph 1 to 22 hereunder;

**Now therefore,** the accused committed the crime of **HIGH TREASON**;

**IN THAT** about or between **January 1992** and **December 2002** and at various places in the Caprivi Region the accused did unlawfully and with hostile intent against the State and to undermine the authority of the State, take over the authority of the State, coercing the State by violence into action or inaction, violating or threatening the existence, independence or security of the Government;

1. Held various meetings where the *coup d'etat* was discussed, planned and agreed upon;
2. Plan a violent take-over of the authority of the State in the **Caprivi Region**, and/or;
3. Gather on or about **2 – 3 October 1998** at **Makanga forest** to arm and train themselves for the *coup d'etat*; and/or;
4. Gather on or about **7 to 14 October 1998** at **Sachona** to arm and train themselves for the *coup d'etat*; and/or;
5. Gather on or about **15 to 27 October 1998** at **Linyati** and **Lyiubu-Lyiubu** forest to arm and train themselves for the *coup d'etat*; and/or;
6. Escape, or assisted other persons to escape from several refugee camps in Botswana to attend camps and training in Zambia, Angola and in Namibia to arm and train themselves for the *coup d'etat*; and/or transported or assisted to transport other for such purpose and/or;
7. Gather and conspired on 30 July to 2 August 1999 at Makanga rebel base with other persons to carry out a *coup d'etat* in the Caprivi Region; and/or;
8. Gather and conspired with other persons at Cameroon rebel base and/or on other places in the Caprivi Region, Zambia, Botswana and Angola to arm and train themselves for the takeover of the authority of the State in the Caprivi Region; and/or
9. Fail to, after the said proposed *coup d'etat* or conspiracy came to his/her/their knowledge, to report it to the Authorities/Namibian Police without further partaking therein; and/or
10. Attempt to recruit or recruiting other persons for the *coup d'etat*; and/or
11. Conspire to steal fire-arms from Mpacha military base, Katounyana Special Field Force base and Katima Mulilo and/or other places and/or take over Mpacha military base, Katounyana Special Field Force base and Katima Mulilo Police Station; and/or;
12. Conspire to attack and/or occupy and on 2 August 1999 did attack Mpacha military base, Katounyana Special Field Force base, Wanela Border Station, Namibian

Broadcasting Corporation, Katima Mulilo Police Station and the Central Business Area of Katima Mulilo as well as the house of Sgt. Liswani Mabuku and/or;

- 13.** Conspire to arrest and/or kill the officials of the State in Caprivi and/or;
- 14.** Perform or neglect to perform any duty resulting in procuring the conspiracy or intended result of the conspiracy or neglecting to report the conspiracy immediately or effecting the arrest of the conspirators;
- 15.** Instigated or recruited or attempted to assist or recruit other persons to flee and/or go to Botswana and/or other places in the Caprivi Region, Zambia or Angola to join the Caprivi Liberation Army and/or to receive military training, and/or to mobilize themselves into a rebel army with a view to take over the authority of the State in the Caprivi Region.
- 16.** Donate money or collect money to assist in rebel activities with a view to take over the authority of the State in the Caprivi Region and/or;
- 17.** Procure firearms or instigate others to procure firearm with a view to take over the authority of the State in the Caprivi Region and/or;
- 18.** Transported or assisted to transport other persons to flee the Caprivi Region to places where they can receive military training and/or to flee to refugee camps with the intent to support and mobilize the Caprivi Liberation Army and/or;
- 19.** Gather at a meeting on 1 August 1999 at Linyanti where in the pursuance of the conspiracy it was decided to attack various places in the Caprivi Region; and/or
- 20.** Gather at Kaliyangile and Masokotwane rebel bases or at other places in the Caprivi Region after the attack of 2 August 1999 with the aim to regroup militarily and/or to remobilize the Caprivi Liberation Army to take over the authority of the State in the Caprivi Region and/or;
- 21.** Transported or assisted to transport rebels on the 2 August 1999 with the aim to attack various places in the Caprivi Region with the aim to take over the authority of the State in the Caprivi Region; and/or;

22. Render assistance in the form of food, water, transport, shelter or accommodation to the rebels with the aim to take over the authority of the State in the Caprivi Region, Which acts were likely to achieve the secession of the Caprivi from Namibia by military means.'

[12] The State called 379 witnesses during the course of the trial. What the State set out to achieve by calling these State witnesses can be gleaned from the opening address of Mr July in the following words:

MR JULY: In our system of law as in the legal system of most communities of the world, it is not criminal to seek political reform. Constitutional changes however far reaching, however radical and far reaching may be lawfully sought by legitimate and constitutional means only. When the methods used become unlawful and unconstitutional individuals using them commit high treason. It is, together with other charges of the crimes which have been committed by those involved in the armed rebellion in the Caprivi Region on the 2<sup>nd</sup> of August 1999. These would be the charges which the State has set itself out to prove during this trial. The State will seek during this trial to bring within the scope of the single prosecution, the development of the events which culminated into the attacks in the Caprivi Region on the second of August 1999. To this end, reference will be made to events in other countries, i.e. Zambia, Botswana and Angola involving many individuals in numerous events and last but not least, a number of documents that will show that the events on the 2<sup>nd</sup> of August 99 in the Caprivi Region were premeditated with the aim of overthrowing the legitimate Government of Namibia in the Caprivi Region. The State will show that the armed secession in the Caprivi Region was planned by the political leadership of the United Democratic Party, executed by the soldiers of the Caprivi Liberation Army and supported by those who have similar aims and objectives of seceding Caprivi from the rest of Namibia by military means. The State will lead evidence during this trial that will prove beyond reasonable doubt that each of the accused having acted individually and collectively committed criminal acts against the sovereign state of the Republic of Namibia under the pretext of seeking political emancipation from Namibia. This objective was to have been achieved through the use of violence. Some of the accused, together with their leaders participated in the drafting of Namibia's Constitution and some took up key positions in the Government of the Republic of Namibia. Some of the accused participated in the creation of the Government of National Unity in Namibia for the process of elections during 1989. It is a notorious fact that Namibia's Constitution provides that Namibia shall be governed as a

unitary state. Article 1(1) of the Constitution provides as follows, that the Republic of Namibia is hereby established as a sovereign secular, democratic and unity state founded on the principles of democracy, the rule of law and justice for all. Article 1(4) further provides the national territory of Namibia shall consist of the whole of the territory recognised by the International Community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the offshore islands of Namibia and its southern boundaries shall extent to the middle of the Orange River. This Constitution is internationally regarded as one of the most liberal Constitutions in the world that guarantees to all its people, civil liberties consistent with those of democratic nations in the world. The State will show that the actions of the accused were performed in pursuance with a conspiracy and with the knowledge and agreement of each accused who intent upon subverting the constitutional structure of Namibia in the Caprivi Region by military means. The evidence will show that these acts were preceded by *inter alia* the holding of meetings where the idea of the violent secession of the Caprivi Region from Namibia was promoted, the obtaining of weapons of war, the establishment of the rebel army, the establishment of various rebel bases in Namibia and on foreign soil, and the recruiting of soldiers for the army and persons in support of the secessionist idea. The Sate will further show that strategic targets that were attacked were identified beforehand by those involved in the attack on the 2<sup>nd</sup> of August 99. In pursuance of these objectives, the accused killed, injured and damaged property of law abiding citizens of the Republic of Namibia in the Caprivi Region. The State will prove that a conspiracy existed amongst those involved that wanted to overthrow the Namibian Government in the Caprivi Region. In preparation of these attacks, persons were recruited in the Caprivi Region to leave Namibia in order to be trained in the use of automatic firearms and explosives. Testimony will be led about the supporters of the rebels who provided logistic and other support while the rebels were in the rebel camps preparing for the attacks. The State proposes to arrive at the following overall picture, that the accused participated in a conspiracy over the period covered in the indictment, but in reaching this aim, rebel bases were established in the Caprivi Region and in neighbouring countries to train the rebels; that meetings were held in various, was held at various times in around the Caprivi Region with the aim of supporting the military insurrection of Namibia in the Caprivi Region; that the exodus of people fled to Botswana and who wanted to return to Namibia in order to overthrow the Government of Namibia in the Caprivi Region by violent means; that a accused gathered at various rebel bases in order to prepare for the violent takeover of the Namibian Government in the Caprivi Region; that shortly before the attack on the 2<sup>nd</sup> of August 99, Makango Rebel Base became the prominent gathering place for the rebels from

where they were supposed to attack various targets in the Caprivi Region; that on the 2<sup>nd</sup> of August 99, attacks took place in the Caprivi Region on different targets, where people were injured, killed and where properties were damaged. The State will further prove that political originations were involved in promoting of the military secession of the Caprivi Region from the rest of Namibia. The accused are not on trial because of their political believes or affiliations, but because of the criminal actions that they waged against the Namibian Government and its people on the 2<sup>nd</sup> of August in the Caprivi Region. The Namibian people are a peace loving nation who cherishes the heart for freedoms that we as Namibians enjoy and never again should any Namibian have to resolve to violence to settle national differences. They could and should be solved through dialogue and persuasion as provided for in the constitution of Namibia. Namibia is a constitutional democracy governed by the rule of law. At the conclusion of this trial, the State would ask the Court to evaluate the actions of the accused that are contrary to the Laws of Namibia. The State does not propose that the political aspirations of the Accused be judged, for this can be lawfully sought, provided it is done by legitimate means and in accordance with the Constitution of Namibia. The State intends to prove that the accused acted contrary to the law of Namibia and would pray at the end of this trial that those are found criminally accountable for their actions. My Lord I ask that that be handed in as part of the documentation as an exhibit. As it pleases My Lord.'

### **The test to be applied in an application in terms of section 174 of the Criminal Procedure Act 51 of 1977**

[13] Section 174 reads as follows:

'174 Accused may be discharged at close of case for prosecution –

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

[14] The words 'no evidence' have been interpreted by the courts to mean no evidence upon which a reasonable person might convict. (See *S v Khanyapa* 1979 (1) SA 804 (A) at 838F; *S v Heller* (2) 1964 (1) SA 524 (W) at 541G).

[15] It is necessary to consider some authorities in order to determine the test to be applied in an application for a discharge at the close of the case for the prosecution.

[16] In *R v Kritzinger* 1952 (2) SA 401 WLD Roper J held that a trial judge had an absolute discretion whether or not to discharge and that the trial judge is 'entitled to refuse a discharge if he considers that there is a possibility that the case of the Crown may be strengthened by evidence emerging during the course of the defence'.

[17] In *S v Shuping and Others* 1983 (2) SA 119 (BSC) Hiemstra CJ at 121A formulated the test to be applied at the State's case as follows:

'(i) Is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.'

[18] In *S v Paulus and Another* 1996 NR 374 Gibson J (with Mtambanengwe J concurring) referred to the reservation by Bekker J in *S v Herholdt* 1956 (2) SA 714 (N) at 723 about the approach in *Kritzinger*, stating that in Zimbabwe the courts have had no hesitation in abandoning the *Kritzinger* test. Gibson J stated the following at 377J to 378A:

'In this appeal I am not going to stick my neck out to say that the *Kritzinger* test has been overtaken by the provisions of the Constitution of Namibia. Although counsel for the accused, Mr McNally argued in his heads of argument that the above test (the *Kritzinger* test) is wrong and needs to be done away with he readily agreed with counsel for the State, in Court, that the ruling could not be made in this appeal without presentation of further and fuller argument by both sides.'

[19] A few years later this court in *S v Le Roux* 2000 NR 209 with reference to case law expressed itself (as per Mtambanengwe J) in respect of the aforementioned test as follows at 216D-J to 217A-C:

‘In *S v Campbell and Others* 1990 NR 310 (HC) 1991 (1) SACR 435 (Nm) applied the test as follows at 321C-D (NR), 445A-B (SACR):

I am in agreement with the authors Hoffmann and Zeffertt (*op cit* at 506) where they submit that Hiemstra CJ’s approach is correct in principle and in the light of the prevailing practice. The application of the second leg of Hiemstra CJ’s formulation should however take the evidence and the circumstances of the particular case into account. This is exactly what Hiemstra CJ did in *Shuping’s* case. After formulating the test as quoted *supra*, he immediately analysed the evidence. At 506 of their work, *Hoffmann and Zeffertt* also have the following to say in this regard:

“Where there might be indications in the explanations of the plea or cross-examination, combined with the State evidence, that give rise to a reason to believe that the defence evidence might supplement the State’ case, it would be unjust to ignore them – a criminal trial is not a game, and its end is to achieve justice by convicting the guilty as well as freeing the innocent.”

Dr *Horn* said that *Campbell’s* case is still the law in Namibia on this subject, as against Mr *Botes’* urging that in light of post-constitutional developments in South Africa the Court here should do the same. He was referring to *S v Phuravhatha and Others* 1992 (2) SACR 544 (V) where at 551-2 Du Toit AJ criticised and rejected the *dictum* (above) of Hiemstra in *Shuping’s* case *supra*, in the following terms:

“I would also want to indicate that I furthermore do not agree, with respect, with the bald statement in the second leg of the question as put in *S v Shuping (supra)*, namely that the reasonable possibility of defence supplementation of the State case should lead to a refusal to discharge the applicant. The reasonable possibility of general supplementation of an inadequate or poor State case at the stage of the closing of the State case is but only one relevant factor present during the consideration of an application for a discharge under s 174 of Act 51 of 1977. It is also a factor which can be, and in my view often is, overridden by other relevant considerations, one of which must be the interest of the accused. Considerations of fairness towards the accused are relevant and equally important.



Furthermore, the interest of the community can in my view not condone a procedure of prosecution and trial by possible self-implication or possible co-accused implication, and the community would normally expect of the State or the prosecutor to bring citizens to court on prima facie cases. It is after all expected of the prosecution to consider carefully whether there is reasonable and probable cause for prosecution, ie whether a *prima facie* case is present.”

And further at 552B:

“However, in my view, a trial court may in suitable cases decide that the reasonable possibility of supplementation of the State case during the defence case does not bar it from discharging an accused person after the closing of the State case if other considerations, including the interest of the accused, warrant the discharge of the accused. Insofar as *S v Shuping (supra)* may create the impression that the existence at the end of the State case of a reasonable possibility of supplementation of an inadequate State case during defence evidence should lead to a refusal to discharge, I am unable to follow it.” ’

Mtambanengwe J concluded as follows on 219F-G:

‘I do not wish for now to consider the constitutionality of the matter save to say that I agree with comments made by Du Toit AJ in *Phuravhatha's* case (*supra*), and by Claasen J in *Mathebula's* case (*supra*), in the context of those cases. In particular I agree that if “no evidence whatsoever has been tendered against the accused it will be unfair, even unconstitutional to place the accused on his defence in the hope that he will supplement the State’s evidence”. ’

[20] Willis J in *S v Ndlangamandla and Another* 1999 (1) SACR 391 at 393h stated that the provisions of section 35(3)(h) of the South African Constitution with regard to the presumption of innocence, the right to silence and the right not to testify have three practical consequences impacting upon section 174 of the Criminal Procedure Act 51 of 1977, one of which is that the second leg of the test in *Shuping (supra)* should not apply. In *Ndlangamandla* the two accused were charged with murder. Their defence was that they acted in self-defence. The two accused persons were discharged *mero motu* by the court. Willis J at 393i-394a remarked as follows:

'In my view a further relevant factor is that the accused, right at the outset, gave an explanation of plea, ie self-defence, which is completely consistent with the satisfactory evidence of the State with regard to the killing of the deceased. Different considerations may have applied if the accused had resorted to a bare denial, or had put up a defence of an *alibi*.'

[21] What different considerations were however not spelt out. If the second leg of the test in *Shuping* is not applicable, and the answer in respect of the first leg is negative (ie there is no evidence upon which a reasonable man might convict), even in those instances where there are bare denials or no plea explanations at all, should that not be the end of the enquiry?

[22] Muller J in *S v Nakale and Others* 2006 (2) NR 455 extensively analysed the applicable law relating to the provisions of section 174 of the Act with reference to a number of decided cases. Muller J agreed with Mtambanengwe J where the latter (*S v Paulus and 12 Others* and unreported judgment delivered on 3 November 2000) favoured the stance taken by du Toit AJ in *Phuravhatha*, namely, only where there is a reasonable possibility of supplementation of the State case by the defence case may it be considered as a factor together with other factors. Mtambanengwe J in *Paulus* (supra) repeated the injunction that each case must be decided on its own merits. (See also *S v Agliotti* 2011 (2) SACR 437 (GSJ) at 456f-h).

[23] Muller J in *Nakale* expounded on the effect fundamental rights of an accused person (ie *inter alia* the right to be presumed innocent, the right to remain silent, and the right not to be compelled to testify), have on the test laid down in *Shuping* and qualified in *Phuravhatha* (supra) and if so to what extent.

[24] In *S v Mathebula and Another* 1997 (1) SACR 10 WLD at 34-35 Claasen J held that the right of an accused person to a fair trial which includes the right to be presumed innocent, to remain silent, not to testify and not to incriminate himself, and the right not to be a compellable witness against himself had been elevated to a higher order by their inclusion in the Constitution and concluded that the discretion which a court may have in terms of section 174 'must be regarded as having been

substantially curtailed, possibly even to the extent of it being non-existent as a result of these constitutional provisions'. It was held by Claasen J that the discretionary power to continue the trial would fly in the face of afore-mentioned constitutional rights and that it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or by another co-accused.

[25] Nicholson J in *S v Jama and Another* 1998 (2) SACR 237 NPD at 242g agreed with the sentiments expressed by Claasen J in *Mathebula*.

[26] Mynhardt J in *S v Makofane* 1998 (1) SACR 603 TPD at 618h-619a disagreed with the judgment of Claasen J in *Mathebula*. Mynhardt J held that the only change the interim South African Constitution brought about is that a court must consider the question whether an accused person will have a fair trial if the application for a discharge is refused. It was further held that the discretion which courts at all times had (at common law) remains unaffected and is still valid.

[27] Blieden J in *S v Hudson and Others* 1998 (2) SACR 359 WLD at 362 supports the views expressed by Mynhardt J in *Makofane* (supra) stating that 'the Constitution cannot affect the discretion contained in s 174 which at all times had to be exercised fairly to both the accused and the State'.

[28] Mynhardt J in *Makofane* at 617 held that the question whether an accused person would have a fair trial if an application for a discharge is refused is to be decided with due regard to the relevant facts and circumstances of a particular case. In support of this view reference was made to the unanimous decision of the Constitutional Court in the case of *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) where Kriegler J stated at 195-196 par 13 the following:

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of

conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as it was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[29] In *S v Ningisa and Others* an unreported judgment of this court (case number CC 4/2002, delivered on 14 October 2003) Silungwe J held that an accused person in an application for a discharge has the right to a fair trial in terms of Article 12 of the Namibian Constitution, has the right to be presumed innocent, to remain silent, not to testify and not to incriminate himself and not to be a compellable witness against himself, and where the State fails to prove a prima facie case against the accused, the State cannot seek the assistance of an accused to do what the State could not do. In these circumstances the accused is entitled to discharge pursuant to the provisions of section 174 of the Act.

[30] Muller J in *Nakale* (supra) was of the view that although constitutional rights should be considered, that it is too simplistic to state that as was held in *Ningisa* that an accused has to be discharged.

[31] In *S v Labaxa* 2001 (4) SA 1251 (SCA) Nugent AJA at 1256 I-J par 18 reiterated 'that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness-box and incriminates himself'. The court held at 1257 paras 20 and 21 as follows:

'[20] The same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a

co-accused. The prosecution is ordinarily entitled to rely on the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (*Skeen (supra)* at 293) that need not always be the case.

[21] Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.'

(See also *S v Nkosi* 2011 (3) SACR 482 (SCA) at 489g-490f).

[32] Skeen in an article in the *South African Law Journal* 'The decision to discharge an accused at the conclusion of the State case: a critical analysis' at 293 stated that the suggestion that the State evidence may be strengthened by evidence given by a co-accused is fraught with dangers since a co-accused is in the position of an accomplice, the cautionary rule of practice should be applied by the court in considering his evidence. It was suggested that if the State wishes to rely on the evidence of a co-accused, the preferable way would be to use him as a State witness after his status as accused has been terminated either by the offering of an indemnity in terms of section 204 of the Act or using him after his own trial is complete.

[33] Not only are the rights of an accused important in an application for a discharge but the 'right of the community to see that justice is done is equally important. In particular, the complainant in any matter, and those members of society with an interest in the outcome of the case'. (See *S v Ggozo and Another* 1994 (1) BCLR 10 (Ck) per Heath J).

[34] Kgomo J in *S Agliotti* 2011 (2) SACR 437 GSJ at 456c stated that section 174 serves a valuable purpose and is also constitutionally acceptable, as the Criminal

Procedure Act's main purpose, amongst others, is to strive for or achieve orderly and fair criminal justice and refers with approval to an exposition in Albert Kruger *Hiemstra's Criminal Procedure* at 22-76 where the following appears:

'Section 174 creates an exception to the normal trial procedure, primarily to relieve the trial court of the burden of persisting machine like with a futile trial when it is clear that there cannot be a conviction. The underlying purpose is to save time and effort, not to complicate the court's task. The working of the section is and its meaning unambiguous. The court is given the power to render there and then, at the closure of the case for the prosecution, a judgment of not guilty. There is however a jurisdictional prerequisite to be satisfied before the power arises in this manner: the court must be of the view that there is no evidence upon which conviction can be based. Therefore, two related but distinguishable decisions have to be made: is there a lack of evidence, and if so, should discharge be granted? The former entails mainly a clinical assessment of the evidential value of the evidence; the latter requires sound judgment in the light of all the circumstances of the particular case.'

[35] Muller J in *Nakale and Others* (supra) listed a number of factors to consider in an application in terms of section 174 one of which is where the State alleges common purpose and expressed himself as follows at 465B:

'Furthermore, if more than one accused is charged for committing the same offence and the State alleges common purpose, evidence which strongly implicates one accused, but to a lesser extent another accused, may be evidence on which a reasonable court may convict, if the basis of common purpose is laid by the State in its evidence. If *prima facie* a scheme or a scam can reasonably be inferred from the State's evidence, in which all, or more than one, of the accused may have played a part, however small, to achieve the result of committing the alleged offence(s) an accused that may appear less guilty at the close of the State case, may at the end of the trial also be convicted.'

[36] It appears in a number of cases referred to (supra) that the advent of a constitution guaranteeing fundamental human rights did not result in a new test to be considered in an application for a discharge at the closure of the State's case. I

prefer the test applied in *Phuravhatha* (supra), approved by Mtambanengwe J in *S v Paulus and 12 Others* and followed by Muller J in *S v Nakale* (supra).

[37] I also agree with Heath J in *Ggozo* (supra) where he expressed himself as follows on 13B-D:

‘The reasoning in the judgment by du Toit is very close when a statute is interpreted against the background of a constitution with fundamental rights and responsibilities. In fact, I agree with the approach that none of those principles can be anything stronger than merely guidelines to consider the question whether a discharge should be granted. In any specific case and depending on the facts and the particular legal principles that apply in that case, one or more of those guidelines can be given more weight than other but in the end it is a question what is required to see to it that justice is done and justice should then be done to both the accused and the community and in particular then, the administration of justice.’

[38] Decisions (supra) to the effect of fundamental human rights contained in a Constitution essentially removes the discretion of a court to discharge at the close of the State case, I decline to follow.

### **The issue of credibility**

[39] Regarding the question whether or not the credibility of a State witness should play any role at the stage where there is an application for a discharge in terms of section 174, Brand AJA in *S v Teek* 2009 (1) NR 127 (SC) at 131A-B stated the position as follows:

‘Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under the section. But the generally accepted view, both in Namibia and South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such a poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg *S v Mpetha and Others* 1983 (4) SA 262 (C) at 265; *S v*

*Nakale* supra at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict ?'

[40] Williamson J in *S v Mpetha* on the issue of credibility emphasised the point as follows at 265D-G:

'In my view the cases of *Nortje*, *Bouwer* and *Naidoo* correctly hold that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. If a witness gives evidence which is relevant to the charges being considered by the Court then that evidence can only be ignored if it is of such a poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional cases where the credibility of a witness is so utterly destroyed that no part of his material evidence can be possibly believed. Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown. It must not be overlooked that the triers of fact are entitled 'while rejecting one portion of the sworn testimony of a witness, to accept another portion'. See *R v Kumalo* 1916 AD 480 at 484. Any lesser test than the very high one which, in my judgment, is demanded would run counter to both principle and the requirements of s 174.'

[41] In *S v Nakale* (supra) Muller J stated at 465:

'The manner in which a State witness is cross-examined and the type of questions or statements put to the State witness, may under certain circumstances require that the accused be put on his defence. If an accused indicates through questions and statements to a witness that his evidence is not correct or truthful and that the accused will testify otherwise, or if no other inference can be drawn that the accused will through his/her testimony refute such evidence, and in the absence of any other documentations, etc disprove such evidence, it seems to me that such a factor may exist. To put it in perspective, such disputed evidence would require an answer by the accused and the accused would not be entitled to a discharge in terms of s 174.'

[42] The question whether the credibility of a witness should play a role in considering whether or not to discharge an accused person appears to have been settled in this jurisdiction.



[43] Muller J in *Nakale* (supra) refers with approval to the view expressed by Williamson J in *S v Mpetha and Others* 1983 (4) SA 262 (C) at 265 D – G:

[44] Mtambanengwe J in the unreported case of *S v Gerson Tjiuri* delivered on 30 November 1995 also approved of this view. See also *S v Campbell and Others* 1990 NR 310 (HC) (1991 (1) SACR 435 (Nm) ).

[45] The Supreme Court of Namibia in *S v Teek* 2009 (1) NR 127 (SC) per Brand AJA confirms that credibility plays a limited role at the stage of an application in terms of section 174 and states as follows at 131C:

‘Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict.’

## **Torture**

[46] Article 8(2)(b) of the Constitution of Namibia provides that no persons shall be subject to torture or to cruel, inhuman or degrading treatment and punishment.

[47] In the case of *Jestina Mukoko v The Attorney-General* an unreported judgment of the Supreme Court of Zimbabwe delivered on 20 March 2012, Malaba DCJ in dealing with section 15(1) of the Zimbabwean Constitution which is similarly worded as Article 8(2)(b) of the Namibian Constitution, stated the following at p 32-33:

‘The obligation on the State, through its agents, not to admit or use in criminal proceedings, information or evidence obtained from an accused person or any third party by infliction of torture, inhuman or degrading treatment is not explicitly set out by a separate provision in the Constitution. It would be contrary to the object and purpose of the prohibition under s 15(1) of the Constitution to allow admission or use of such information or evidence in any legal proceedings.’

[48] The Court continues at 33 (last paragraph) to 34 as follows:

'At various stages of the whole process of proceedings by which the State deals with persons suspected of crime who are in the custody of police officers, the Constitution imposes duties for the protection of the fundamental rights of the subject. The primary duty is on the law enforcement agents not to abuse executive authority in the investigation of crime by torturing or treating suspects in an inhuman or degrading manner to extract information or confessions to be used against them in legal proceedings anticipated to follow the ill-treatment. If the duty fails to achieve its intended purpose at this stage, the law imposes the duty on public prosecutors not to admit or use information or evidence obtained from an accused person suspected of having committed a criminal offence or any third party by torture, inhuman or degrading treatment when making prosecutorial decisions. If the duty fails at this stage the law imposes the duty on judicial officers. Eventually it lies with the Court to intervene through the exercise of its original jurisdiction to enforce or secure the enforcement of fundamental rights.'

The Court continues at 35 as follows:

'Information or evidence obtained from an accused person or any third party by torture, inhuman or degrading treatment if admitted or used in legal proceedings would reduce s 15(1) of the Constitution to a mere form of words. As JACKSON J put it in the dissenting opinion in *Korematsu v United States* (1944) 323 US 214 at 246 "once judicial approval is given to such conduct it lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need". In *People (Attorney-General) v O'Brien* (1965) IR 142 KINGSMILL MOORE J of the Supreme Court of Ireland said that: "to countenance the use of evidence extracted or discovered by gross personal violence would . . . involve the State in moral defilement.'

(See also *Ex parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC); *S v Likuwa* 1999 NR 151; *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment*, acceded to by Namibia during 1994).

## Identification

[49] It is common cause that no identification parades were held at any stage during the investigation of this case. It was placed in issue at the inception of the trial. In the absence of any identification parades State witnesses were allowed to identify the accused persons in court whom at any stage of the trial exceeded 100 individuals.

[50] A common outstanding feature of many of the State witnesses who testified regarding the identity of specific accused persons and their involvement in the charges preferred against them, is that even though the names of individuals were mentioned which correspond with the names of accused persons appearing on the charge sheet, many witnesses were, when given the opportunity to point out the individual(s) in court referred to by the State witness in his or her testimony-in-chief, unable to do so.

[51] The issue which remains to be resolved is whether there was a proper identification in those instances where the full names of an individual corresponding with the name of an accused person was mentioned by a witness, but where such a witness failed to point out the individual so mentioned in court.

[52] The normal human expectation is, where an individual is well-known to a witness, that such a witness should have little difficulty in identifying such known individual even amongst a group of persons.

[53] In *R v Dladla* 1962 (1) SA 307 AD at 310 the South African Appellate Division approved of remarks by James J in delivering the judgment of the trial Court as follows:

‘One of the factors which in our view is of the greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. . . . In a case the witness has known the person previously, questions of identification marks, of facial characteristics, and clothing are in our view of much less importance than in cases where there was no previous

acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made.'

[54] It was submitted on behalf of the State that it was not imperative to hold identification parades since identification was never put in dispute during the investigation stage of this case. It was further submitted that dock identification is admissible in the circumstances of this case and serves as confirmation of the earlier out of court identification by name.

[55] This court was referred to a passage in *Criminal Evidence* by Richard May, 4<sup>th</sup> edition where the following appears at 382 paras 16-38:

'Once a witness has made an out of court identification on some previous occasion, he is permitted to identify the suspect in the dock. This is by way of exception to the rule that dock identification should not generally be permitted. The reason for this exception is that it is though generally that the dock identification in this instance is safe and reliable since it is confirmed by the earlier out of court identification. This evidence is admitted despite the general rule excluding evidence of previous consistent statements. The rationale for admitting evidence of the previous out of court identification is "to show consistency, in the identification made by the witness: 'to show that the [witness] was able to identify at the time to exclude the idea that the identification of the prisoner in the dock was an afterthought or mistake". '

[56] This court in an earlier ruling on the question whether dock identification is inadmissible ruled that it is not inadmissible per se but that a court must decide in the specific circumstances of each case what weight the court should attach to such dock identification. This court in that ruling stated the following:

'different considerations apply when an identifying witness testifies that a suspect is well-known, where the witness and the suspect had been attending the same school during the same period, or where they had been acquainted under circumstances which would make it unlikely for the identifying witness not to be able to make a positive identification. In such a case, one would expect of a witness to have the capacity to identify an accused

person irrespective of the compromising position of an accused person in the dock, especially if such witness is required to identify a person amongst a very large group of 120 persons.'

[57] The 120 persons referred to the number of accused persons before court at that stage.

[58] The practice then followed in this court was to give a State witness an opportunity to identify or point out those accused persons whose names had been mentioned by such a witness during his or her evidence-in-chief.

[59] I shall therefore accept as a general rule, and, for the purpose of this application, where a State witness had made a positive dock identification that such identification is reliable.

[60] The question I posed earlier however is what weight, if any, this court should attach to the fact that a name was mentioned by a State witness but where there was no dock identification or where a wrong accused person was pointed out.

[61] May (supra) reasons that dock identification (in the circumstances referred to) is safe and reliable since it is confirmed by an earlier out of court identification. It follows logically, in my view, that where a witness fails to identify an accused person in the dock the reliability of the identification by name is questionable and may be indicative of the fact that such a witness is indeed not so familiar with the faces behind the names.

[62] A factor which may impact upon the reliability of dock identification are those instances where an accused had indeed been positively identified by a State witness is the special entry recorded by this court in terms of section 317(4) of the Act.

[63] In an application in terms of s 317 of the Act on the basis that the prosecuting counsel engaged in activities during court adjournments which amounted to irregular conduct (see *S v Malumo and Others* 2006 (1) NR 323) this court on 335G-H stated:

'Mr July has during his evidence-in-chief explained why it is necessary, in respect of the witnesses who are required to testify about events covering a period of a number of years to consult with those witnesses during adjournments in order to present evidence still to be given in Court after the adjournment in a chronological and logical manner. Although not prohibited to do so by any rule of law as indicated *supra*, the undesirability of such conduct in my view lies in the temptation of revising and rectifying the testimony of such a witness given prior to the adjournment.'

On 336D this court stated:

'It is also the testimony of Mr July that in addition to containing the photographs of accused persons in one of these albums, the names of the accused persons also appear underneath these photographs, and on top of the photographs appear numbers (presumably the number of such an accused person)!'

and continues at 336G-J and 337A-D:

'What weight now should this Court attach to dock identification in those circumstances where a witness had mentioned the name of an accused person in his witness statement, and is shown during consultation photographs together with the names and numbers of accused persons. The aforementioned practice by the prosecutors has the same effect of putting a leading question to a witness, which is generally prohibited. One of the reasons underlying such prohibition against leading questions to a witness is that it suggests the desired answer. In providing the photo album to a witness it suggests the identification of an accused person still to be identified in the dock. The accused persons find themselves in a compromising position in the dock and this Court at the end of this trial will be required, *inter alia*, to assess the capacity of witnesses to identify accused persons who had been pointed out by them. This unsatisfactory situation is further compounded by the fact that prior to the dock identification the witnesses are already provided with photos and names of accused persons. This in my view is an irregularity which militates against any perception of fair play, and is prejudicial to the accused persons in the sense that it negatively affects their right to a fair trial. I am accordingly of the view that the practice of providing a photo album to witnesses in which the accused persons are identified prior to the witness identifying the accused persons in Court amounts to an irregular or illegal departure from those "formalities, rules, principles, or procedure in accordance with which the law

requires a criminal trial to be initiated or conducted”, and that such irregularity warrant a special entry on the record in terms of the provisions of section 317 of the Act.’

[64] This ruling was given on 8 December 2005 and may affect the reliability of all those positive dock identifications of accused persons by State witnesses done prior to 8 December 2005.

[65] This court in that ruling stated that the irregularity resulted ‘in the fairness of the trial being compromised’.

[66] In *S v Kroon* 1997 (1) SACR 525 (SCA) at 530b-c the Supreme Court of Appeal held that the wording of a special entry had to be formulated in the form of a factual finding accompanied by the *allegation of the accused* person that it resulted in an irregularity that prevented justice from being done. (Emphasis provided). It was held in *Bezuidenhout v Director of Public Prosecutions* 2008 (2) SACR 579 (SCA) para [16] that the court making the entry must determine the facts on which the entry is based and make the entry accordingly. It was also held that it is the duty of the trial court to determine whether or not a complaint or irregularity is well founded.

[67] The Supreme Court of Appeal in South Africa subsequently in *S v Botha* 2006 (1) SACR 105 (SCA) at 110a-d held (and referred with approval to *Kroon* (supra) ) that it was not the task of the trial court to make a finding that there had been an irregularity. It held that it was the task of the Supreme Court of Appeal to determine whether or not there had been an irregularity and thereafter to decide on the merits and consequences thereof. If it was found (by the Court of Appeal) that an irregularity had occurred, the next step was to determine, in accordance with the proviso to s 332 of the Act whether the irregularity had caused a failure of justice.

[68] The provisions of section 317 only introduce the alleged irregularity.

[69] The effect of the special entry made by this court on 8 December 2005 is therefore important in this application only to the extent of the factual findings made

by this court. On the authority of *Botha* supra any finding by this court that there indeed had been an irregularity, is thus wrong.

[70] In my view therefore those positive identifications of accused person in court prior to the ruling on 8 December 2005 remain as evidence presented by the State and should be considered in this application.

I shall now briefly deal with the common law offences of high treason, sedition and public violence.

### **High Treason**

[71] In *S v Banda and Others* 1990 (3) SA 466 BGD at 479C-E 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.'

[72] An overt act is any act, 'if viewed objectively, which is seemingly and apparently to all appearances innocent, may establish treason if it is performed with a hostile intent'. (See *Banda* supra at 473J-474A). The State need not actually be overthrown before high treason is committed. Attempts to destroy the existence, independence or safety of the State are punishable as completed and not attempted high treason. (See *Snyman Criminal Law* Fourth Edition p 314). Incitement or conspiracy to commit high treason are overt acts and is high treason. (See *Banda* supra at 474). No distinction is made in high treason between the perpetrator of the act, the accomplice and accessory after the fact because every person who with



hostile intent, assists in the commission of the crime whether before or after the event, conforms to the wide definition of the crime (See *Banda* supra at 474E).

[73] However 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 (See *Banda* at 474F).

[74] An overt act may take the form of speaking or writing words if an individual writes or speaks in the furtherance of an intent to overthrow or coerce the government.

[75] Acts and declarations in the furtherance of a common purpose are receivable as evidence as they are relevant. They are regarded as relevant when they are 'executive statements' but are inadmissible when they constitute an account or admission of past events, and not made in the furtherance of a common purpose, that is 'narrative statements'. As *Hoffmann and Zeffert* (op cit) point out at 190:

'2 Acts and declarations in furtherance of a common purpose:

There is some uncertainty as to whether this topic should be treated as an exception to the rule that admissions are not vicariously admissible. Some say that it should; but the better view, it is submitted, is that the reception of the declarations of persons engaged in a common purpose stands on the same footing as acts done; in other words, they are received when they are relevant acts. They are relevant, as will be seen below, when they are "executive" statements; they are inadmissible when they are "narrative", that is to say, when they are not made in furtherance of a common purpose but as an account or admission of past events. An admission contained in narrative is inadmissible precisely because admissions are not, in general, vicariously admissible; but they may, of course, be received against the persons making them.' (See *Banda* supra p 506G-507A).

[76] Executive statements may only be taken into account where there is evidence *aliunde* laying the foundation of a common purpose. Boshoff J in *S v Moumbaris and Others* 1974 (1) TPD 681 at 685H-686A stated the following in this regard:

'Once there is evidence *aliunde* of a common enterprise and the parties thereto, the acts and statements, executive as opposed to narrative, of one of the *socii criminis* or co-conspirators are admissible to confirm the scope of the common enterprise or the conspiracy and the nature of the steps taken to carry it out, and there seems to be no reason why such evidence should not be used to confirm the other evidence as to the parties who took part therein; see judgment of Schreiner JA, as quoted in *R v Leibbrandt and Others* 1944 AD 253 at p 276; *R v Mayet*, 1957 (1) SA 492 (AD) at p 494.'

[77] 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 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.'

[78] In *S v Mgedezi and Others* 1989 (1) SA 687 (AD) at 705I-706C, Botha JA stated the following regarding concept of common purpose:

'In the absence of proof of a prior agreement, accused no. 6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[79] The State is required to prove *prima facie* all these requirements at this stage in respect of each accused person.

[80] An overt act may also be in the form of an omission. Friedman J in *Banda supra* at 512A-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.'

[81] The hostile intention (*animus hostiles*) accompanying the act has been described as the definitive element of high treason. Motive is irrelevant in the commission of high treason. *Hunt South African Criminal Law and Procedure* Vol II p 33 Third Edition referred to a judgment in *R v Leibbrandt* 1944 AD 253 where at 281 Schreiner J drew the distinction between motive and intention as follows:

‘Treason may be committed and the hostile intent be entertained with a view to achieve some further purpose. The ultimate goal may be the achievement of some solid or economic advantage for a portion or even for the whole community. It may be the achievement of some political or ideological theory, or it may be the fulfilment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the enquiry whether treason has been committed or not. Whatever the factors are that induce a citizen to entertain an intention to help the enemy, or to weaken the effort against the enemy, if he acts in order to carry out that intention he commits an act of treason.’

Hunt at 34 states as follows:

‘Though an intent to overthrow the State certainly does constitute “hostile intent”, hostile intent” is not confined, to this state of mind. Someone who intends “to coerce the governing authority” by force, but has no intent to overthrow it, has “hostile intent”. ’

[82] “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.’

## **Sedition**

[83] Sedition according to *Snyman* consists in unlawfully and intentionally taking part in a concourse of people violently or by threats of violence challenging, defying

or resisting the authority of the State or causing such a concourse. The intention required (not necessary hostile) is only to resist or challenge the authority of the State without the object of overthrowing the government of the State and can be committed by someone who owes no allegiance to the State.

[84] Contrary to *Snyman's* view that violence is a necessary element of the crime of sedition, the courts have over the years not included violence as an element of this crime.

[85] In *S v Twala and Others* 1979 (3) SA 864 TPD the court referred with approval to the decisions of *R v Endemann* 1915 TPD 142 and *R v Viljoen* 1923 AD 90 and Van Dyk J at 869G-H stated the following:

'The gathering need not be accompanied by violent and forcible conduct and violence is certainly not an essential part of the seditious gathering. What is essential is that the gathering occurs with the necessary intent – see in this regard *Endemann's* case at 147 at *Viljoen's* case.

Reliance on *R v Klaas and Others* 1915 CPD 58 at 63 for the contrary proposition, ie that acts of violence should have been committed, cannot be supported as INNES CJ in *Viljoen's* case effectively incorporated the whole of DE VILLIERS' judgment in the *Endemann* case as far as the elements of sedition are concerned, where DE VILLIERS JP specifically found that "to constitute the crime of sedition it is not necessary that act of violence should have actually been committed".

Moreover, if regard is had to the quality of the intention required, namely to defy or subvert the authority of the State or its officials, there is no logical reason why violence must be regarded as a natural concomitant, or an essential element of a seditious gathering.' (See also *S Zwane and Others* (3) 1989 (3) SA 253 WLD at 261C.

## **Public Violence**

[86] *Snyman* defines the crime of public violence as the unlawful and intentional commission, together with a number of people, of an act or acts which assume

serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others. This definition was quoted with approval in *S v Mlotswha* 1989 (4) SA 787 (WLD) at 794E.

[87] Milton in *Hunt South African Criminal Law and Procedure* Vol 11 mentions that the crime of 'public violence has the unusual feature that it involves that punishment of an individual for the unlawful conduct of a crowd of people. In other words, the crime of public violence does not require that the wrongdoer should have committed some act of violence; it is sufficient that he associated himself with the group of people who collectively perpetrated acts of violence. The justification for substituting liability based upon the offender's own act and intent for liability based on the acts of the crowd is the following:

'A person who is part of a group will draw courage from the conduct of others in the group, and may well behave in ways that he would not act when alone. His chances of detection are, in the nature of things, rather lower when he can hide in the rabble . . . . [W]here several people are together acting violently, their weight of numbers in itself increases the danger to public order inherent in their conduct.' (ATH Smith *Offences against Public order* (1987) 3.

Milton (supra) continues at 76 as follows:

'The essential point of distinction between public violence and high treason and sedition lies in the fact that the latter two crimes are committed against the *majestas* of the state: high treason requires an intention to overthrow or coerce the executive (hostile intent); sedition requires an intention to defy or subvert the government's authority. In public violence there need be no defiance or nor attack on the public authorities. The three crimes overlap where a number of people acting in concert and with hostile intent assemble and disturb the public peace.'

[88] I shall now deal with the applications for discharge in respect of each accused person. I shall not be dealing with them in numerical order but will instead deal with them as clients of the different counsel. I shall therefore first start with those accused

persons who are the clients of Mr Kauta. I intend to set out briefly the evidence found to have been proved by the State against them.

[89] Mr Kauta in his heads of argument stated that the following facts are either common cause or not seriously disputed:

That the Republic of Namibia is a sovereign State; that the accused persons owe allegiance to the Republic of Namibia; that the Caprivi Liberation Army was formed in 1989; that various public and private meetings were held in different places in the Caprivi Region between 1992 and 1998; these meetings discussed the secession of the Caprivi Region from the Republic of Namibia by either violent or diplomatic means; that Mr Muyongo's army set up camp in October 1998 at Lyibu-Lyibu on the eastern side of Linyanti in preparation of liberating Caprivi by violent means, and that one Victor Falali was killed after he escaped from this camp at Linyanti; that a group of 92 armed individuals fled to Botswana shortly afterwards; that inhabitants from the Caprivi Region started fleeing to Botswana in order to seek education, employment and an opportunity to liberate the Caprivi Region by violent means; that the conspiracy to secede the Caprivi Region from the rest of Namibia continued unabated in Botswana; that a plan was hatched in Botswana that refugees should escape and return to Namibia; that a group of approximately 100 Namibian men with fire-arms from Angola gathered at Navumbwe Island were treated by a traditional healer in preparation for the imminent attack on the Caprivi Region; that on 1 August 1999 the plans culminated in a meeting held at Linyanti at which Geoffrey Mwilima said 'we who fall under UDP, we cannot go for that issue. We have just to cut Caprivi from the rest of Namibia'; that from 31 July 1999 to 1 August 1999 people gathered at Makanga in preparation for the attack; that at Makanga those present were transported in a government owned TATA truck and were registered in writing and thereafter divided into various groups in order to attack specific targets; that at Makanga after final instructions the co-conspirators were transported and some walked to their various destinations of attack; that on 2 August 1999 various Government institutions in the Caprivi Region were attacked with mortars and fire-arms; that the institutions that were attacked were 'Katounyana Special Field Force

base, Katima Mulilo police station; Wanela border post, Katima Mulilo town centre; the Namibian Broadcasting Corporation in Katima Mulilo, and the house of a police officer sergeant Patrick Liswani; that the attackers had tied red ribbons around their heads; that as a result of the attack eight police officers lost their lives; that a state of emergency was declared in the Caprivi Region and Inspector Goraseb was instructed 'to arrest all the prominent and executive members of the United Democratic Party ,(UDP)'; and that after the attack people regrouped at Cameroon, Masokokotwane, Malongwa Island and Kaliyangile.

I agree with this synopsis.

I shall now deal with the individual accused persons.

#### **1. Bollen Mwilima Mwilima (accused no. 65)**

[90] Oscar Mwisepe testified that the accused is his cousin and that Bollen Mwilima discussed the issue of secession anywhere he was. The accused was identified that he had offered his vehicle to be used to transport Mishake Muyongo to Botswana. Thaddeus Ndala brought food to Sachona rebel camp with a white Hilux motor vehicle belonging to the accused who was identified by the witness. The accused was arrested in Botswana.

[91] Christopher Siboli testified that the accused was a mobiliser of persons for the secession of Caprivi and that he donated money for the purpose of acquiring weapons in Angola. He identified the accused person in court.

[92] The witness Bernard Kanzeka testified that the accused was present at a meeting in November 1998 addressed by Geoffrey Mwilima at the DTA office where Geoffrey Mwilima informed those in attendance that people should go to Botswana and should return to liberate the Caprivi Region by fighting, by acquiring weapons and by collecting money for the purpose of transporting people to Botswana. Those present were in agreement with Geoffrey Mwilima. Kanzeka testified that he knew the accused as a teacher in Katima Mulilo and that the accused used to fill up his



motor vehicle with fuel at the filling station where he (ie Kanzeka) had been employed. He however failed to identify the accused in court. He testified that the accused also attended a second secret meeting addressed by Mishake Muyongo at the DTA office in Katima Mulilo on the topic of secession. Testimony was presented that the accused was with one Danbar Mushwena when persons were transported to go Botswana.

[93] A witness Roger Kepa testified that he was approached by the accused in the year 1999 who informed him that he should go to Singalamwe where others were already in the bush preparing themselves to secede Caprivi by fighting and said that those who refuse to go would be killed. The witness later during cross-examination conceded that the accused did not state for what purpose he was to go to Singalamwe although he was aware that there was a group of soldiers at Singalamwe and conceded that in his statement to the police he did not mention that the accused had threatened him.

[94] Ignatius Buchane testified that during January 1999 he was approached by the accused on two occasions who subsequently transported himself and his sister to Botswana. He had known the accused at that stage since the accused was his teacher during the year 1995 at Masida. He failed to identify the accused in court.

[95] There was evidence by Innocent Mahoto that on 18 April 1999 he was at Chinchimane where a new chief of the Mafwe was suppose to be inaugurated. The accused opposed the inauguration, was in a confrontation with a police officer and scuffled with him. He testifies that the accused had told one Mathew Simuza that the new chief would disturb their plans. The witness failed to identify the accused in court.

[96] The evidence establishes, in my view, the commission of an overt act from which hostile intention maybe inferred. In addition the accused had information of plans to secede the Caprivi and he failed to report this information to the relevant authorities.

[97] This application for a discharge is accordingly refused.

## **2. Alfred Lupalezwi Siyata (accused no. 80)**

[98] Christopher Siboli testified and identified the accused person to have recruited persons for the CLA and was present at a meeting in 1991 where members of the organisation Kopana ya Tou were called to by Mr Mishake Muyongo and were each one present was in favour of the Caprivi Region seceding from the rest of Namibia by force. The witness Bernard Kanzeka identified the accused as having attended a secret meeting in 1998 at the DTA offices in Katima Mulilo.

[99] A witness Lascan Sikosi testified that the accused was with one Francis Mubita when he was informed by Mubita that he should go to Angola to receive training and come back and fight Namibia. According to the witness the reaction of accused, when Mubita spoke these words, was to nod his head in agreement. He testified that the accused and one Chrispin Samahili were both in Botswana. He testified that the accused was a relative of his from Linyanti. The witness failed to identify the accused person in court. During cross-examination the witness was confronted with the evidence of State witness Dascan Nyoka who was with the witness when they met Francis Mubita but Dascan Nyoka never testified that the accused and Chrispin Samahili were present at that stage. The witness persisted with his version that the accused was present at that stage. He testified that he knew the accused since he used to work at 'Government Security'. The witness Nyoka mentioned the names of three other individuals who had been present at the time they encountered Francis Mutiba. The evidence of Sikosi is contradicted by the evidence of Nyoka on the question whether the accused had been present at the relevant time. In my view an overt act has been established at least from the

evidence of the witness Siboli. Taken together with the facts which are common cause hostile intent is to inferred.

[100] The application for a discharge is accordingly refused.

### **3. Chrispin Sali Samahili (accused no. 81)**

[101] Holstein Simasiku together with one Martin Matau testified that Chrispin Samahali together with others campaigned and informed people to go to Botswana. The witness Holstein Simasiku testified that the accused informed him that he should go to Botswana to join the 92 persons who had earlier left for Botswana. He testified that he attended Mafuta Combine School up to Grade 10 and was taught in Grade 6 and 7 by the accused. This witness declined to identify the accused person since he wouldn't be able to recognise him.

[102] Lascan Sikosi testified that after his repatriation from Botswana Chrispin Samahili was with Alfred Siyata when Francis Mubita informed him that he should go to Angola to receive training and come back and fight Namibia. According to him Chrispin Samahili nod his head in agreement when this was said. However, according to the evidence of Duscan Nyoka the accused was not present during this incident. The witness Sikosi was unable to identify this accused person in court.

[103] Innocent Falali Mahoto testified that Chrispin Samahili was on 18 April 1999 at Chinchimane where the inauguration of the new chief was to be held. Chrispin Samahali was against the inauguration of the new chief.

[104] Allen Mulanba Sihela testified that he attended Mafuta Combined School in 1998 and was in Grade 9. He knew the accused as a teacher at the school. He testified that they intended to go to Botswana and that the accused had told them that he would transport them to BP Service Station and from there another vehicle would pick them up. This was during January 1999.

[105] Vasco Mubika Mulaiwa testified that Chrispin Samahali who was his teacher informed him that he should go to Botswana in order to get education and employment. Himself was transported by Chrispin Samahili in his motor vehicle to Botswana. Another teacher at the same school one Bevin Mulife had told him to join the CLA. The witness testified that Bevin Mulife accompanied Chrispin Samahili in the vehicle of the accused but that he, ie Bevin Mulife did not cross the border into Botswana. During cross-examination this witness testified that he went to Botswana in the same vehicle as Holstein Simasiku. When it was put to him that the version of Holstein Simasiku was that they went together in the vehicle of Danbar Mushwena on 17 January 1999 and that Bevin Mulife was already in Botswana when they arrived there he readily conceded that he suffered from impaired memory due to a head injury. During cross-examination the witness admitted that one of the persons who accompanied him to Botswana was one Holstein Simasiku. The witness denied that they were transported in the vehicle of Mr Danbar Mushwena. The witness also denied that when they arrived in Botswana that Bevin Mulife had already been there. The witness conceded that a head injury may have caused him some memory loss.

[106] The evidence of the witness Mulaiwa cannot be relied upon in view of his concession that he suffered loss of memory. The remainder of the evidence does not establish any overt act from which a hostile intent may be inferred.

[107] The application for a discharge is granted.

#### **4. Linus Chombo Chombo (accused no. 82)**

[108] Oscar Mwisepi testified that the accused attended meetings as an observer. Bernard Kanzeka testified that during the year 1998 he attended two meetings which took place at the DTA office in Katima Mulilo. The first meeting took place during November 1998. Geoffrey Mwilima who addressed the meeting informed the attendants that the Caprivi Region should be cut from the rest of Namibia, that money should be collected, that people should go to Dukwe, Botswana, and people would be transported to Botswana. According to the witness Geoffrey Mwilima stated

that Caprivi should be out by way of fighting. The purpose of people to go to Botswana was to receive training in fighting. The witness testified that the attendants of the first meeting had reached an agreement that money would be donated in order to transport people to Botswana. He testified however that not everyone was happy with the way in which they have to cut Caprivi from Namibia and the way in which weapons had to be obtained. He testified that Branson Kwala, Matheus Sasele, Charles Mainga, Bollin Mwilima, Chombo Linus, Gibson Luka, Muketwa Eustace Sizuka and Chrispin Samahili amongst others attended this meeting. During cross-examination the witness conceded that Geoffrey Mwilima did not seek an agreement with the attendants but only presented an idea to secede Caprivi and he (ie Mwilima) then left. He also conceded that during the first meeting there was no discussion of persons receiving military training in Botswana.

[109] The second meeting was a secret meeting. Only a few selected people attended this meeting, ie amongst others Branson Kwala, Bollen Mwilima ,Chombo and Alfred Siyata. The second meeting was addressed by Mishake Muyongo who propagated the secession of Caprivi from the rest of Namibia. This was during December 1998.

[110] During cross-examination the witness conceded that during the second meeting Mishake Muyongo did not seek an agreement with the attendants, that he presented his idea to the attendant's saying if they did not want to participate he would do it on his own. The witness further conceded that when Muyongo addressed the attendants at this second meeting there was no discussion about people going to Botswana to receive military training.

[111] Brian Lisepo Lubeile testified that he is an induna and stays at Chinchimane in the Caprivi Region and holds traditional court (Khuta) at Linyanti. On 18 April 1999 a group of people opposed the inauguration of the new chief, Chief George Simasiku Mamili stating that they were waiting for their Chief Boniface Bebi Mamili who was in Botswana. Amongst those who opposed the inauguration of the new chief was Geoffrey Mwilima, Kwala Branson, Gibson Luka and the accused Linus Chombo.

These people said that the Caprivi should be cut. The accused person according to this witness was one of the persons who uttered that the Caprivi should be cut and had threatened to assault him with a stick.

[112] This witness when he was asked to point out Bollen Mwilima and Linus Chombo pointed out two accused persons in court of whom neither one answers to the name of Bollen Mwilima or Linus Chombo.

[113] There is no evidence that this witness committed any overt act. His mere presence at the two meetings does not constitute an overt act or circumstances from which hostile intent may be inferred, neither was common purpose established.

[114] The significance of evidence that people opposed the inauguration of the new chief was to indicate that those who opposed the inauguration of the new chief, support the previous Chief Boniface Mamili who had fled together with Mishake Muyongo into Botswana and who were apparently the main instigators of the secession. Therefore, so the argument goes, those who had opposed the inauguration of the new chief supported the session of the Caprivi Region from the rest of Namibia. Even if this argument is accepted to be valid there is no evidence that it was the accused person who goes by the name of Linus Chombo who had made an executive statement that the Caprivi should be cut from Namibia.

[115] The application for a discharge is granted.

## **5. Stephen Milinga Ntelamo (accused no. 83)**

[116] Mary Lumba Shamulele testified that the accused was her brother-in-law and that during the year 1999 she was staying with the accused at Masida in the Caprivi Region. During June 1999 she found three men at their home of whom she recognised as Victor Matengu. The three men were tired. The accused asked the three men where they were coming from and Victor Matengu told him that they were coming from Botswana. The three men slept there and the next day the accused

took them to Katima Mulilo. She did not know the reason why these men were in Botswana. She pointed out the accused person, Stephen Ntelamo, in court. During cross-examinations she conceded that men carried no weapons. She also conceded that she cannot testify that the accused had transported the three men to Katima Mulilo in order for them to carry out an attack on the town. It was put to the witness during cross-examination that she correctly pointed out the person Victor Matengu in court, but that the accused person had transported these men to the police station at Katima Mulilo where they had reported themselves, had been arrested by the police, was subsequently convicted in the Magistrate's Court of illegally entering Namibia and was sentenced. The witness testified that of this she was unaware.

[117] In my view, there is no evidence that this accused committed any overt act, with the necessary hostile intent and neither was it proved that he acted with others with a common purpose to commit any of the charges preferred against him.

[118] The application for a discharge is accordingly granted.

## **6. Leonard Mutonga Ntelamo (accused no. 84)**

[119] Christopher Lifasi Siboli testified that it was decided at a meeting held at the home of the accused in 1997 that the accused and one Bernard Mucheka (accused no. 75) were to announce over the Namibian Broadcasting Corporation (NBC) that the Caprivi had been taken over by the secessionists. This witness correctly identified accused numbers 75 and accused 84 in court. The accused no. 84 was employed at the NBC as head of operations.

[120] Shailock Sitali Sinfwa testified that the accused attended a meeting during 1998 at the DTA regional office where Mishake Muyongo informed the attendants that he was going to meet with the Chief of the Lozi in Zambia and that the peoples' idea was to secede the Caprivi from the rest of Namibia. The accused was correctly identified in court. The witness himself attended this meeting. The witness during cross-examination testified that he only attended two meetings – one during 1994

and one during 1998. The witness conceded during cross-examination that at neither these two meetings the acquisition of arms was discussed and that the establishment of a military training base in Botswana was not discussed. The witness testified that after the accused person had told him that he (ie the accused) was prepared to transport people to Botswana he had not seen the accused person again and never saw the accused transporting people to Botswana.

[121] Progress Munsu Mulonga testified that in 1998 at the DTA office he attended a meeting addressed by Mishake Muyongo as well as by Geoffrey Mwilima. Muyongo informed the meeting that the Caprivi had to be cut from the rest of Namibia by the use of fire-arms, by the barrel of the gun. Those in attendance were divided on this issue. Those in support of secession was asked to raise their hands. The accused was on those who had raised his hand as well as one Branson Kwala. This witness was unable to identify the accused and Branson Kwala in court when given the opportunity to do so.

[122] There was evidence to the effect that on 2 August 1999 (the day of attack) four young men were taken from his house for interviews. Nothing however turns on this evidence. The accused was arrested on 4 August 1999 in Katima Mulilo.

[123] The evidence that the accused attended a meeting in which the issue of secession was discussed, the evidence that he was one of the persons who to announce over the NBC, given his position there, that the Caprivi had been taken over by the secessionists, and the evidence that he expressed his willingness to transport people to Botswana and with due regard to the common facts, in my view is evidence that the accused was part of conspiracy to secede the Caprivi from the rest of Namibia. There is no evidence that the accused with knowledge about the conspiracy afoot, reported same to the authorities as he was duty bound to do having regard to the fact that he owes allegiance to the State. The accused needs to reply to the charges preferred against him.

[124] The application for a discharge is accordingly refused.



## **7. Molicious Simone (accused no. 85)**

[125] Oscar Mwisepi identified the accused in court as being a family member of him who used to attend meetings just as a listener.

[126] Innocent Falali Mahoto testified that he was present on 18 April 1999 at Chinchimane where the new chief was to be inaugurated. A group of people opposed the inauguration of the new chief. One of the persons whom he recognised who was amongst the group who opposed the inauguration was the accused person. He testified he knew the accused as he (ie the witness) was one of his students and that the accused was from the Linyanti village. When the witness was given the opportunity to identify the accused in court he was unable to do so.

[127] The evidence against the accused does not establish any overt act with the necessary intention to commit any of the crimes preferred against him. Neither did the evidence establish that the accused was in any way involved in a common criminal enterprise with others, with the aim of committing the crimes preferred against him. I am further of the view, that in the absence of any evidence as to the nature of the discussions at meetings and whether any resolutions were taken that the accused had no duty to report anything to the authorities.

[128] The application for a discharge is accordingly granted.

## **8. George Lifumbela Mutanimiye (accused no. 86)**

[129] Fabian Simbwaye Lifasi testified that during the year 1999 he attended a DTA meeting at Lisikili in the Caprivi Region in his capacity as a branch chairman of the party. He testified that he informed the attendants that they should be aware of people who are looking for people 'who must come back and fight the Government'. He testified that he came to know about this since he had attended a meeting addressed by one Shailock Sinfwa and a Mr Muyongo. After a few days the accused

and Richard Mundia came to his village. They asked him where were the people he was suppose to hand over and who were suppose to go to Dukwe (Botswana). He testified that he did not answer them and they left. These two individuals then returned for a second time with a Government vehicle. On both these occasions Richard Mundia was the spokesperson and the accused person kept quiet but 'seemed interested'. The witness testified that he (ie the accused) was interested in what was requested.

[130] In my view there is no evidence against this accused person on which a reasonable court may convict him on any of the charges preferred against him. The fact that he was with Richard Mundia placed him under no obligation to report anything to the authorities in the absence of any evidence that he had knowledge of the underlying purpose of the request by Richard Mundia. It can also not be inferred from his mere presence with Richard Mundia that an inference can be drawn that the two of them were involved in a common enterprise. I am accordingly of the view that there is no evidence against the accused which requires an answer from him.

[131] The application for a discharge is granted.

## **9. Charles Myange Mainga (accused no. 87)**

[132] Oscar Mwisepi testified and identified the accused person as a 'supporter of the issue' and that the accused was one who used to make phone calls from a public phone in Dukwe refugee camp.

[133] Christopher Siboli testified that he, himself, was first informed about the secessionist idea during the year 1989 when he was a mobiliser for the DTA and when people were preparing for elections. In the year 1991 there was a meeting at the DTA office attended by ex-SWAFT members. Where the issue of secession was raised. Thaddeus Ndala, John Samboma, Geoffrey Mwilima were amongst those in attendance. Another topic at this meeting was the tribal issue of the Masubias. Also discussed was the fight against the Government in the Caprivi Region.

[134] A second meeting was held during the year 1991 which involved the committee 'Kopano ya Tou' which was a DTA special intelligence committee. 'Kopano ya Tou' means pride of the elephant' and was on standby to fight anytime using fire-arms. The accused was pointed out in court by the witness as one who attended this meeting and where those who attendants had 'the idea of seceding the Caprivi'.

[135] Bernard Kanzeka testified that he attended a meeting during November 1998 addressed by Geoffrey Mwilima at the DTA office where the issue of secession was discussed, and that money should be collected for transport to Dukwe in order for people to liberate the Caprivi Region. The accused person was identified as being one of the attendants.

[136] Richard Samuzala Mbala testified that he was employed as a casual worker and the accused was his supervisor at Teleshop, Katima Mulilo. He testified that on 15 March 1999 the accused asked him whether he supported the idea of seceding the Caprivi from Namibia. The witness replied that he did not support such an idea. During June 1999 in the corridor at the Telecom building the accused asked him what were the reasons why the Subia speaking people do not support the secessionist idea, because there is a lack of development in Katima Mulilo, unemployment is high and that they have better qualifications than 'Wambo's' who actually 'dominate us or trying to rule us'.

[137] The witness further testified that the accused told him that people of the Caprivi must stand together and secede the Caprivi from the rest of Namibia in order to form their own government. The witness testified that he told the accused that he could not be part of it.

[138] The witness testified about a second incident during June 1999, this time outside the Telecom building, the accused asked him whether he was aware of an agreement signed in 1964 in Lusaka between the 'former president of the Republic

of Namibia and Mishake Muyongo chaired by the former President of Zambia, Dr Kenneth Kaunda'. According to the witness he replied that he did not know about such an agreement. The witness testified that the accused told him that they were going to attack the government, seceding Caprivi from the rest of Namibia.

[139] The witness testified that he was informed by the accused person that the Lusaka agreement determined that once Namibia had become independent, the Caprivi Region would remain 'a country on its own led by Mishake Muyongo while Namibia is led by Doctor Sam Nujoma'.

[140] The witness testified that the accused had informed him that those people who had fled to Botswana were busy 'reforming' and would come to secede the Caprivi from Namibia. The witness further testified that the accused wanted to persuade him to follow whatever the accused was trying to do.

[141] Raymond Kamwi Sezuni testified that he was employed at Telecom Namibia in Caprivi as a branch manager and was the supervisor of the accused person. The witness testified about print outs of phone calls made to Denmark and Botswana from the office of the accused person. He however does not say that the accused made the calls himself.

[142] Regina Sinvula testified that she was employed at the Teleshop, Katima Mulilo during the years 1998 to 1999 and that she was working with one Thaddeus Mbala and the accused person. This witness confirmed that Richard Mbala worked at the Teleshop as a temporary employee for six months. She further testified that the accused had received a number of visitors at his office including Gabriel Mwilima, Richard Mukau and Jospeh Muchale. She testified that she laid a complaint against the accused because in most cases when she wanted to work with him he was always with visitors.

[143] Mr Kauta in his heads of argument submitted that on the witness Richard Mbala's testimony he had no opportunity to have met the accused person because it

was his deceased brother (Thaddeus Mbala) who had worked with the accused and not him. This is however not borne out by the evidence of Richard Mbala who is supported by the testimony of Regina Sinvula that Richard Mbala had been employed at the Teleshop for a period of six months. There was thus ample opportunity and time for the accused to have had the discussions testified about by Richard Mbala.

[144] It appears from the evidence that the accused was not only aware for quite some time prior to the attack on 2 August 1999 of the endeavours to have the Caprivi seceded from the rest of Namibia but that he also tried to recruit individuals in support of the secessionist idea. The accused was furthermore aware of the activities of those persons who would come to secede the Caprivi from the rest of Namibia. The evidence in my view establishes overt acts and the required intention. It should also be apparent from the evidence presented that the accused person, having regard to his knowledge about the intended secession, was under a duty to disclose such information to the authorities, which he failed to do.

[145] The application for a discharge is refused.

#### **10. Kabende Victor Makando (accused no. 90)**

[146] Oscar Mwisepi testified that the accused was one of the attendants at the meeting which was chaired by Mishake Muyongo at Ngwezi Community Hall in Katima Mulilo. The accused did not say anything at that meeting.

[147] Mazezo Calvin Mafenyeho testified that he was a student at Simataa Senior Secondary School in 1998 when Chris Mushanana, George Lisho and the accused assigned one Sizeho to call the students to the dining hall. The accused was a teacher at this school. There they were encouraged by Chris Mushanana to go to Botswana in order to have free education. Mushanana said that after completion of their education and after Caprivi had been liberated they would be provided with employment. It was not said in which way Caprivi would be liberated. They returned

for a second time and for third time. Mushanana was the spokesperson. The accused remained silent. On the third occasion the students agreed to go. The accused on this occasion started to write down the names of the students – 150 names. The accused together with the other two individuals transported the students in a motor vehicle up to a place called Miako and from Miako they proceeded and crossed into Botswana.

[148] Christopher Lifasi testified that he once travelled from Katima Mulilo on his way to Linyanti when he was stopped on the road by two men one of whom was the accused person. The accused person on this occasion asked him why he seemed to be isolating himself from the issues in general. These issues were not identified by the accused.

[149] Roger Kepa testified that during the year 1999 after he had been repatriated from Botswana he met the accused and one Bollen Mwilima. He knew the accused as his teacher. The accused informed him that he should go to Singalamwe and that the accused uttered virtually the same words which Bollen Mwilima had uttered on a previous occasion. His testimony was that Bollen Mwilima had informed him that those who came back from Dukwe would be the first to be killed since they were spreading information that the people at Dukwe were suffering. Bollen Mwilima further informed him that there were people in Singalamwe in the bush preparing themselves to cut the Caprivi region by fighting.

[150] During cross-examination the witness confirmed that Bollen Mwilima and the accused person wanted to recruit him in order to join people at a base in Singalamwe and that they had threatened to kill him. Although Mr Kauta submitted that the witness conceded that in his first statement to the police he referred to Victor Matengu and not Victor Makando the witness insisted that although that might have been a mistake it was indeed the accused person who had tried to recruit him to go to the group in Singalamwe. Mr Kauta further submitted that the reason why the accused was arrested was because his name appears on exhibits EGF(13) and EGK(1). Those were referred to in evidence as the so-called deployment lists. The

name 'Kabende M' appears on exhibit EGF(13) and the name 'Kabende Martin' appears on exhibit EGK(1) . These names are not similar to the names of the accused person.

[151] The evidence presented shows that the accused person was in the presence of someone who encouraged students to go to Botswana, and that he himself recorded the names of the 150 students. He was together in the motor vehicle which transported the students to Botswana, he tried to recruit a person to join other 'soldiers' in the bush at Singalamwe and threatened to kill him should he refuse. In my view this evidence constitutes an overt act or acts, having regard to the common facts, the required intention may be inferred from those facts. In addition his knowledge about a pending secession is sufficient to have placed a duty on him to report these activities to the authorities which he failed to do.

[152] The application for a discharge is accordingly refused.

#### **11. Norman Christopher John Justus (accused no. 93)**

[153] Helmut Kachibolewa Muzwaki testified that he was in Dukwe refugee camp and returned to Namibia through the process of repatriation. After his repatriation he saw John Samboma coming to their village and went to the courtyard of one Richwell Manyemo. John Samboma was carrying 'a very big gun'. He testified that Samboma was accompanied by the accused person and another white man. The accused was the driver of the vehicle in which they arrived, 'a 4 x 4 double seat'. It was a government vehicle. He knew the accused as a person who at that stage worked at the government garage in Katima Mulilo. These people stayed about one hour at Richwell Manyemo's courtyard. This incident occurred during June 1999. Richwell Manyemo was also a passenger in the car when they arrived. The vehicle left afterwards. The accused was correctly identified by the witness in court.

[154] Christopher Siboli testified that he attended a meeting held at the house of Mishake Muyongo during the year 1997. The accused was also in attendance. The

accused was identified by the witness in court. At this meeting Mishake Muyongo said that they should go to Angola to collect fire-arms. This view was echoed by Geoffrey Mwilima and Alfred Tawana. John Samboma and Thaddeus Ndala were also present and supported the idea. The witness testified that the accused said that he was supporting 'the idea of seceding Caprivi, because Caprivi is a beautiful country and he wanted to stay in Caprivi'. The witness testified that the accused promised to donate diesel and food in exchange for the fire-arms. The witness further testified that the accused donated diesel which was taken to Angola.

[155] The witness testified about a meeting at the DTA offices where discussions took place on how to acquire fire-arms from UNITA. Fuel had to be acquired by way of Government orders from Zambezi Shell filling station. The witness testified about an incident at the Zambezi Shell filling station where vehicles had to be refuelled in order to take people to the CLA camp at Singalamwe. He testified that one of the persons Richard Mundia arrived there with a government fuel order book. The accused arrived there and signed this fuel order book.

[156] Bernard Kanzeka testified about another incident at Zambezi Shell filling station. When 3 x 210 litres drums were filled on the account of Mishake Muyongo. The accused person signed the account book. This witness, who was the petrol attendant at that stage, testified that he was informed by Mathews Lulambo that the drums were to be taken to Angola in exchange for fire-arms.

[157] Chrispin Makuta Saushini testified that he was employed by the Government Garage under supervision of the accused person. On 2 August 1999 at 07h45 no one was at the Government Garage. He testified that he went to look for the accused and eventually found him at a friend's house. He reported to the accused that there was war in town but the accused disbelieved him, saying that it was only soldiers shooting at each other.

[158] The evidence establishes in my view an overt act (the provision of fuel) and the required hostile intention. The evidence also establishes that the accused acted



in concert with others with the aim of the violent overthrow of the government in the Caprivi Region.

[159] The application for a discharge is refused.

## **12. Muketwa Eustace Sizuka (accused no. 95)**

[160] Bernard Kanzeka testified that he attended a secret meeting during November 1998 at the DTA office, in Katima Mulilo which meeting was addressed by Geoffrey Mwilima. This witness identified the accused in court as one of the persons who had attended this meeting as a teacher at Sesheke Primary School.

[161] The witness testified that at this meeting Geoffrey Mwilima informed the persons present that they needed to liberate Caprivi from Namibia by fighting, acquiring weapons, going to Botswana, collecting money for the purpose of transport for taking persons to Botswana. There were murmurs and it seemed that some people were not happy with what Geoffrey Mwilima had informed them. There was then a break. During the break people were divided into discussion groups. After the break all of the attendants agreed with what Geoffrey Mwilima had informed them. The witness testified that how he knew that the attendants agreed was that when Geoffrey Mwilima told them that they would get good jobs and money they laughed.

[162] The evidence against the accused does not prove any overt act, hostile intention or common purpose. The only aspect which counts against the accused is that there is evidence that the accused person having attended the meeting addressed by Geoffrey Mwilima and having regard to the information which had been conveyed to the attendants (ie the intended secession of the Caprivi Region from the rest of Namibia by violence) the accused failed to report such information to the authorities.

[163] The application for a discharge is refused.

**13. Branson Mudala Kwala (accused no. 99)**

[164] Oscar Mwisepi testified that he had known the accused since childhood a person from his mother's village who frequented meetings of Muyongo and was close to Mishake Muyongo, a person very entertaining when given the floor to speak at meetings. The accused was identified by the witness in court.

[165] Bernard Kanzeka testified that the accused attended a meeting during November 1998 addressed by Geoffrey Mwilima and attended a second meeting during December 1998 addressed by Mishake Muyongo. The topic under discussion at the meeting addressed by Mishake Muyongo was to cut the Caprivi Region from the rest of Namibia. Muyongo urged the attendants to co-operate in order to secede the Caprivi, people needed to donate money, to provide transport to Botswana and to come back from Botswana to liberate Caprivi by fighting the Government of Namibia. He testified that Muyongo said that he had an account for fuel at Zambezi Shell filling station, which fuel could be used in exchange for fire-arms in Angola. The witness testified that the accused during this meeting asked where the fire-arms were to be obtained from but that he received no answer in this regard. The witness identified the accused person in court Branson Kwala who had attended these meetings.

[166] Shailock Sitali Sinfwa testified that Branson Kwala had attended a meeting during 1994 where Mishake Muyongo informed the attendants that the UDP (United Democratic Party) would separate from the DTA (Democratic Turnhalle Alliance) and that the Caprivi Region should be part of the Western Province of Zambia. This witness was however unable to identify the accused person in court.

[167] Patrick Mabuku Liswani, a warrant officer in the Namibian Police testified that the accused was a guest speaker at a meeting at a Linyanti during 1999, which he also attended where the accused said that 'they' should fight in order to liberate the Caprivi because the Caprivi is not part of Namibia and that they cannot be led by a 'Wambo'. He testified that the accused 'did not agree with' the present Government

and that something had to be done. This witness identified the accused in court. He testified that the accused played a leading role in organising people who were being transported to Dukwe and arranging meetings. He testified that he arrested the accused on 5 August 1999 at the village of the accused. This witness testified that during a meeting held at the house of the accused person during the year 1999, prior to the attack, the accused requested donations of money in order to buy weapons.

[168] The evidence established that the accused attended meetings in which the idea of seceding the Caprivi from the rest of Namibia by violence was discussed. The evidence further establishes that the accused propagated the liberation of Caprivi, that he was opposed to the present Government, and that he solicited donations of money in order to buy weapons.

[169] I am of the view that there is evidence of overt acts, that the accused had the necessary hostile intention, and that there was a common purpose. In addition the accused having regard to his knowledge about efforts to secede the Caprivi from Namibia was under a legal duty to inform the authorities of such plans but failed to do so.

[170] This accused subsequently passed away after the hearing of this application.

#### **14. Matheus Muyandulwa Sasele (accused no. 100)**

[171] Oscar Mwisepi testified that the accused used to receive persons who had returned from Botswana, that the accused supported the idea of seceding the Caprivi and that the accused had offered transport to people crossing into Botswana with the aim of seceding the Caprivi.

[172] Christopher Siboli testified that the accused attended a meeting in 1997 at the house of Mishake Muyongo where donations and fire-arms were discussed. All those present were in favour of obtaining fire-arms. He testified that CLA and 'Kopano ya Tou' was one and the same army, a 'private hidden army'. He testified that he

recruited people to join the CLA. The witness identified the accused person in court as being a member of the CLA.

[173] The evidence in my view establishes a overt act, hostile intent and common purpose.

[174] The application for a discharge is accordingly refused.

#### **15. Gibson Luka Luka (accused no. 101)**

[175] Bernard Kanzeka identified the accused person as one of those who attended the secret meeting during November 1998 where Geoffrey Mwilima addressed the attendants on the issue of secession, donations of money and that people needed to go to Botswana. He testified that Geoffrey Mwilima informed those in attendance that Caprivi should be cut by fighting the Government of Namibia with weapons which were to be acquired in Angola.

[176] Linus Kufuna Manga testified that the accused was an 'in-law of my grandfather'. He testified that the accused had been involved during two discussions relating to the inauguration of the new chief for the Mafwe tribe at Chinchimane. During the first conversation the accused was not in agreement with the election of the new chief but was of the view rather to wait for Chief Mamili to return from Botswana because Caprivi had to be seceded from Namibia. During the second discussion the accused agreed to the inauguration of the new chief.

[177] He testified that during the inauguration he only saw the accused at the end of the ceremony when he walked past him as he was getting into his car and left. During cross-examination the witness conceded that in his police statement regarding the events of the inauguration he stated that the accused's reason for saying that the chief should not be replaced was not clear to him, that the sole reason was that they had to wait for the chief who went to Botswana and that there was no nefarious reason or any other reason.

[178] Mr Kauta submitted that any suspicion that this accused was involved in the secession was put to rest by the evidence of this witness that before the attack the accused had disassociated himself from such secession (when he agreed to the inauguration of the new chief). This disassociation, in my view, cannot relieve the accused from his duty to report treasonous activities. The accused had been aware of plans to secede the Caprivi from Namibia by violent means but never reported such information to the relevant authorities.

[179] The application for a discharge is refused.

#### **16. Kennedy Simasiku Chunga (accused no. 116)**

[180] Mushe Bevin Sinvula testified that during November 1999 he went to a certain shop 'Service the Nation' at the market in order to buy meat. Whilst there he was approached by a person who he had seen for the first time on that day and who introduced him as Kenneth Simasiku Chunga. Chunga tried to recruit the witness as a soldier who should come and liberate the Caprivi. The witness rejected the offer. During January 1999 Chunga arrived at his house with a motor vehicle with registration number N 852 KM. They drove to the place of Gasper Machana at Masokotwane. On the way he informed the witness that he was taking him to a place where people joined the army. He offloaded the witness at the courtyard of Gasper Machana and told him that he would return after he had collected other persons. The witness testified that he (ie the witness) did not wait but returned to Katima Mulilo. The witness testified that during July 1999 Kennedy Chunga again visited his house and tried to convince him to join the army, but he refused again. Thereafter he never saw Kennedy Chunga again. During cross-examination the witness testified that he was never told that there would be an attack and that the attack came as a surprise to him. The witness testified that he was not told that the Caprivi would be liberated by way of an attack. The witness further conceded that he had no personal knowledge whether or not Kennedy Simasiku Chunga was involved in the attack which took place on 2 August 1999. The witness when given the opportunity to

identify the person Kennedy Simasiku Chunga in court stated that due to the lapse of time he was unable to do so.

[181] Bonafatius Kanyetu testified that he was a detective sergeant involved in the investigation of this case during the year 1999. The witness testified that after the attack he received information from the late detective sergeant Chizabulyo relating to Kennedy Simasiku Chunga supplying food to rebels at Cameroon. The witness testified that he went to a certain house and after a while he approached a motor vehicle where he arrested Kennedy Chunga. The witness conceded that the information he received was false. The witness conceded that when the house was searched there 'was nothing that was seized that was relevant to the accused'.

[182] In my view due to the failure of the witness to identify the person who tried to recruit him for an 'army', there is no evidence that accused no. 116 was that person referred to by the witness in his testimony.

[183] The application for a discharge is accordingly granted.

#### **17. Agry Simasiku Muamba (accused no. 118)**

[184] The accused made a formal admission in terms of section 220 of Act 51 of 1977 in the following terms:

'That on 16 March 2000 in the area of Lyanshula he was arrested by Navy Captain Setson Angula.

That at the time of his arrest he was the driver of a white City Golf in which there were two occupants, accused 65 and accused 117.

After their arrest accused 118 admits that a bag was found in that motor vehicle and that bag did not belong to him.'

This was accepted by the State.

[185] It is common cause that Richwell Mahupelo (accused no. 117) and Bennet Mutuso (accused no. 69) were the passengers in the vehicle. The reference to accused 65 seems to be an error.

[186] Hobby Habaini Sinyabata testified that between March and April 2000 he was in Ngwezi town when he saw Richwell Mahupelo in a vehicle. Mahupelo requested his assistance to load maize meal. He in turn requested a lift back to his village. The accused was the driver of the vehicle. They transported him to Itobo village where he was staying. During his evidence-in-chief the witness was asked what the distance is between Ngwezi and Itobo village and he replied as follows: 'The distance in kilometres I do not know it very well, but it is far'.

[187] Hobby Habaini Sinyabata testified that about a week later he had decided to visit the house of Richwell Mahupelo (accused no. 117) in his village. Accused no. 117 was not there. He waited there and accused no. 117 arrived there in a motor vehicle. Accused no. 117 entered the house and later returned with Bennet Mutuso (accused no. 69). Bennet Mutuso was carrying a travel bag as well as an AK 47. They, ie Mutuso and Mahupelo, got into the vehicle which was driven by the accused person, Agry Muamba. The witness testified that the AK 47 was inside the travel bag and that the accused , Agry Muamba, waited in the vehicle when Richwell Mahupelo entered his house. There was no conversation between the accused, Mutuso and Mahupelo when they boarded the vehicle.

[188] Steve Likutumusu Masilani testified that he was the owner of a white City Golf 1.3 with the registration number N 26686 W and that he gave permission to the accused person to drive the motor vehicle while he (ie Masilani) was in Okahandja. He had agreement with the accused that he could use this motor vehicle as a taxi and to transport his wife (ie the wife of Masilani) whenever she needed transport. At one stage he was informed that his motor vehicle was not parked at his wife's place, as agreed, and he then travelled from Okahandja to his village Nampengu. He thought that his car was stolen or that the accused had been killed. He together with family member of the accused went to the police station to make a report. He found

his motor vehicle on 28 June 2000 at Mpacha Military Base – the car was missing for a period of 2 years and 4 months. The witness testified that he did not confront the accused about where he was. The witness conceded that he had no permit to use the vehicle as a taxi. During cross-examination the witness conceded that the accused never returned on 16 March 2002. He testified that he was not aware that the accused had been arrested and his vehicle impounded. According to this witness his agreement with the accused was to transport people from the village Nampengu to Ngwezi (in Katima Mulilo) and back to the village and that the accused had to hand over monies to his wife at the end of every day. He testified that the accused was his friend. The witness testified that there was no arrangement regarding the use of the motor vehicle on other routes.

[189] The testimony of one Given Tubaleye, a Zambian citizen, was that he attended a DTA meeting during the year 1998 chaired by Siboyili Kaliyangile Joseph where people were urged to join their heroes in Botswana and to be trained as soldiers. During the year 1999 he was called by his girlfriend, Makiti, in order to go with her to Botswana. He agreed. They arrived at Kaliyangile school where his girlfriend together with two of his cousins boarded a motor vehicle, a white Golf. The witness enquired who the owner of the vehicle was and his girlfriend told him that it was Agry Muamba.

[190] This is hearsay evidence since the girlfriend was not called to testify and this evidence is inadmissible.

[191] There is no evidence to show where the village of Itobo is situated and the possibility is not excluded that it is situated between Ngwezi and the village Nampengu. There is therefore in my view no evidence that the accused transported persons without the consent of the owner.

[192] There is also no evidence of any overt act whatsoever, no evidence of any hostile intention, no evidence of a common purpose, no evidence that the accused had been aware of what was inside the travel bag. There was no evidence that the



accused had any knowledge of treasonous activities and that he was because of such knowledge under a duty to report to the authorities.

[193] The application for a discharge is granted in respect of all the charges.

I shall now deal with the clients of Mr McNally.

**1. Michael Mundia Mubyana (accused no. 27)**

[194] Sinvula Reverent Sabuta testified that at some stage during the year 1998 he had a discussion with one Michael Mundia who revealed to him that there was an organisation preparing to separate the Caprivi from Namibia and that there was going to be bloodshed. The name of the organisation was not mentioned. This witness when given the opportunity in court to identify Michael Mundia was unable to do so.

[195] Benhard Walubita Muyambango testified that during the year 1999 Michael Mundia was his neighbour at Chotto compound, Katima Mulilo. One evening around the fire Michael Mundia told him that he (ie Mundia) wanted to leave to Botswana in order to receive education. The witness replied that he himself was satisfied with his education. The witness when given the opportunity in court to identify Michael Mundia identified the wrong person.

[196] Kenneth Muyambango Muyambango testified that during January 1999 he was at his courtyard in his village when Mike Mundia told him about the issue of cutting Caprivi from Namibia and that he was going to Botswana. The witness testified that Mike Mundia was his neighbour in the village Muviza. When the witness was given the opportunity to identify this person in court he identified the wrong person.

[197] Anna Keyi Mwangala testified that she was a co-worker of Michael Mundia Mubyana and that he was absent from work. She testified that the accused returned to work on 6 August 1999 and thereafter she never saw him again.

[198] Innes Batumana Muleke testified that she was married to Michael Mundia Mubyana. On 1 August 1999 the accused was with her at home because she was sick. She identified Michael Mundia Mubyana in court as accused no. 27. During cross-examination she confirmed that the accused was with her from 31 January 1999 until the time of his arrest during January 2000 and that the accused could not have attacked Katounyana Special Field Force Base, since he was with her.

[199] The evidence presented does not prove that accused no. 27 committed any overt act.

[200] The application in respect of this accused is granted.

## **2. Wilson Mutumuswana (accused no. 42)**

[201] This court heard testimony that after the attack on 2 August 1999 there was an engagement between members of the Namibian Security Forces and some rebels. During the clash one of the rebels killed was one Cedric Chaina whose body was searched. Certain papers were found on his body on which the names of persons appear as well as certain institutions. These documents were labelled by 'the State as the deployment list' and was provisionally received as exhibit EEC (also marked EGK(1), exhibit DAY (provisionally ) and exhibit DAZ (provisionally). Exhibit DAY and DAZ were also marked exhibit EGK(13).

[202] It was submitted by the State in their heads of argument that the name of accused person appears on exhibit EGK(1) at p. E1(7) no. 52. There indeed appears on exhibit EEC (provisionally) the name 'Mutumuswana Wilson'. These exhibits were received provisionally since the author was unknown. There is also conflicting evidence of who actually discovered these documents on the body of Chainda.

[203] Mr McNally submitted that the onus is on the State to prove that an accused person before court is the very same person whose name appears on this 'deployment list', and that it is not for this court to make that inference. These documents were provisionally received as *evidence of the fact that documents had been found* on the body of this dead person. However, if a party intends to rely on the truth of the contents of such a document such a party must satisfy certain admissibility requirements. The original document must be produced (which was done in this case), and the authenticity of the document must be proved. Such a document must be handed in by a witness who drafted the document, or signed the document, or a person who witnessed the signing or who can identify the writing or signature of the author.

[204] The authors CWH Schmidt and H Rodemeyer in *Law of Evidence* Issue 10, July 2012 at 11-6 footnote 24 refers to Wigmore par 2129, and stated the following: 'He believes that there are two reasons why specific rules apply to documents: (1) a document usually indicates that a specific person is the author: "Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document"; and (2) because documents handed in to court and exhibited created the impression "that they *are* all that they purport to be" there is a danger that their authenticity will be too readily accepted – par 2130.'

[205] If a document is not authenticated, nor admitted by the opponent, the document is not only inadmissible but also may not be used for the purpose of cross-examination. (*Law of Evidence* (supra) ); see also *Israelsohn v Power, N.O. and Ruskin, N.O* (1) 1953 (2) SA 499 AD; *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 (TPD); *S v Mvulha* 1965 (4) SA 113 (O) ).

[206] The exhibits which have been received provisionally (EEC, DAY and DAZ) had never been authenticated. These documents, or rather the contents thereof, are inadmissible and may not be relied upon by the State (or any other party) as proof of the truthfulness thereof.

[207] Lascan Sikosi testified that he met the accused on his return from Dukwe when the accused requested money from him in order to buy food for people in the bush. This witness was unable to identify the accused in court due to the fact that he had an eyesight problem.

[208] Richard Simataa Kopano testified that Wilson Mutumuswana (the accused) told him that they want to cut Caprivi from Namibia. The witness testified that with reference to the President of Namibia the accused stated that he did not like him and that he needed a new President. The witness testified that he was then slapped twice by the accused. His testimony was that he identified the accused to the police. The witness was however unable to identify the accused in court.

[209] The evidence presented in my view does not establish that accused no. 42 before this court committed any offence.

[210] In the circumstances the application for a discharge is granted in respect of all the charges.

### **3. Oscar Gilson Libuo (accused no. 52)**

[211] Maino Netsai Mukutulo testified that he heard that Oscar Gilson Libuo went to Botswana and that the accused was at the burial of the witness' father on 1 August 1999. On 2 August 1999 the witness left him at his courtyard whereafter he (ie the witness) went to Shatinga. This witness did not point out Oscar Gilso Libuo.

[212] Chrispin Mekalabi Menangeni mentioned Oscar Gilson Libuo as one of the persons who returned from Dukwe (repatriated). This witness did not point out the accused in court.

[213] The evidence does not establish the commission of any crime by the accused.

[214] The application for discharge is granted in respect of all the charges.

#### **4. Mutemwa James Jimmy Liswaniso (accused no. 58)**

[215] Ruben Bakuba Sikwala testified that on 1 August 1999 he was collected from his house by six persons inter alia by Richard Misuha and Moses Kayoka. Both of them were armed. Richard Misuha informed him that if a person had been in Botswana he should meet the others in the bush so that they can cut Caprivi from Namibia. The witness testified that he wanted to refuse but was reminded of an incident at Liyanti where a person was killed. He was scared. He testified that they travelled in a vehicle which belonged to Chadrick Chainda to the rebel camp. At that stage Mukoya Franco, Austin Ziezo, Smith Mikini, and Zorrow Kaine were also in the vehicle. At Makanga he boarded a TATA truck belonging to the Government and destined for Katounyana Base. There were four vehicles. One of the vehicles a white Toyota belonged to Jimmy Liswaniso. When the shooting started at Katounyana base the witness and one Hoster Sikunga ran away.

[216] Bornbright Mutendelwa Kufwa testified that on the night of 1 August 1999 he was visited at his house by Richard Misuha and another person and was informed to accompany them. Both of them were armed. He was in fear. They went to the bush of Makanga vehicles arrived there and they were divided into groups and were informed of the places that were to be attacked, namely Katounyana Special Field Force, Shopping Centre, NBC, Police Station and Wanela Border Post. He was initially assigned to attack Wanela Border post by David Mumbone. He was thereafter told to board the vehicle of Jimmy Liswaniso, a white Hilux with registration number N 133 KM. He knew Jimmy Liswaniso. They drove and alighted at Waya-Waya and proceeded on foot to Liluba village in order to circumvent the roadblock at the T-junction of Kongolo. At Liluba the same vehicle picked them up and off loaded them at the Engen Service Station in Katima Mulilo. Some of the persons in his group were armed.

[217] The witness testified that the persons whom he knew from his village and who were at Makanga that night were: Sikunga Hoster, Kambukwe Hastings, Muyumbano

Adams, Mikini Smith, Mutahane Herbert, Jimmy Liswaniso, Luyanda Brendan, Austen Ziezo, Ntaba Christ, Kufwa Roster. Persons from other villages who were there were: Brian Mboози, Liseho George, Daves Majuwo, David Mambone and Brian Mushandikwe. Brian Mushandikwe was armed

[218] Given Lufela Ndungati testified that on 31 July 1999 he was at his village when a man Adams Muyumbano collected him during night time and informed him that they were going to the bush of Makanga. He was forced to go with but walked on his own. At the roadside they met persons inter alia Mikini Smith who had a weapon in his possession. At Makanga they were divided into groups. In his group were Roster Kufwa, Jimmy Liswaniso, Aggrey Makandano and Osbert Likanyi. He knew these persons. Aggrey Makandano and Osbert Likanyi were armed and Jimmy Liswaniso had a 'shell' in his possession. He recognised the vehicle of Jimmy Liswaniso but the driver was unknown to him. He boarded this vehicle. His group was supposed to attack the Police Station. They drove until Waya-Waya where they alighted in order to circumvent the roadblock. The vehicle picked them up at Liselo and took them to the police station.

[219] Thomas Franco Mukoya testified that he was in the group destined to attack Mpacha (military base). The witness testified that he recognised the vehicle a white Toyota with registration number N 133 KM as that of Jimmy Liswaniso which was driven by the owner (Jimmy Liswaniso). This witness correctly identified the accused person in court.

[220] This witness when he testified during his evidence-in-chief stated that he gave his statement freely and voluntarily to the police. During cross-examination he admitted that he had been assaulted by the police prior to giving his statement. The witness testified that he refused to give any information to the police before he was assaulted. He testified that he was extensively assaulted over a period of one day, spent the night at a certain house and was picked up again by the police the next morning. It was a humiliating experience. He was assaulted because he denied knowledge of the incident and that the statement came about as a result of force.

The witness testified that even as he was giving his testimony he was scared of the police. The witness testified that when he was interviewed by the prosecutor the previous day he did not mention the assault to the prosecutor, Mr July, because the police had informed him that he should not even mention the assault.

[221] I have discussed the issue of torture and degrading and humiliating treatment of witnesses (supra) and must mention at this stage that had the State presented the evidence of this witness as the only evidence against the accused person I would have disallowed such evidence and would have released the accused.

[222] The evidence establishes that accused no. 58, Jimmy Liswaniso was during the period 31 July 1999 to 1 August 1999 at Makanga when the final preparations were made for the attack on Katima Mulilo during the early morning hours on 2 August 1999. The evidence establishes that his motor vehicle was one of the vehicles used to transport the belligerents to targets of attack and that he himself according to one witness was driving his motor vehicle. The evidence establishes that the accused was, in the company of a group of persons some of whom were armed, with the aim of attacking the police station. The evidence also establishes that he was seen in these circumstances carrying a 'shell'. It is not clear from the evidence what this 'shell' was or what its intended use was.

[223] In my view it should be apparent from the evidence that the accused no. 58 was at least actively involved in the preparations of the attack and made his vehicle available for this purpose. If one has regard to the common facts it is inescapable that there is evidence which establishes overt acts, a hostile intent and a common purpose with co-conspirators.

[224] The application for a discharge is accordingly refused.

## **5. Matheus Munali Pangula (accused no. 59)**

[225] Christopher Siboli testified that the accused, a police officer in Katima Mulilo, was one of the persons who was looking for people to join the CLA. This witness correctly identified the accused in court. This witness testified that the accused person donated money during a meeting in order to acquire weapons.

[226] Lovemore Lutambo Litabula testified that he was a police officer during the year 1999. On 1 August 1999 he was on duty at Katima Mulilo police station as charge office sergeant and the accused was the shift driver whose duty was to collect and offload those police officers who worked shifts.

[227] On 1 August 1999 the accused did not turn up when he was suppose to take a police member home after the end of a shift and that the accused gave no explanation for his conduct. On 2 August 1999 the accused also did not turn up for his shift at Katima Mulilo police station.

[228] Although Mr McNally submitted that the witness Litabula was an accomplice who had not been warned in terms of the provisions of section 204 of the Act, and criticised the evidence of this witness, the fact that the accused absented himself from work is not disputed.

[229] This court in a ruling dated 17 June 2007 admitted as evidence a confession made by the accused to Chief Inspector Lifasi when the accused was confronted about his absence from the police office.

[230] I am satisfied that the evidence referred to (supra) establishes not only overt acts, and a hostile intention, but also common purpose with co-conspirators, and at least a duty to report to the authorities treasonous activities of which he had been aware of.

[231] The application for a discharge is refused.

## **6. Masiye Victor Matengu (accused no. 60)**



[232] Oscar Mwisepe testified that the accused was one of the persons who were at Dukwe refugee camp in Botswana. This witness correctly identified the accused in court.

[233] Christopher Lifasi Siboli testified that the accused was a member of the CLA and correctly identified him in court. He testified that the accused was a mobiliser of persons for the secession of Caprivi. He testified that the accused attended a meeting during the year 1992 and was willing to go to Angola for training and for the acquisition of weapons. According to the witness the accused attended a meeting at the house of Mishake Muyongo during the year 1997 where the issue of secession was discussed.

[234] Nuwe Michael Mashwabi testified that the accused was amongst a group of persons who went during October 1998 to Angola to order to receive military training and to acquire weapons.

[235] Ovis Muleta Kwala testified that the accused came to his house during May 1999. The accused was in the company of one Elvis Puteho. According to this witness the accused informed him that he escaped from Dukwe and wanted to report to the police. This witness was unable to identify the accused or Elvis Puteho in court.

[236] Peggy Matia Mufalali testified that during June 1999 the accused arrived at her house in Katima Mulilo in the company of Elvis Puteho and Solvent Chunga. The accused told her that they were coming from Dukwe refugee camp, that they were tired of being intimidated and that they wanted to report themselves to the police. She testified that she sent someone to call her ex-husband, Stefan Ntelamo, from work. When he arrived the accused asked him to transport them to the police station. Her husband then left with these individuals. When her husband returned he informed her that they requested to be dropped at Masokotwane since they wanted to tell the pastors that they (ie the pastors) should go to the police station and report them. This witness correctly identified the accused in court.

[237] The evidence establishes in my view overt acts, an hostile intent and a common purpose with co-conspirators to commit treason.

[238] The application for a discharge in respect of this accused is refused.

## **7. Mwilima Gabriel Mwilima (accused no. 61)**

[239] Oscar Mwisepi testified that he attended a meeting at the house of the accused where the topic of discussion was the escaping of the Steven Mamili group from Botswana to Namibia. During this meeting he was labelled by one Chris Muchana as an informer and he left.

[240] He attended a second meeting at the house of the accused where the topic of discussion was the 'renegades' who were in the bush preparing themselves for a fight. The witness testified that the accused had informed him at the end of July 1999 that 'the shooting' was going to take place on 1 August 1999. During cross-examination the witness said that the accused did not specify when the attack was going to take place.

[241] I must say at this stage that nothing turns on this apparent contradiction. What is apparent from this testimony of this witness is that the accused knew of an impending attack. The witness further testified that the accused was arrested at Dukwe refugee camp and when he returned a meeting was held at this house.

[242] Christopher Siboli testified that the accused attended meeting at the house of Mishake Muyongo and identified the accused as one of the persons who donated money for the acquisition of weapons from Unita in Angola. This witness testified that he accompanied a delegation of persons to Botswana in order to deliver a letter from the Chief in Linyanti to a Commissioner in Botswana. During this visit the witness informed the Commissioner about the idea of secession. The witness testified that it was the accused person who transported them to Botswana.

[243] This witness testified that during 1997 the accused accompanied Chief Boniface Mamili on a visit to Pretoria, South Africa in order to see a certain Mr Zimmermann with the aim of getting his support for the idea of seceding the Caprivi and the possible delivery of mercenaries for this purpose.

[244] The witness Bernard Kanzeka testified that this witness was one of the attendants at a meeting in November 1998 addressed by Geoffrey Mwilima at the DTA office where Geoffrey Mwilima informed them about the idea of a secession, that money should be donated, and that people should go to Botswana. According to this witness there was a disagreement at some stage but later after a break consensus was reached.

[245] Versmus Haipa a constable in the Namibian police testified that on 27 October 1999 he was in the company of Constable Aupa and sergeant Simasiku when the house of the accused was searched. The accused was in custody at that stage, but the search was conducted in the presence of the wife of the accused. During the search some items were found which were considered to be evidential material. These items were taken to the police station and were booked into the Pol 7 register as exhibits, by sergeant Simasiku

[246] The evidence presented against this accused person, in my view, establishes overt acts, with the required hostile intention and a common purpose. In addition the accused had knowledge of treasonous acts and was under a duty to disclose such information to the authorities which he failed to do.

[247] The application for a discharge is refused.

## **8. Eugene Milunga Ngalaule (accused no. 64)**

[248] Oscar Mwisepi testified that the accused was one of the persons who registered individuals who were to form an army. The witness testified that the

accused organised people to go to Botswana. The reason for people going to Botswana was to 'enhance' the idea of seceding Caprivi. The witness testified that Caprivi was to be seceded from the rest of Namibia in two ways, firstly 'through the barrel of the gun', and secondly by way of deliberation. This witness testified that once he (ie the witness) had secured people for transport he would contact the accused person and that he had continuous discussions with the accused concerning trips to Botswana.

[249] Christopher Siboli pointed the accused out in court as a person who supported the idea of seceding Caprivi and that the accused was a person who looked for people to join the CLA. The witness testified that during the year 1998 at a meeting held at the DTA office the accused was present. During this meeting money was donated in order to acquire weapons from Angola.

[250] Bernard Kanzeka testified that the accused attended a meeting during December 1998 where the topic of discussion was to cut Caprivi from Namibia. The witness conceded during cross-examination that merely listening to a speech does not imply agreement. The witness agreed that at this meeting the only speaker was Geoffrey Mwilima and that the acquisition of weapons was not discussed.

[251] Ernest Mwangala testified that Eugene Ngalaule informed him to join them on a trip to Botswana but was unable to identify Eugene Ngalaule in court.

[252] The witness Annety Twambo Samunzala testified that Eugene Ngalaule informed her that if she was willing he could arrange transport to take her to Botswana. This witness was unable to identify Eugene Ngalaule in court.

[253] The evidence in my view establishes overt acts from which a hostile intention may be inferred

[254] The application for a discharge is refused.

**9. Richard Likezo Saweke (accused no. 66)**

[255] Lovemore Lutambo Litabula testified that a person by the name of Richard Saweke transported a group of persons who attacked the police station. This witness was unable to identify the person he referred to as Richard Saweke in court.

[256] There is no evidence against this accused. The application for discharge is granted in respect of all charges.

**10. Mashazi Allen Sameja (accused no. 67)**

[257] Christopher Siboli identified the accused person in court as a mobiliser of persons with the aim of seceding the Caprivi. The witness testified that the accused donated money for the acquisition of weapons in Angola.

[258] Profysen Pulano Muluti testified that the accused person encouraged her to go to Botswana where she would receive money (50 pula). This witness testified that she eventually with four other persons crossed the Chobe river into Botswana. She testified that the accused is her brother.

[259] Linus Kabunga Mubonda testified that on 1 January 1999 he went with one Richwell Mukungu from his village to Ngwezi on the way to Botswana with the aim to attend school. At the market in Ngwezi they were told to board a vehicle and drove to Lyibu-Lyibu and from there proceeded to Dukwe. He testified that she was transported by Allen Sameja but was unable to identify Allen Samaja in court.

[260] Elvis Kanungu Elijah testified that during December 1998 two men, Robert Chelezo and Allen Sameja came to his village and told him to go to Dukwe in order to find employment and education and thereafter to return to Namibia in order to separate Caprivi from Namibia. The witness testified that he eventually travelled and reached the Chobe river. Here Robert Chelezo directed him where to cross the river.

Robert Chelezo was in the company of Allen Sameja. This witness was unable to identify either of Allen Sameja or Robert Chelezo in court.

[261] The evidence of the witness who failed to identify the accused person in court will not be considered by this court. The only evidence left against the accused is the evidence of Christopher Siboli and Profysen Muluti. The evidence in particular of Siboli is incriminating in the sense that the accused was a co-conspirator with the aim of seceding the Caprivi from the rest of Namibia. The evidence also establishes that the accused had knowledge of treasonous activities and failed to report such activities to the authorities.

[262] The application for a discharge is accordingly refused.

#### **11. Matengu Elvis Puteho (accused no. 74)**

[263] Oscar Mwisepi testified that he met this accused person in Dukwe refugee camp and identified him in court.

[264] Kingsley Simwanza Kalundu testified that he was in Dukwe refugee camp and was a section leader. He once attended a meeting chaired by Thaddeus Muzamai where the topic of the meeting was to escape from Dukwe to fight the Government of Namibia. At some stage Elvis Puteho came to him and informed him that it was time to escape and that he (ie Elvis Puteho) was ready to escape. This witness testified that Elvis Puteho did subsequently escape from Dukwe refugee camp. This witness identified the accused in court.

[265] Another witness testified about a incident where Elvis Puteho and another person during May 1999 arrived and wanted to report themselves to the police. This witness could make no positive identification in court.

[266] Kavenaue Kombungu testified that he was unable to obtain any repatriation documents in respect of Matengu Elvis Puteho.

[267] The evidence establishes that the accused was in Dukwe refugee camp and that he escaped. It is not clear from the evidence that the accused attended the meeting where the topic was discussed that people should escape in order to attack the Government. In my view the evidence does not establish the underlying reason why the accused had escaped.

[268] I am not satisfied that the evidence establishes hostile intent, or the intention to commit any other crime.

[269] The application for discharge is granted.

## **12. Simon Max Mubita (accused no. 76)**

[270] Lascan Sikosi testified that he met Max Simon after his return from Dukwe. He did not identify this person in court. The State in its heads of argument refers to the evidence of Rassen Luslizi Kumana who testified that on 3 August 1999 a person by the name of Max Simon Liyemo looked scared and told him that he was afraid because his father was the one who forced him to go and attack or to go and shoot. The testimony was that this person was the son of Mubita Francis Liyemo, who in turn is the cousin of the witness. The name Max Simon Liyemo does not correspond with the name of the accused person. However, more importantly, this person referred to as Max Simon Liyemo was never identified in court.

[271] There is accordingly no evidence against this accused person that he committed any offence.

[272] The application for a discharge is granted.

## **13. George Kasanga (accused no. 77)**

[273] Oscar Mwisepi identified the accused as having been in Dukwe and was one of the persons who gathered there with the intention to seceding the Caprivi Region.

[274] Kingsley Simwanza Kalundu testified that he, George Kasanga was a traditional healer and that he treated people including the witness to be invisible to their enemies. He testified that the accused was telling them that they will go to Angola to get training and thereafter 'must come back to Namibia and fight the nation of Namibia in order to liberate Caprivi'.

[275] Avelino Masule was warned in terms of section 204 of the Act. He testified that on 22 August 1996 he saw Mishake Muyongo coming out of the house of the accused and thereafter went with the accused to Zambia in two motor vehicles where they collected six wooden boxes from boys dressed in UNITA uniform. The boxes were not opened but he knew that there were fire-arms in those boxes. They returned to the house of the accused person where the boxes were offloaded. He testified that the next morning the accused informed him that there were fire-arms inside those boxes and told the witness not to tell anybody about it. He testified that the accused gave him N\$50.

[276] The evidence at this stage establishes that the witness was informed that six boxes offloaded at the house of the accused contained fire-arms. There is no evidence on the type of fire-arms if it is accepted that there were fire-arms in those boxes. There is no evidence that these weapons which were acquired in the year 1996 were used in the attack on 2 August 1999. It was submitted by Mr McNally that there is no evidence that the accused collected AK 47s from Angola as has been stated in the further particulars.

[277] In my view the evidence does not establish any overt act, hostile intent or common purpose. The evidence establishes that the accused (based on the evidence of Mwisepi and Kalundu) had knowledge of plans to secede the Caprivi from Namibia and failed to inform the authorities thereof



[278] The application for a discharge is accordingly refused.

#### **14. Alfred Tawana Matengu (accused no. 79)**

[279] Oscar Mwisepe testified that the accused attended a meeting at Liselo in 1998 where the resuscitation of the UDP was discussed as well as the formation of an army. This witness testified that the accused was an interpreter at meetings addressed by Mishake Muyongo and that he never used to miss a meeting convened by Muyongo.

[280] Christopher Siboli testified that the accused attended a meeting at the DTA office in 1989 where secession was discussed and was to be achieved by way of fighting. The witness testified that the accused was present when the CLA was formed in 1989. He testified that the accused was present when an answer was received from Angola that weapons could be procured from Angola and people could go and receive military training. The accused donated money. The accused attended a meeting during the year 1992 at the DTA office chaired by Mishake Muyongo where the acquisition of weapons from Angola was discussed. The accused at this meeting stated that he was 'willing to see the Region being seceded'. The accused attended a meeting during 1993 at the DTA office in Katima Mulilo where the secession of Caprivi was discussed.

[281] The witness testified that during the year 1997 meetings were held at the DTA office, at the old house of Muyongo, at the new house of Muyongo, at Liselo village, at Masokotwane, at Linyati, at the house of the accused at Sangwali and Kongola, and at Sibinda village where the issue of secession was discussed. The accused attended all these meetings. The accused attended a meeting during 1998 where secession was discussed and was present at a meeting at the DTA office in Katima Mulilo in 1998 where money was donated in order to acquire weapons from Angola.

[282] David Sitali testified that he himself, attended two meetings at the DTA office during the year 1998. He testified that he, himself, just listened and did not express

any opinion. This witness testified that the accused agreed that the Caprivi had to be seceded.

[283] Christina Nyambe testified that the UPD was a regional party affiliated to the DTA and that during the year 1996 at a congress of the UDP Mishake Muyongo was elected as President of the party and the accused was elected as Vice-President.

[284] Mr McNally submitted that the mere presence of a person at a meeting even if views were expressed that weapons had to be secured and the country had to be seceded by such means does not amount to conspiracy.

[285] The evidence establishes that the accused was much more than a mere silent observer. He expressed his willingness to see the Caprivi seceding from the rest of Namibia. He was present when the CLA, the armed wing of the UDP was formed, he donated money in order to acquire weapons, he agreed that the Caprivi should seceded from the rest of Namibia, and he was the Vice-President of the UDP. The aims of the CLA must have been known by him. There is no evidence that the accused dissociated himself from the aims and objectives of the CLA. On the contrary the evidence suggests that he actively supported those aims. Furthermore the accused at no stage during all these years reported anything to the authorities.

[286] I am of the view that the evidence establishes overt acts and a hostile intent.

[287] The application for a discharge is refused

#### **15. Richard Limbo Makuwa (accused no. 91)**

[288] Christopher Siboli testified that he attended a meeting at the house of the accused in 1998 on the issue of the secession of Caprivi. This witness identified the accused as one of the 'mobilisers of persons for the secession of Caprivi. This witness identified the accused as one of the persons who donated money for the acquisition of weapons in Angola.

[289] Innocent Falali Mahoto testified that Richard Makuwa was amongst a group of persons who opposed the inauguration of the new chief.

[290] This evidence establishes that the accused was aware of the fact that there were discussions in respect of the secession of the Caprivi Region, that he availed his house for a meeting, that he mobilised persons, and donated money, that the accused did not report to the authorities that he knew about moves afoot to secede the Caprivi from the rest of Namibia.

[291] This application for a discharge is refused.

#### **16. Robert Lifasi Chelezo (accused no. 97)**

[292] Elvis Kanungu Elijah testified that Robert Chelezo and Allen Sameja came to his village and told him that he should go to Botswana in order to separate the Caprivi from Namibia. This witness was unable to identify either Robert Chelezo or Allen Sameja.

[293] Martin Matau testified that Robert Chelezo registered people who went to Botswana. The reason for going to Botswana was 'to hold the guns in order for us to come and cut Caprivi'. This witness failed to identify Robert Chelezo or any other person in court.

[294] John Sinvula testified that Richard Chelezo told him to go to Botswana, following others, in order to cut the region of Caprivi from Namibia. This discussion took place during November 1998 at the village of the witness. On 1 December 1998 during the night he departed for Botswana together with other persons. They crossed the Linyanti river into Botswana and went to Dukwe. He returned to Namibia during the year 1999 by way of repatriation. This witness testified that before the attack on 2 August 1999 he was in the company of David Matau when they met Robert Chelezo who informed them that they should not report to the police the fact that he

recruited them, and that should they report him, he would kill them. This witness correctly identified the accused person in court.

[295] The only evidence presented by the State and which should be considered by this court is the testimony of the witness John Sinvula.

[296] The accused was not charged with assault ie that he threatened to kill the witness but this evidence in my view points to the state of mind of the accused person when he told Sinvula about the cutting of Caprivi. The only evidence against this accused which indicates knowledge to secede the Caprivi is the testimony of Sinvula and that he should go to Botswana in order to cut the Caprivi from Namibia.

[297] The exception to the rule that there must be an overt act manifesting the hostile intent is that anyone who knows that an act of treason is being committed or is to be committed and who fails to communicate his knowledge to the authorities, himself commits treason.

[298] The application for a discharge in respect of this accused person is accordingly refused.

#### **17. Bernard Maungulo Jojo (accused no. 98)**

[299] Oscar Mwisepi identified the accused as a person who frequently attended meetings of Muyongo where the issue of secession was discussed. This witness stated that he was not in a position to testify anything regarding the attitude of the accused regarding secession. The witness however testified that the accused had offered himself entirely 'in terms of attacking or fighting against the Subias including those who would be stumbling blocks to our plan or our idea'. The witness testified that he knew this because he was involved with the accused chasing Subias around.

[300] Christopher Siboli testified and pointed the accused out as a member of Kopano ya Tou who attended a meeting during 1991. He further testified that the accused looked for people to join the CLA. The witness testified that the accused

transported persons, including himself to go to Botswana. According to him the accused had transported him to a certain river. He (ie the witness) crossed the river into Botswana and the accused returned. He testified that the accused knew the reason why he had to go to Botswana namely to receive military training and that the accused was aware of the 'Caprivian idea'. The witness testified that the accused was present at the new house of Muyongo in 1997 where secession was discussed.

[301] Bernard Kanzeka testified that the accused attended a meeting during November 1998 at DTA office addressed by Geoffrey Mwilima where the issue of secession was discussed, money was donated, and people were informed to go to Botswana.

[302] Kinsley Simwanza Kalundu testified that the accused person during the years 1998 and 1999 recruited him to go to Botswana in order to receive military training and to return to fight the nation of Namibia using fire-arms and liberate the Caprivi Region. During 1999 himself together with about 21 other persons started their journey to Botswana from Katima Mulilo. That evening they slept at the house of Bernard Maungulo and the next day they were ferried across the river into Botswana. This witness testified that he returned to Namibia on 24 June 1999 through the process of repatriation and went to stay at the house of the accused person. He further testified that before he left for Botswana a G3 and AK 47 fire-arms were offloaded at the house of the accused person. One evening after his return from Botswana during July he saw two vehicles drove from the house of the accused. The witness was together with the son of the accused. They were informed by the accused that the people travelling on those vehicles were 'Steve Kwala and the group' and that they have fire-arms and hand grenades. On 2 August 1999 he was together with the accused and his son in Katima Mulilo when he heard the sound of gunfire. The accused said 'those are our people who have started shooting'.

[303] Peggy Martin Mufalali testified that the accused was amongst the group that opposed the inauguration of the new chief.

[304] Mr McNally submitted that the witness Siboli was thoroughly discredited during cross-examination by Mr Kauta. Even if this may be accepted just for the sake of argument, the evidence of the other three witnesses should be considered. The evidence in my view establishes overt acts together with the required hostile intent. There is further no evidence that the accused reported to the authorities his knowledge about the attempt to secede the Caprivi Region.

[305] This application for a discharge is refused.

**18. Richard Simataa Mundia (accused no. 104)**

[306] Christopher Lifasi Siboli identified the accused as a person who was willing to see the region seceded and was also identified as a member of Kopano ya Tou, as a recruiter and a transporter. The witness testified that the accused was present at a meeting at the new house of Muyongo where Muyongo said that they should go to Angola and collect fire-arms. The witness testified that the accused attended a meeting during the year 1998 at the DTA office in Katima Mulilo where there was a discussion that people should steal diesel.

[307] He testified that 'a good number of people' gathered at Shell filling station in Katima Mulilo to be transported to the CLA base at Singalamwe. There were vehicles ready to transport these people. The accused person was present and he had a fuel order. The witness testified that a white man, Norman Justus (accused no. 93) also arrived there and spoke to the accused person. Thereafter Justus approached Muyongo and then left. The witness testified that the accused attend a meeting at Lisikili (Nambweza was also mentioned) where an agreement was reached that the Caprivi Region should be seceded through fighting.

[308] Nasco Liswaniso Chombo testified that during December 1998, at Lisikili village the accused who was in the company of other persons including Richwell Mukungu told him that Caprivi will be cut from Namibia. The witness was in the company of one Christopher Simataa Muswea when this was conveyed. Richwell

Mukungu informed them that transport would be arranged for them to go to Botswana to train as soldiers in order to cut Caprivi from Namibia. The witness testified that nothing happened in Botswana.

[309] Voster Mukungu Nawa testified that Richard Mundia told him during December 1998 to go to Botswana in order to fight for his country. According to him Richard Mundia informed him that he would receive training in fire-arms. This witness was unable to identify Richard Mundia in court.

[310] The State in its heads of argument submitted that the accused was in the company of John Samboma, Bennet Mutuso, Richard Libano Misuha and Oscar Muyuke Puteho after the attack near Masida with weapons. The name of the person on the record which was with the afore-mentioned individuals was Richard Samati. This person has not been identified by the witness, Oscar Mwisepi. The State in its heads also submitted that the motor vehicle of the accused was at Makanga on 1 August 1999 where the final preparations were made for the attack the next day. The record however does not support this submission.

[311] Versmus Haipa a police officer in the Namibian Police testified that on 27 October 1999 the house of the accused was searched and the evidential material found inside the house was taken to the police station and booked into the Pol 7 register (Pol 7/340/99 Exhibit AAC). Exhibit AAC is a document containing the aims of the CLA which inter alia was to establish an army in order to liberate the Caprivi Zipfel.

[312] The evidence in my view establishes that the accused committed overt acts from which a hostile intention may be inferred. It is also apparent from the evidence that the accused was aware of plans and preparations to secede the Caprivi from Namibia by violence. This information was not conveyed to the relevant authorities.

[313] The application for a discharge is refused.

I shall now deal with those accused persons who are represented by Mr Kachaka.

**1. Rodwell Kasika Mukendwa (accused no. 106)**

[314] This accused person was discharged on the 10<sup>th</sup> of August 2012 on all the charges.

**2. Vasco Inambao Lyonga (accused no. 38)**

[315] Boyd Nasilele Mambo testified that he (ie himself) boarded a Government TATA truck on 1 August 1999 with other people amongst them one Lyonga Nambahu and Steven Mashando. This truck was driven by Fabian Simiyasa. The witness testified that he went to Makanga. It appears from the evidence that this witness took a ride in the truck without any aim or purpose. This person was unable to identify any person in court.

[316] Kennedy Muchisani Tiyeho testified that he attended a meeting held at Induna Kahenda's village in 1998 addressed by Muyongo. According to the witness the meeting was about Caprivi not being part of Namibia and that they wanted to cut Caprivi from Namibia. This witness testified that one of the attendants was Vasco Lyonga Inambao. He mentioned that he had walked with Inambao to Botswana. He returned through repatriation to Namibia on 15 June 1999. This witness also testified about events on 1 August 1999 and the role played by Vasco Lyonga Inambao. This witness was unable to identify this person in court.

[317] The State in their heads of argument submitted that the name of the accused appears on the deployment list (Exhibit EGK(1) at E1(2) no. 34). I have indicated (supra) why this evidence is inadmissible.

[318] Bornface Kalwizibwa Mulonda testified that Vasco Inambao Lyonga, the son of his elder sister told him that he was not part of the people shooting and that he just ran away when they started shooting at Mpacha.



[319] The State in their heads of argument submitted that this person Vasco Inambao Lyonda made an admission to his uncle, Bornface Mulonda. This witness was given the opportunity to point on the person he referred as a Vasco Inambao Lyonda in court. The witness failed to identify him.

[320] There is in my view no evidence which requires a reply by this accused person.

[321] The application for a discharge is granted.

### **3. Jacob Linus Musondeke (accused no. 94)**

[322] Holstein Simasiku testified that Linus Jacob Musondeke approached him in order to go to Botswana in order to join the 92 whom he said were the first people to come up with the idea to secede the Caprivi from Namibia. He stayed for 6 months in Dukwe doing nothing except playing soccer. This witness was given the opportunity to identify Jacob Linus Musondeke but did not even attempt to do so, saying: 'Even if I look at them I won' t know them'.

[323] Vistor Iluya Sakutiya testified that he was told by a person called Danbar Mushwena to go to Botswana. A person he referred to as Ufondeka Linus told him the same thing and they would find employment and 'some form of life'. When given the opportunity to identify Ufondeka Linus he failed to do so.

[324] There is no evidence that this accused committed any crime.

[325] The application for a discharge is granted in respect of all the counts.

### **4. Chombo Elvin Simon Kauhano (accused no. 107)**

[326] Sydney Mutwaezi Mwabi testified that on 11 August 1999 he was approached by one person, namely, Simon Kauhano Allen. This person told him that he was looking for money in order to buy food for the people at Masokotwane rebel camp.

He testified that this person wanted him to join them at their camp since they wanted to cut Caprivi from Namibia. This witness was given the opportunity to identify this person, Simon Kauhano Allen but failed to do so.

[327] The State called further two witnesses, namely the wife of the accused who after having been warned in terms of the provisions of section 195 of the Act declined to testify against her husband. The other witness called by the State was Jonas Aaron a prison warden at Grootfontein prison who was called to identify the accused or a person whom he came to know in prison from 1999 to 2005.

[328] There is in my view no evidence which proves the commission of any crime by this accused person.

[329] The application for a discharge is accordingly granted.

## **5. Stephen Kandela Mashando (accused no. 36)**

[330] The witness Boyd Nasilele Mambo's evidence was considered as far as it relates to this accused person when this court considered the evidence against accused 38 (supra). The witness failed to identify this accused in court.

[331] Kennedy Muchisani Tiyeho mentioned that a person by the name of Stephan Kandela boarded a white TATA truck but failed to identify this person in court.

[332] Chrispin Monangeri Mekalabi testified that during 1998 he resided in the village Sikali in the Kaenda area. At that stage he was a member of the DTA and was the village induna. This witness mentioned the name of Mashando as one of four young men from his village who went to Dukwe. This witness testified that he did not know where Stephan Mashando and Stephen Libuo were on 2 August 1999. This witness testified that after the attack on 2 August 1999 Stephan Mashando came to his courtyard and said to him: 'It's us who were fighting'. He testified that Mashando also said they were fighting at Mpacha. This witness also testified that Stephan Mashando was one of four persons who ran into the bush at Sikali village when NDF

soldiers or the police approached the village. This witness when given the opportunity was unable to identify Stephan Mashando in court.

[333] It was submitted by the State in their heads of argument that the name of the accused appears on the 'deployment list', exhibit EGK(1). This evidence, as pointed out (supra), is inadmissible.

[334] Three other witnesses, ie Sem Mbinge, Evans Simasiku, and Aupa Erastus, members of the Namibian Police testified about the arrest of the accused on 1 September 1999.

[335] In my view the evidence does not establish that the accused committed any crime.

[336] The application for discharge is granted.

## **6. Linus Kashala Luseso (accused no. 45)**

[337] Calicious Annenias Luseso testified that he is the brother of the accused person and whom he also correctly pointed out in court. The witness testified that he was in Windhoek during the year 1998. When he returned home during May his brother was not in the village. He was informed by his father that his brother went to Botswana. He testified that he saw his brother again 'maybe' two weeks after the 2<sup>nd</sup> of August 1999, when police officers 'collected' him at his fathers' courtyard, because one of his other brothers had gone to the police and reported the presence of the accused at his presence in his father's courtyard. This witness testified that when he saw the accused person his clothes and his body looked dirty.

[338] Memory Kahimbi Matemwa testified that she was at Dairy Compound in Katima Mulilo when a man by the name of Simon Liemo informed her brother, Nyoka Duscan, that on 2 August 1999 there would be 'some shooting'. This witness was not able to identify this man by the name of Simon Liemo, in court.

[339] Lascan Sikosi testified that on 10 August 1999 he found Gilbert Poshowe together with Linus Luseso at the village wearing black jackets. Poshowe said that he wanted to get rid of informers. This witness failed to identify Linus Luseso in court.

[340] Eimo Dumeni Popyeinawa testified that he is a member of the Namibian Police and one of the investigating officers in this case. During his investigation he was at some stage introduced to a group of men including one Linus Liseso. He himself in turn provided a false name. This witness did not identify the person who he referred to as Linus Liseso, he simply stated that he 'is here as an accused person in court'.

[341] It should be apparent from the testimonies of these witnesses that there is no evidence that the accused committed any of the crimes preferred against him.

[342] The application for a discharge is granted in respect of all the charges.

## **7. Richwell Kulisesa Mahupelo (accused no. 117)**

[343] Hamlet Kachibolewa Muzwaki was warned in terms of the provisions of section 204 of the Act. This witness testified that one Shine Mahupelo use to buy food at Katima and drop these food at Richwell's courtyard. This witness testified that later he observed that the food was taken to rebels in the bush during 'evening time'. This witness failed to identify Shine Mahupelo when given the opportunity to do so in court.

[344] Judith Lubinda testified that during the year 1999 she was married to Richwell Mahupelo when she observed 'foodstuffs' being brought into the courtyard by Richwell Mahupelo personally. This food was taken by other unknown persons during the night. She testified that the food were packed in a hut and was locked.

When she was asked to identify her former husband in court, strangely, she stated that she would be unable to do so 'since long time has lapsed'.

[345] Given Earthquake Zikinyeho Tubaleye, a Zambian citizen testified that during the year 1998 – 1999 he stayed at Masesa village in the Caprivi Region. At that stage he had a girlfriend called Manyando Mahupelo who was the sister of a person called Shine Mahupelo. He testified that on 9 March 2000 he went to the village, New Look, where his girlfriend was residing when he saw Shine Mahupelo offloading food from a motor vehicle and took it into his house. He assisted in the offloading. On 11 March 2000 these goods were loaded on a sledge and were taken by Starline Tabakuza and Kennedy Tabakuza to Zambia. The witness testified that in Zambia the food (mealie meal) was exchanged for meat at the village of Mike Masiku. This witness identified accused no. 117 as Shine Mahupelo.

[346] Hubby Habaini Sinyabata testified that during March and April 2000 he was in Ngwezi when Richard Mahupelo, the son of one of his sisters requested him to assist him loading bags of maize meal he had brought. This witness also testified about an incident about a week later involving Bennet Mutuso who was in the company of Richwell Mahupelo, and who was carrying a travelbag and an AK 47. On this occasion Agry Muamba was the driver of the motor vehicle. The witness was given the opportunity to identify in court the person he referred to as Richwell Mahupelo and he failed to do so.

[347] The testimonies against this accused person establishes no evidence that the accused has committed any of those offences he had been charged with.

[348] The application for a discharge is granted in respect of all the charges.

## **8. Richwell Mbala Manyemo (accused no. 115)**

[349] Oscar Mwisepi testified that Richwell Manyemo was amongst a group who was given the task of organising rebels after the attack on 2 August 1999. He testified that he, himself, was given the task by Richwell Manyemo and Lorenz

Simbozi to go to Masida in order to meet the group of John Samboma, who 'happens to be one of accused here'.

[350] Michael Mutanimiye Tubazumbe testified that he went to Dukwe because Richwell Manyemo explained to him that since he is from the military he should go and train people there. He had this conversation during the year 1999. He testified that Richwell Manyemo had arranged transport which eventually took him to the border with Botswana and thereafter he crossed with other persons into Botswana. This witness correctly identified Richwell Manyemo in court as accused no. 115.

[351] Mr Kachaka in his heads of argument submitted that the witness was biased by only mentioning the name of this accused and not other names that he had mentioned to the police. Mr Kachaka also pointed out that the witness conceded during cross-examination that he never told the police about Richwell Manyemo influencing him to go to Dukwe but only about being accused of coming back from Dukwe. It appears from the record that such a concession was indeed made but the witness tried to give an explanation but was interrupted.

[352] I have indicated (supra) credibility plays a limited role in the consideration of an application in terms of section 174 of the Act. The fact that there is merit in criticising the evidence of a witness or the fact that a witness made certain concessions, depending on the nature, gravity, relevance and impact of such criticism or concession on the rest of the testimony of a witness, does not necessarily, in my view, mean that a court should at this stage disregard such evidence. It is only in the most exceptional case where the credibility of a witness is utterly destroyed that a court may disregard such evidence. As it was stated (supra) a very high degree of untrustworthiness must be shown.

[353] Hamlet Kachibolewa Muzwaki testified that he went to the courtyard of the accused when the accused informed him that the Government of Namibia is discriminating against them and that only 'Owambo people' are the people who get jobs. The accused informed him the 'best way' is to cut Caprivi from the rest of

Namibia. According to this witness he was informed that everything was ready and that he should get a gun to liberate Caprivi. This was said to him during December 1998 by the accused who is his uncle.

[354] The witness also testified about an incident where John Samboma came to their village at night and went to the courtyard of the accused carrying 'a big gun'. During cross-examination the witness conceded that he did not mention a big gun in his statement to the police.

[355] In my view the evidence establishes the accused person had been involved in the organisation of the rebels after the attack on 2 August 1999, that he recruited people to go to Botswana and arranged transport for them and that he encouraged someone to liberate the Caprivi by violence. The evidence in my view establishes overt acts from which the necessary hostile intent may be inferred. In addition the accused at no stage reported to the authorities this knowledge regarding the secession of Caprivi from the rest of Namibia.

[356] This application for discharge is refused.

#### **9. Rodwell Sihela Mwanabwe (accused no. 30)**

[357] Dasken Simasiku Nyoka testified about the arrest of the accused person whom he had correctly identified in court. This arrest took place after the attack on 2 August 1999 at the courtyard of the mother of the accused. He testified that he observed some sort of black powder on the ears of the accused person, a bangle on the wrist of the accused which had some charms on it, and a string hanging from his neck. He testified that the police assaulted the accused.

[358] Lasken Munalula Sikosi testified but failed to identify the accused person because of an 'eyesight problem'.

[359] George Alufeya Sizuka testified that Rodwell Sihela came to his village in the company of Mutalife Adour during July 1999 and told them that they should go and join their friend. The witness testified that he was with his younger brother Libuku John. The witness testified that he refused to go. On the second occasion they were informed 'let us go and join our friends so that we can cut the region'. The witness testified that he observed that their clothes were soiled with dirt and that there was something around their necks which appeared to be like fibre. This witness identified Rodwell Sihela in court.

[360] John Libuku testified that he went to Botswana amongst other, his uncle Chrispin Mandoile on 13 November 1998 because they were told about 'military lessons'. The witness testified that after his return to Namibia during July 1999 Rodwell Sihela informed them that they should come to town. Rodwell was with his friend Chika Adour Mutalife. The reason why they had to go to town was that they were busy with military preparations, that they wanted to fight in order to get their nation, Caprivi. The witness testified that Rodwell Sihela and Adour Chika Mutalife said that they were going to fight the government.

[361] During cross-examination the witness admitted that in his statement to the police he did not clarify how Adour Chika Mutalife and Rodwell Sihela approached him and influenced him. The witness further testified that he 'did not hear very well as to what they were telling me and I was not interested in it'.

[362] Chrispin Mandoile identified the accused and testified that on 2 August 1999 around 06h00 he met the accused who was running. When he asked him why he was running the accused said: 'Why I am running, I'm seeing people who are busy running and that I can even hear the gunshots. That's why I'm also running, coming to your house or to your place'. The witness testified that the accused was not carrying anything at that stage.



[363] I am of the view that the evidence establishes at least that the accused had knowledge of plans to secede the Caprivi region and that he failed to inform the relevant authorities it.

[364] The application for a discharge is accordingly refused.

#### **10. Rosco Matengu Makapa (accused no. 108)**

[365] Bernard Kanzeka testified about person who attended a meeting including one Risto Makapa.

[366] Albert Mutile Lingesa testified about a person Rosco Makaba buying food in Katima Mulilo. This witness was unable to identify Rosco Makapa in court.

[367] Kennedy Malumo Matengu testified about a meeting attended by Rosco Makapa where Aggrey Makendano, Oscar Puteho, John Sando, himself and Raymond Silelwa were also in attendance. At this meeting certain plans were discussed. After these discussions he provided transport to some of the participants. This witness failed to identify Rosco Makapa.

[368] Vasco Simombela testified about an incident when Rosco came to the village and took mealie meal. He testified that he did not know Rosco Makapa. This witness failed to identify Rosco Makapa in court. There is no evidence presented implicating the accused in the commission of any offence.

[369] The accused is accordingly discharged in respect of all the charges.

#### **11. Moven Kawana Chombo (accused no. 111)**

[370] Society Limbo Shozi, a person from the traditional court (Khuta) in Chinchimani, testified that a son of Chrispin Chombo who had gone to Dukwe was brought to him by his father. The boy informed him that he was staying in the bush at

Masokotwane and those people made him work for them by fetching water and cooking for them. The police was informed. He testified that he did not know the boy. This witness failed to identify this boy in court.

[371] Chrispin Mate Chombo testified that his son Movem Chombe Kawana was in Botswana and returned to Namibia. At one stage the police arrived to enquire about his son. He informed them that his son was at Sibinda, at his mother's place. The police instructed him that should he see his son, he should either to take him to the Khuta or to bring him to Katima Mulilo. He testified that his son had informed him that he had met three people who had carried him along. He confirmed what his son had said to the previous witness at the Khuta. This witness failed to identify his own son.

[372] Stephanus Shilumba Lungameni was a member of the Namibian Police Force. He testified that a boy was brought from the Khuta in Chinchimani by the name of Chombo. The father of the son explained why he had brought the son. This witness testified that the son told him that he was abducted and taken to Masokotwane.

[373] Sydney Mutwaesi Mwabi testified that on 10 August 1999 Chombo Kawana Moven informed him that he was looking for people to join and for donations to buy food for the people at a camp in Masokotwane. This witness also testified that this person told him that he had escaped from Masokotwane. This witness failed to identify the person by the name of Chombe Kawana Moven. The evidence establishes that some person by the name of Moven Chombo Kawana was abducted and had to work for persons as a cook and drawing water. This person was eventually handed over to the police. The witnesses including the father of this person were unable to identify him in court.

[374] There is no evidence against this person. The application for a discharge is granted.

## **12. Kester Lisemu Kabunga (accused no. 102)**

[375] Progress Lifasi Mibonda refers to a group of people crossing into Botswana and that it was 'the gang of Cesta Kavunga and Chris Mushanana' who took them. The witness testified that a small river was crossed by this group (of 19 persons) and himself, Manja, Cesta and Christ went back to the village. He testified that Kester Kabunga was the driver of the motor vehicle, a Hilux yellow in colour. This witness identified the accused in court.

[376] Bernard Kanzeka testified that he was fetched from his house in Ngwezi, Katima Mulilo by Kester Kabunga and Mathews Mutambo in order to attend a meeting during November 1998. The witness testified about another incident where Kester Kabunga came to him in the Ngonga area around 22h00 and informed him that he had brought people who wanted to go to Botswana. This witness testified that he demanded payment and Kester gave him N\$150. Kester Kabunga was driving a Toyota Hilux 1800, yellow in colour, with registration number N 678 KM.

[377] The witness testified about a second occasion when Kester requested transport for five people. The witness testified that he was not paid but helped because of the first payment. The witness identified Kester Kabunga in court.

[378] Progress Munsu Mulonga testified about persons who attended a meeting at the DTA officers during 1998 where the issue of secession was discussed. One of the attendants was Kester Kabunga. He identified Kester Kabunga in court.

[379] Jeremiah Masule Kanchele testified that he told Kester Kabunga not to be telling his (ie Kanchele's) son to go to Botswana.

[380] Mushe Events Kaine was also warned in terms of the provisions of section 204 of the Act. He was at Makanga fields on 1 August 1999 where he also observed the vehicle of Kester Kabunga.

[381] A number of witnesses were called but failed to identify the accused person. The evidence establishes that the accused was involved in the organisation and transportation of persons from Namibia to Botswana on more than one occasion,

that he attended a meeting where the secession of the Caprivi was discussed and that his motor vehicle was at Makanga on 1 August 1999 where the preparations were made for the attack on Katima Mulilo the next day.

[382] I am of the view that having regard to the facts which are common cause in conjunction with the testimonies of these witnesses that the evidence establishes overt acts from which hostile intent may be inferred. In addition the accused being well aware of plans to secede the region failed to report this information to the authorities.

[383] The application for a discharge is accordingly refused.

### **13. Fabian Thomas Simiyasa (accused no. 96)**

[384] Oscar Mwisepi testified that he was a body guard of Muyongo and that the accused person was a prominent person who had played a big role 'in the idea of seceding the Region'. He testified that he was involved in registering people for the CLA, logistics, amongst others, transport, also to mobilise persons and that the accused and Eugene Ngalaule fulfilled similar roles. This witness testified that the accused gave O'Brien Sinkolela Mwananyambe one of the accused persons a lift to Botswana in order 'to enhance the idea of seceding the Caprivi'. This witness testified that the accused brought water to the group of 92 at Kalumba. This witness testified that the accused gave a lift to a group of persons who attacked the town (of Katima Mulilo). The witness testified that the accused was an escort of Mishake Muyongo when he 'entered Botswana'.

[385] Alfred Kupulo Kupulo was warned in terms of the provisions of section 204 of the Act. The witness testified that he had joined the CLA in order to fight the Government of Namibia. He testified about an incident where he found himself in a group of 22 men at Kalumba where the accused brought food to them. The accused arrived there with a Colt 4 x 4 Government vehicle.

[386] Walters Mwezi Sikochi testified that Fabian Simiyasa was at Makanga on 1 August 1999 and was driving a TATA truck. This witness identified the wrong person in court. A number of other witnesses also testified but failed to identify the accused person.

[387] The evidence in my view establishes overt acts from which hostile intent may be inferred. The evidence further establishes that the accused had knowledge about plans to secede the Caprivi Region from the rest of Namibia.

[388] The application for a discharge is accordingly refused.

#### **14. Albert Sekeni Mangilazi (accused no. 55)**

[389] Oscar Luwate Simbulu testified about the events how he went to Singalamwe and how they went to the border of Angola. He testified that John Samboma entered into Angola and returned. Thereafter the whole group moved to Sachona. The witness testified that the accused came to join them at Sachona. He testified that the accused held no position and was an ordinary member like himself. The accused was identified in court.

[390] Michael Maswabi Nuwe recounted events how a group went into Angola with John Samobma in order to obtain military training from UNITA. They were unsuccessful. The witness identified the accused as one of the members of this group. This group went to Sachona where they were taught how to use bombs, mortars, and AK 47s. The witness testified that the accused was their chef. The witness testified that he stayed there for six days with this group before escaping. The witness testified that he was in Dukwe where the accused was also observed. This witness identified the accused person.

[391] It was submitted by Mr Kachaka in his heads of argument that this witness testified that when he entered Botswana he no longer entertained the idea of cutting the Caprivi Region. Mr Kachaka argued if that is the case, people like the accused person could have been in Dukwe without any intention to cut the Caprivi. This in my view calls for speculation as to what the state of mind of the accused was when he was in Dukwe.

[392] Richard Kafulanole Mutanale testified that during 1998 he met a man by the name of Albert Mangilazi who informed him about a meeting the next day at Sachona. The next day he, himself, the accused and other young men left for Sachona. There Franscis Mushandikwe was saying that they should have strong hearts and commitment. He testified that himself and his brother decided to sneak away at night. The accused recognised them on the road and told them to board the vehicle. They drove and eventually diverted to Katima Mulilo and entered the bush where they were offloaded. Here the accused requested them to register their names. There the accused stated the following: 'at that place where you came, we came here to form or to make the army, private army'. The witness testified that the accused told him that the army belonged to Muyongo and that the purpose of the army was to cut Caprivi from Namibia. The witness testified that he and his brother succeed to escape. The witness identified the accused in court.

[393] Alfred Kupulo Kupulo testified how he was transported by motor vehicle to Sibinda. At a school other people got onto the vehicle including Albert Mangilazi. The witness identified Albert Mangilazi in court. At Sibinda they found a group of about 22 persons in the bush. They moved from Sibinda to Kalumba at night. They travelled in two vehicles. They stayed at Kalumba until the next morning when the accused brought food to them. They stayed for two days at Kalumba and were then transported to Sachona arriving there on 8 October 1998. They stayed for two weeks at Sachona and then moved to Linyanti where they stayed for one day and then left for Libyu-Libyu. Here young men escaped and were followed, and which led to the death of Victor Falali. (The evidence on record is that Victor Falali was shot). It was because of this incident that the whole group of 92 men were forced to leave and

went to Botswana. Oscar Mwisepe testified and identified the accused person as a person whom he was with at Dukwe refugee camp and who gave advice regarding the struggle.

[394] The evidence establishes that the accused actively participated in plans to accomplish the secession of the Caprivi Region from the rest of Namibia. The evidence establishes overt acts from which a hostile intent may be inferred. Furthermore, the accused at no stage reported these activities to the authorities.

[395] The application for a discharge is refused.

I shall now deal with those accused persons who are being represented by Mr Nyoni.

**1. Joseph Kabuyana Kabuyana (accused no. 33)**

[396] Hobby Habaini Sinyabata testified that on 2 August 1999 he was at Sikelenge village in the company of a group of men at a drinking place. They were chatting and joking. In this group were Richard Masupa, Joseph Kabuyana and Felix Taulo. Felix and Joseph recounted an incident at Mpacha Military Base when Felix said that he had been carrying bombs and Joseph said that he was carrying ammunition. This witness was given the opportunity to identify the person he referred to as Joseph Kabuyana but failed to identify him. This witness testified that he had been subjected to psychological torture before a statement was taken from him.

[397] Even if one were to disregard the reference to psychological torture the remainder of the evidence does not establish that the accused has committed any offence preferred against him.

[398] The application is accordingly granted in respect of all the charges against him.

**2. Ernest Salufu Samunzala (accused no. 41)**

[399] Oscar Mwisepe testified that he met Ernest Samunzala in the refugee camp in Botswana and correctly identified this person in court. He testified that he had discussions with the accused person about the issue of secession and that the accused was interested in the idea. During cross-examination the witness testified that he could not recall *any* discussion that he had with the accused.

[400] There is no evidence that the accused was interested in the violent secession of Caprivi from Namibia. The evidence also does not establish any overt act committed by the accused person.

[401] The application for a discharge is granted in respect of all the charges preferred against him.

### **3. Thaddeus Sibonwa Mundube (accused no. 46)**

[402] Kasunga Kasunga testified that during the year 1998 young boys were fleeing to Botswana. One young boy, Thaddeus Mundube, came on occasion to his place to inform him that they were going to Botswana and when they come back they would cut Caprivi, ie that they would come back and fight the Government of Namibia since they wanted to rule themselves in Caprivi. The witness testified that he was at that stage a branch co-ordinator for SWAPO at Kaliyangile and used to mobilise and convince people to join SWAPO. The accuse came to him so that he could do the same, namely, to mobilise those people not willing to go to Botswana and to convince them to go. The witness testified that he refused. The witness was unable to identify Thaddeus Mundube in court.

[403] Joe Rascan Tubasehe testified that during the year 1999 he was approached at his village Kaliyangile by one Thaddeus Mundube who told him that he should 'follow' his idea. The witness testified that the 'idea was to come and cut the country'. The witness testified that he was not informed how or when the country would be cut. This witness identified Thaddeus Mundube as accused no. 46 in court. During



cross-examination this witness conceded that Mundube actually proposed to him to become a member of the DTA party.

[404] Boyd Munahano Ishangu testified that Thaddeus Mundube recruited him to go Botswana to train in order to return to the Caprivi Region and secede the latter from Namibia.

[405] It was submitted by Mr Nyoni in his heads of argument that the first statement of this witness was recorded on 22 September 2000, the second statement on 9 April 2001, the third statement on 10 October 2001 and that in none of those statements the name Thaddeus Mundube was mentioned. The name of Thaddeus Mundube was only mentioned in his fourth statement which was recorded on 6 December 2001 and that in his first statement the witness laid the sole blame for being recruited to go to Botswana on one Jacob Luyana. This witness during cross-examination admitted that the day that his fourth statement was taken, that he was drunk and that what he had stated in the fourth statement implicating the person Thaddeus Mundube was false. This witness did not identify Thaddeus Mundube in court when he was given the opportunity to do so.

[406] Advocate Nyamabo Tubazibale gave testimony about the circumstances he met one Thaddeus Mundube at Makanga. This witness was unable to identify Thaddeus Mundube in court.

[407] The evidence in my view does not establish that the accused person has committed any of the preferred charges against him.

[408] The application for his discharge is granted.

#### **4. Martin Sabo Chainda (accused no. 103)**

[409] Oscar Mwisepi testified and identified accused no. 103 as one of the individuals who had recruited people for the CLA. The witness referred to him only

as Chainda stating that he did not know his first names. This witness during cross-examination persisted that it was the accused person and no other Chainda whom he knew as the individual who recruited persons for the CLA.

[410] Kasunga Kasunga testified that Martin Chainda told him: 'these young boys who went to Botswana they came back so now we are going to cut Caprivi'. This witness testified that Martin Chainda referred to the CLA which would cut Caprivi and that it would be cut by fighting the Government. The witness testified that Martin Chainda told him this because he knew that he (ie the witness) was a member of SWAPO. This witness when given the opportunity in court to identify Martin Chainda was unable to identify him.

[411] The only evidence, in my view, against the accused is that of Oscar Mwisepi. This evidence establishes that the accused recruited people for the CLA. At the very least this evidence establishes that the accused person had been aware of plans to secede the Caprivi from the rest of Namibia and failed to report this to the relevant authorities.

[412] The application for a discharge is refused.

##### **5. Francis Liyemo Mubita (accused no. 110)**

[413] Lascan Sikosi testified that after he had been repatriated from Botswana during the year 1999 he met one Francis Mubita who was in the company of Francis Siyata, Alfred Siyata and Chrispin Samahali. The witness was with his cousin Dascan Nyoka. Francis Mubita told them that they were cowards to return home and that they were supposed to stay there until Caprivi got its independence. Francis Mubita told them to go to Angola to get training in order to fight Namibia. This witness did not identify Francis Mubita.

[414] Chrispin Mandoile testified that during the year 1998 he met the man by the name of Francis Liyemo Mubita who asked him why he was still in the Caprivi because others have already left, when they come back they will get a better living.

The witness testified that he then decided to go to Botswana. The person who transported him was Danbar Mushwena. This witness was able to identify Francis Liyemo Mubita as accused no. 110. It is apparent that it is not this witness's testimony that Mubita said anything about the violent secession of the Caprivi Region or about military training in Botswana or that the institutions of the Government would be attacked and destroyed.

[415] Starlife Joseph Sisinzi testified that during September 1998 Hans Meyer Tungulu informed him about the secession issue and that people should for that purpose go to Botswana. Hans Meyer Tungulu told him that some people would go to further their education and some would go there to be trained as soldiers. He was referred to Francis Mubita who arranged for transport to Botswana. He boarded a Hilux at a service station and travelled to Makanga. This witness was unable to identify Francis Mubita in court when he was given the opportunity to do so.

[416] The evidence does not establish the commission of any of the charges preferred against the accused person.

[417] The application for a discharge is accordingly granted.

## **6. Osbert Mwenyi Likanyi (accused no 57)**

[418] Walters Mwezi Sikochi was warned in terms of the provisions of section 204 of the Act. This witness testified that he observed Osbert Likanyi at Makanga bushes before the attack on Katima Mulilo. This witness identified Osbert Likanyi in court as accused no. 57.

[419] It was submitted by Mr Nyoni that this witness had been tortured and his testimony is inadmissible. I have (supra) dealt with the incident testified by the witness when he was taken into a thick bush by police officers and I have concluded that evidence of this witness is admissible evidence for the purpose of this application.

[420] Michael Maswabi Nuwe testified and identified the accused person being in Dukwe refugee camp in Botswana.

[421] Oliver Munyandi Mbulunga testified that one Osbert Likanyi invited him to a meeting. He subsequently boarded the motor vehicle of Thaddeus Ndala during October 1998 at Singalamwe village and they drove to Masida village. There was no meeting. Instead the next day he was transported with others to Singalamwe where John Samboma told them that they were going into Angola in order to get assistance of a military nature. This witness testified that the accused person was part of the group of 92 armed men who went to Botswana.

[422] Given Lufela Ndungati testified that during the night of 31 July 1999 one Adams Muyumbano collected him from his village and forced him to Makanga bush. The next day they were divided into groups and his group was assigned to attack the police station. He testified that one Osbert Likanyi was armed and also in this group. This witness was unable to identify Osbert Likanyi in court.

[423] I am satisfied that the evidence presented establishes an overt act from which a hostile intent may be inferred.

[424] The application for a discharge is accordingly refused.

## **7. Ignatius Nauha Twabushalila (accused no. 44)**

[425] Progress Munsu Mulonga testified about a incident at Shell Filing Station where he met Geoffrey Mwilima who was in the company of John Samboma. On the motor vehicle were 12 men including Ignatius Twabushalila. According to this witness, Geoffrey Mwilima told him that he was on his way with those people to Angola for military training. The witness stated that Geoffrey Mwilima could not have kept quiet because of the fact that he (ie the witness) used to attend meetings which had been also attended by Geoffrey Mwilima. This witness referred to a meeting where it was said that Caprivi must be liberated through the barrel of the gun and

people must go to Angola for military training. This witness identified Ignatius Twabushalila in court as accused no. 44.

[426] Ruben Hanghome testified about a incident on 28 August 1999 when he was with members of the NDF near Cameroon rebel camp. He testified that three individuals tried to run away. In the process one of them was shot in the leg. Two individuals were arrested there, one being Gilbert Poshowe and the other person who was shot in the leg was Ignatius Twabushalila who was identified by Gilbert Poshowe. He testified that two fire-arms had also been retrieved in the vicinity where these two individuals had been arrested.

[427] Mr Nyoni in his heads of argument submitted that this incident at the filling station lacks the ring of truth in it since taking people to Angola for military training is a highly sensitive and secret matter. This may be so, however the answer appears to lie in the testimony of the witness to the effect that both himself and Geoffrey Mwilima had prior to this incident attended meetings where the secession of Caprivi had been discussed and that Geoffrey Mwilima had no need to hide this information. In any event as I have indicated (*supra*), at this stage credibility plays a limited role.

[428] In my view, having regard to the facts which are common cause the evidence establishes an overt act from which a hostile intention may be inferred.

[429] The application for a discharge is accordingly refused.

## **8. Oscar Kushalula Muyuka Puteho (accused no 49)**

[430] Oscar Mwisepi testified that he met Oscar Puteho in Dukwe, Botswana and that Oscar Puteho was one of the platoon leaders. The witness testified that he also met Oscar Puteho at Masida where he was in the company of *inter alia* John Samboma, John Samati, Richard Misuha, Bennet Mutuso and Oscar Puteho Muyuka. This witness identified Oscar Puteho in court as accused no. 49. This witness testified that after the attack on 2 August 1999 a group was formed with the

task of organising the rebels and that he (ie the witness) was one of the members of this group. The witness testified that the group of persons he met at Masida had fire-arms. During his evidence-in-chief the witness was asked to repeat the names of the group of John Samboma he had met at Masida and he mentioned John Samati, Bennet Mutuso, Oscar Muyuka Puteho and Richard Misuha, but failed to mention the name of the accused again.

[431] Michael Maswabi Nuwe testified about an incident where under the pretext that he would be attending a meeting he eventually found himself with a group of people at Sachona and unwillingly took part in a journey to Angola. Here at Sachona they were trained in the techniques of using fire-arms. The witness testified that Oscar Puteho was one of the leaders of this group and he was their instructor in the operation of 60 mm and 80 mm mortar pipes. Oscar Puteho was identified by this witness in court as accused no. 49. The witness further testified that they were warned by the accused who informed them of the rule that no one should escape from Sachona and that the consequences of any escape or an attempt would be that such a person would be shot.

[432] Mr Nyoni in his heads of argument submitted that this witness did not mention Oscar Puteho in his statements to the police and criticised the witness's testimony in respect thereof as being unreliable. However, the *viva voce* evidence of this witness in my view should stand for the purpose of this application since this witness did not contradict himself in any one of his statements to the police.

[433] Mr Nyoni also criticised the evidence of Mwisepi *inter alia* on the basis that the witness is the only single witness who had testified about an alleged meeting with the alleged rebels in the bush at Masida. The mere fact that he was the only witness who testified about this incident is no reason to reject his evidence on this incident.

[434] Thomas Franco Mukoya was also called as a witness. His evidence is however inadmissible for the reasons mentioned (*supra*).

[435] The evidence in my view establishes an overt act committed by the accused from which hostile intention may be inferred.

[436] The application for a discharge is accordingly refused.

**9. Gabriel Nyambe Ntelamo (accused no. 88)**

[437] Bernard Bareka Kanzeka testified about two meetings that he had attended during the year 1998. The first meeting was during November 1998 addressed by Geoffrey Mwilima and the second meeting during December 1998 chaired by Mishake Muyongo. The witness testified that the second meeting was a secret meeting since only selected people attended that meeting.

[438] As indicated (*supra*) at this first meeting Geoffrey Mwilima told those in attendance that Caprivi had to be seceded from the rest of Namibia by fighting, that weapons would be obtained from Angola, that the task of those in attendance was to assist people to escape to Botswana by providing transport and that they should contribute money toward the fuel for such transport.

[439] It was submitted by Mr Nyoni that there is no evidence in fact or in law that those in attendance had associated themselves with the speaker's sentiments. On the contrary the attendants murmured, protesting that they had no power to get weapons. They were not happy. The testimony was that there was a break and thereafter according to the witness 'all of them agree'. Mr Nyoni disputes that there was a such an agreement in view of testimony by this witness during cross-examination that only Geoffrey Mwilima spoke and that not one of the 14 attendants said: 'I agree with Mr Mwilima, let's do this, let's do that'.

[440] Mr January submitted that the accused was aware of plans to secede the Caprivi by violence from the rest of Namibia and that the accused person, being someone who owes allegiance to the State, had a duty to report to the relevant authorities which he failed to do. This is indeed in line with the authorities (*S v Banda*

(supra) ) and is an exception to the rule requiring the commission of an overt act of treason accompanying the hostile intent.

[441] Thus even if the submission by Mr Nyoni is accepted the accused cannot escape liability since what was submitted by Mr January correctly reflect authoritative case law.

[442] The application for a discharge is accordingly refused.

#### **10. Patrick Itwa Likando (accused no. 89)**

[443] This accused person is in exactly the same position as accused no. 88. Similar evidence was presented. This accused also owes an allegiance to the State.

[444] This application for a discharge is accordingly refused.

I shall now deal with those accused persons represented by Mr Neves.

#### **1. Kingsley Mwiya Musheba (accused no. 9)**

[445] Lemmy Kasoondaha Haufiku, a member of the Namibian Defence Force held the rank of Captain during the year 1999. He testified that he was stationed at Mpacha Military Base as an interrogating officer and in charge of all the captured materials of the enemy. On 2 August 1999 he was asleep when he heard the sound of an assault rifle and the sound of a bombshell. He took his AK 47 rifle and went to investigate and established that the sound came from the quartermaster. He met some of his colleagues and there was an exchange of fire with unknown persons. When the fire ceased, they searched the area and captured 'four enemies'. These persons were taken to the interrogation room where he interrogated them. One was identified as Raphael Lifumbela, The other three identified themselves, on his request, as Silvester Ngalaule, Musheba Mwiya and Christ Ntaba. Raphael Lifumbela was requested to identify some of the 'enemy' that had been killed. Lifumbela identified three bodies as Chiziza, Albrin Mwahi and Herbert Muketela.



They also seized material which was found next to the bodies and around the enemy positions including a military bag, military sleeping bag, various other materials as well as a list of names, an AK 47 rifle of Chinese origin with 17 rounds of live ammunition, a pistol machine gun, 60 mm mortar, a pipe and also a mortar shell. All the material captured was handed in at the police station pending investigation. He testified that a person holding the rank of captain in the NDF is a commissioned officer. He testified that he was assisted during the interrogation by Corporal Libebe who acted as an interpreter, interpreting from Lozi to English. The witness testified that Raphael Lifembela was identified by Corporal Libebe because he recognised him. The witness testified that those captured were interrogated one by one. He testified during cross-examination that after they had interrogated those persons who had been captured, they were kept in the interrogation room and later that morning handed over to the Namibian Police.

[446] Kennedy Muchisani Tiyeho testified that Kingsley Mwiya Musheba attended a meeting at Kahenda during 1998 during which secession was discussed. This witness failed to identify the person Kingsley Mwiya Musheba.

[447] The evidence in my view establishes that the accused was one of the persons who had attacked Mpacha Military Base and who had been captured on the premises.

[448] The application for a discharge is refused.

## **2. Chika Adour Mutalife (accused no. 2)**

[449] Oscar Mwisepi identified the accused person as someone he had met in Botswana.

[450] George Alufeya Sizuka testified that accused no. 30 came with Chika Adour Mutalife during July 1999 at Nyanda Nyanda village and summoned people to town

since they had to prepare themselves military to fight so that they can get their nation, Caprivi. The accused was identified in court.

[451] John Libuku corroborated the testimony of George Sizuka. This witness testified that they said that they were going to fight the Government.

[452] It was submitted by the State that after the witness Sizuka had identified the accused person with his hair uncut counsel for the accused asked for a re-identification the next day when the accused had cut his hair bold. The witness failed to identify the accused the second time. I shall accept that the accused had been correctly identified the first time since there was no suggestion that the person mentioned by the witness namely Chika Adour Mutalife, was not accused no. 2 before court.

[453] In my view the evidence establishes that the accused person tried to persuade people to join the preparation for a fight against the Government in order to secede the Caprivi by violence. The evidence thus establishes an overt act from which the accused had knowledge of preparations to secede the Caprivi by force from the rest of Namibia and he failed to inform the authorities thereof.

[454] The application for a discharge is accordingly refused.

### **3. O'Brien Sinkolela Mwananyambe (accused no. 28)**

[455] This witness was identified as having been in Botswana. The State in its heads of argument stated that his name appears on the deployment list. I have indicated that this evidence is inadmissible.

[456] Oscar Mwisepi testified that O'Brien Sinkolela Mwananyambe was given a lift by Fabian Simiyasa 'without knowing his destination'. It was the evidence of Mwisepi that a group of people was given a lift by Fabian Simiyasa in order to attack the town

of Katima Mulilo. The evidence of Mwisepe is exculpatory. It is an indication of a lack of any intention on the part of the accused person.

[457] The application is accordingly granted in respect of all counts.

**4. Joseph Omo Mufuhi (accused no. 29)**

[458] The State in its heads of argument stated that the name of the accused appears on the deployment list. I have indicated that such evidence is inadmissible. There is no other evidence against the accused person.

[459] The application for a discharge is accordingly granted in respect of all the charges.

**5. Boswell Adams Muyumbano (accused no. 40)**

[460] Kingsley Simwanza Kalundu testified that a person by the name of Muyumbano Adams informed him at Dukwe that he was of the intention to escape to Angola, get some training and come back and fight the Government of Namibia so that Caprivi can stand on its own. This witness testified that this person never escaped from Dukwe. This witness did not identify the person he referred to as Muyumbano Adams.

[461] Ivan John Mate testified that during July 1999 he travelled with one Adams Mayumbano to Sachona base during the night in preparation for the attack. This witness was unable to identify the person referred to as Adams Muyumbano in court when he was given the opportunity to do so.

[462] Given Lufela Ndungati testified that one Adams Muyumbano came to collect him in order to go to Makanga bush. This witness testified that he did not know the reason why they had to go to Makanga. This witness when given the opportunity failed to identify Adams Muyumbano in court

[463] Walter Sikochi testified that he was at Makanga camp on 1 August 1999 where the final preparations were made for the attack on 2 August 1999. A person by the name of Muyumbano Adams was also present. This witness when given the opportunity to identify Muyumbano Adams in court, failed to do so.

[464] Shikulo Totius, a member of the Namibian Police attached to the Special Field Force, testified that on 22 August 1999 he was at the village Masida with members of the NDF. Here he searched a person by the name of Muyumbano Adams Boswell and found a piece of paper in his shirt pocket which contained information how persons moved from Namibia to Botswana and how to attack different places in Katima Mulilo. At the time this evidence was presented by the State it was presented not to prove the truthfulness of the contents of this document but to show what caused this witness to do what he did after finding this particular document.

[465] The evidence presented does not establish any overt act from which a hostile intention may be inferred. It does not also establish a common enterprise.

[466] The accused person is accordingly discharged in respect of all the charges against him.

## **6. Tiiso Ernest Manyando (accused no. 37)**

[467] Ruben Bakabuba Sikwela testified about his involvement in the plan to secede the Caprivi from Namibia. He testified about an incident when he was at Makanga on 1 August 1999 prior to the attack on 2 August 1999. He testified that one Ernest Manyando was present at Makanga. This witness correctly identified Ernest Manyando as accused no. 37.

[468] Felex Muyaye Kaliyangile testified that during the year 1998 he attended a meeting at Kaliyangile where the attendants were informed that Caprivi was to be seceded from Namibia. He testified that Ernst Manyand Tisso, his neighbour agreed with the idea and agreed to go to Botswana. This witness when given the opportunity in court to identify his neighbour failed to do so.

[469] Lister Akani Tubazibale testified that Ernest Manyando Tiiso and himself lived in the same village in the area of Kaliyangile. During the year 1998 Ernest Manyando Tiiso and Thaddeus Mandube told him that he should go to Botswana in order to join the army of Muongo with the purpose of liberating the Caprivi from Namibia. His reply was that he could not turn against the Government. The witness when given the opportunity to identify the person Ernst Manyando Tiiso in court, failed to do so.

[470] The evidence establishes that the accused was present at Makanga on 1 August 1999 where the final preparations were made for the attack on Katima Mulilo on 2 August 1999. The evidence in my view establishes a overt act from which hostile intention may be inferred.

[471] The application for a discharge is accordingly refused.

## **7. Bernard Mucheka (accused no. 75)**

[472] Christopher Siboli testified and identified the accused as the person who was to announce at the Namibian Broadcasting Corporation (NBC) after all the institutions targeted for attack had been taken over, to announce such take over. It is common cause that the accused was employed at the NBC in Katima Mulilo as an executive producer. This witness testified that during the year 1997 at the house of Leonard Mutonga Ntelamo a meeting was held where the issue of secession was discussed. The accused attended this meeting as well as Gabriel Mwilima. What was also discussed was what was to be done after they have taken over the Caprivi Region. The accused expressed his willingness to make such announcement.

[473] The evidence establishes that the accused person was aware of plans to secede the Caprivi from Namibia, not by way of negotiations, and failed to convey this information to the authorities.

[474] The application for a discharge in respect of this accused is refused.

**8. Geoffrey Kupuzo Mwilima (accused no. 68)**

[475] Oscar Mwisepi, was warned in terms of the provisions of section 204 of the Act. This witness testified that he attended various meeting where the idea of seceding the Caprivi was discussed. He identified the accused as a leader of the secessionist movement. It is common cause that the accused was a member of Parliament. The witness testified that the accused 'offered himself' with the aim of seceding the Caprivi Region from Namibia. His testimony was that the accused chaired meetings; that he was present at a meeting at Liselo during 1997 where secession and the formation of an army was discussed, and that the accused supported the idea of seceding the Caprivi from Namibia.

[476] Christopher Siboli testified that the accused was present during the year 1989 when the CLA was formed; the accused in the year 1992 at a DTA meeting appointed the witness, John Samboma and Thaddeus Ndala to go to Angola in order to get weapons; he attended a meeting during the year 1993 at the DTA office in Katima Mulilo where the secession of Caprivi was discussed; and he attended six meetings during the year 1997 at various venues where the secession was discussed.

[477] Progress Munsa Mulunga testified that the accused addressed a meeting during 1998 at Kashese Branch of the DTA informing the attendants that Muyongo had left Parliament and that Caprivi must be cut from Namibia. This witness identified the accused person. This witness testified that he found the accused at Shell filling station in Katima Mulilo with 12 people. The accused informed the witness that he was taking those people to Angola and John Samboma was amongst

those persons. The evidence is further that the house of the accused was searched and evidential material was found and booked in as exhibit in Pol 7/330/99.

[478] In my view the evidence establishes overt acts from which a hostile intention may be inferred and that the accused was a protagonist for the secession of Caprivi from the rest of Namibia.

[479] The application for a discharge is refused.

I shall now deal with those accused represented by Mr Kruger.

**1. Steven Kwala Kwala (accused no. 112)**

[480] Kingsley Simwanza Kalundu testified that he entered Botswana on 2 February 1999 and that a man Bernard Jojo Maungulo caused him to go to Botswana in order to liberate the Caprivi by fighting 'using fire-arms'. This witness testified that on 24 June 1999 he returned to Namibia through repatriation. This witness testified about an incident one evening during July 1999 when Bernard Maungulo told him, with reference to two motor vehicles that had left his yard, that the people on the vehicles were Steven Kwala and his group. This witness did not personally see Steven Kwala at that stage. This witness identified Steven Kwala in court as accused no. 112. The testimony of this witness was that he had left Steven Kwala in Dukwe, Botswana when he repatriated.

[481] Calvin Mazila Chilima testified about an incident during December 1998 when he was on his way to his village Namaluvi. He was together with Chris Madanelsa Nyambe. At a village called Jutakwala, Steven Kwala called them and there was a discussion. Steven Kwala asked them whether they were aware that other people were going to Botswana. He informed them that since he is a member of UDP party he would be able to secure schools and jobs for them. The witness testified that Steven Kwala said: 'This is the only time you have to go so that you can liberate

Caprivi'. This was where the discussion ended. The witness identified Steven Kwala in court.

[482] Richard Suya Mutumba testified that he resides in Manyandelo village in Namaluvi area. The witness testified that he went to Botswana during the year 1998, the year in which they were mobilised to go to Botswana in order to cut Caprivi from Namibia. The witness testified that he was told this by Steven Kwala at Namaluvi. The witness testified that he together with other persons crossed the border into Botswana at Linyanti since they had been informed by Steven Kwala that they should cross at that point. The witness testified that he returned to Namibia during June 1999 through the process of repatriation. This witness testified that Steven Kwala was one of the leaders at Dukwe who was unhappy about their repatriation. It was also Steven Kwala together with other leaders namely Fred Ziezo, Thaddeus Muzamai and Progress Munuma Mutorwa who used to visit them at night whilst they were in their tents and told them to escape and to go to Angola in order to 'learn about the army'. They refused. Steven Kwala was one of the persons who spoke to them. This witness was unable to identify Steven Kwala when he was given the opportunity to do so in court.

[483] The evidence as presented by the witness Chilima does not establish the manner in which Caprivi had to be liberated. According to this witness the accused referred to education and employment. It cannot in my view be inferred that the only means to liberate the region was through violence. The testimony of the witness Mutumba is unhelpful, in the sense that it does not link the accused before court as the person who had allegedly informed them about an army in Angola. It therefore appears to me that the evidence presented does not establish an overt act or acts from which a hostile intention may be inferred.

[484] This accused passed away on 6 August 2012 after this application had been launched.

**2. Chris Sitali Mushe (accused no. 14)**



[485] Linus Office Kasale testified that after his return from Botswana during the year 1999 he was at the village when he was approached by a person by the name of Chris Sitali Mushe. This person told him that they should escape together to Zambia. The witness testified that he replied that he did nothing wrong whereupon Chris Sitali Mushe informed him that he, (ie Mushe) was at Mpacha when the shootings occurred and that they should run away because even those people who went to Botswana were being arrested.

[486] During cross-examination it was put to this witness that the wife of the accused was critically ill from 1 July 1999 until 7 August 1999 and that the accused had looked after her in another village called Kashese. The witness replied that he was not present with the accused and couldn't dispute it. It was submitted by Mr Kruger that the evidence presented to court shows that in addition to Mpacha Military Base there is also a village called Mpacha and that if the accused had referred to 'Mpacha' it is no evidence that he referred to Mpacha Military Base.

[487] This witness was however unable to identify Chris Sitali Mushe (a person he had known well according to him) when he was given opportunity to identify him in court. The version of the accused which was put to this witness was confirmed by the mother of the accused who was called by the State to testify against her son.

[488] There is in my view no evidence against this accused proving the commission of any of the charges against him.

[489] The application for a discharge is accordingly granted in respect of all the charges.

### **3. Calvin Liseli Malumo (accused no. 1)**

[490] Kabeti Idah Mulemo testified that Calvin Liseli Malumo is her brother, that he had left for Dukwe and that he returned by way of repatriation. She testified that he

was not in his village Luvula on 1 August 1999 and only saw him again at 12h00 the next day. She did not speak to him.

[491] During cross-examination she admitted that it was the daily task of her brother to look after the cattle. This witness failed to identify her brother in court. The State in their heads of argument stated that his name appears on the deployment list, exhibit EGK(1). I have ruled that the content of the deployment list is inadmissible evidence.

[492] The evidence does not establish the commission of any offence by this accused person or that he was involved in a common criminal enterprise with other individuals.

[493] The application for a discharge is accordingly granted in respect of all the charges against the accused person.

#### **4. Tobias Muswabe Kananga (accused no. 20)**

[494] Muyela Ndeuke testified that she is the mother of Tobias Kananga and that they resided in Musiba village. She was asked about the whereabouts of her son on 2 August 1999. This witness testified that he was all the time in the village, building his house. This witness failed to identify her son in court because it was a 'long time since I saw him'.

[495] I must state that the State endeavoured to introduce certain admissions as well as the contents of bail proceedings as evidence against the accused person which were subsequently ruled inadmissible.

[496] The evidence does not establish the commission of any offence or that the accused was involved in a common criminal enterprise.

[497] The application is accordingly granted in respect of all the charges preferred against the accused person.

I shall now deal with the evidence of those accused persons represented by Mr Samukange.

**1. John Tibiso Mutalife Masake (accused no. 10)**

[498] Advocate Nyamabo Tubazibale testified about an incident on the night of 1 August 1999 when he and his brother was collected by Joseph Kaliyangile who threatened them saying if they do not come out of the house the same might happen to them that happened to Falali. Joseph Kaliyangile was in the company of Johnny Masake, Ernest Manyando and Lolisa Llifasi. They were told to board a vehicle and they drove to a place called Makanga where other persons were. This witness was given the opportunity to identify these men who came and collected them but failed to do so.

[499] Eimo Dumeni Popyeinawa a member of the Namibian Police and one of the investigating officers in this case testified that during the course of his investigation he once arrived at Singobeka village at the courtyard of Moses Mahoto where he met a group of five young men of whom John Masake was one. These young men boasted that they came back from Botswana in order to liberate their country and to follow their leader in Zambia, Johnny Samboma. The next morning when he woke up he found the group was gone. There is no evidence who amongst the group boasted. This witness did not identify the person by the name of Johnny Masake in court. When he was asked by the prosecutor where this person John Masake was the witness replied that he is in court. This in my view is no identification at all.

[500] The evidence does not establish that this accused has committed any of the charges preferred against him or that he participated in a common criminal enterprise.

[501] The application for a discharge is accordingly granted in respect of all the charges.

**2. Isaya Shaft Kamwanga (accused no. 43)**

[502] The evidence against this accused is that he was in Dukwe, Botswana and later returned to Namibia by way of repatriation. The State at some stage during this trial endeavoured, unsuccessfully, to introduce evidence of a pointing out by this accused.

[503] The evidence does not establish that the accused committed any of the charges preferred against him or that he participated in a common criminal enterprise.

[504] The application for a discharge is accordingly granted in respect of all the charges preferred against this accused person.

**3. Bennet Kacenze Mutuso (accused no. 69)**

[505] Oscar Mwisepi testified that he saw the accused person in Dukwe, Botswana. He testified about an incident at Masida where this accused was with John Samboma and that they were in the status of seceding the country, meaning that they were still in the status of rebelling against the State. This witness identified the accused person in court.

[506] Jason Ntelamo testified that he was introduced to the accused in Dukwe as a group leader. This witness testified that the accused person told them to be patient and that one day the Caprivi Region would be cut from Namibia. The accused was identified by this witness in court.

[507] Walter Sikochi testified that Bennet Mutuso was the leader of a group which attacked Mpacha Military Base. This witness when given the opportunity to identify the accused person in court, failed to do so.

[508] Lemmy Kasoondaha Haufiku a member of the NDF holding the rank of Captain, testified that after the attack a bag was found at Mpacha Military Base containing amongst others an exercise book (Exhibit EGX(5) ) and marked 'Bennet Mutuso' and a plastic plate marked 'Bennet'.

[509] The evidence presented was that between March and April 2000 the accused boarded a Golf motor vehicle driven by Agry Muamba in Sikelenge village with a travel bag and an AK 47. A handwriting specimen was obtained from the accused person linking him to documents found during the investigation. The evidence presented was further that the accused had a pseudonym namely, 'Spiderman' and had the intention to attack Caprivi revealed in documents seized, which linked him to the attacks on 2 August 1999.

[510] The evidence establishes in my view overt acts from which a hostile intent may be inferred.

[511] The application for a discharge is accordingly refused.

#### **4. Oscar Nyambe Puteho (accused no. 72)**

[512] Simeon Nghinomenwa Kaipiti testified that he was the officer in charge of Grootfontein Prison during August 1999. On 10 August 1999 the group of Steven Mamili which included Oscar Nyambe were admitted – the group consisted of six people. The next day these persons identified their respective properties in the presence of the police. The properties included diaries and letters. These documents were taken by Inspector Haingumbi. This witness testified that a diary with a black leather cover was amongst the documents. This diary was handed in as Exhibits EGJ(1) – (3). In this diary the accused narrated that he joined the armed struggle of the Caprivi Liberation Army on 16/12/1998 to fight for the independence of Caprivi. He stated that the key to the independence of Caprivi is the armed struggle. The handwriting of this accused person was found by an expert witness to be highly probable to the writer of the documents found in exhibit EGJ(1).

[513] The evidence establishes that the accused was involved in plans to secede the Caprivi from the rest of Namibia. The evidence shows at least that he was aware of plans to secede the Caprivi from the rest of Namibia by violence, and that he failed to report this to the authorities.

[514] The application for a discharge is accordingly refused.

## **5. Charles Mafenyeho Mushakwa (accused no. 73**

[515] Oscar Mwisepi testified and identified the accused person as being one of those who went to Zambia.

[516] The witness Christopher Lifasi Siboli testified and mentioned that Charles Mushakwa was someone who recruited persons for the CLA and that he was also a mobiliser of persons in connection with the secession of the Caprivi. He identified the accused in court. The witness testified about a meeting held at the DTA office Katima Mulilo when John Samboma and Thaddeus Ndala returned with an answer from Angola that weapons could be procured from Angola and people could go to Angola for military training. The accused was one of the attendants at this meeting.

[517] Oliver Munyandi Mbulunga was warned in terms of the provisions of section 204 of the Act. This witness testified that he was in a group of persons at Singalamwe on their way to Angola and that John Samboma told the group that they were going to Angola for training and military assistance. He testified that Charles Mushakwa was one of the members of this group which consisted of about 60 individuals. This witness identified Charles Mushakwa in court as accused no. 73. The witness testified that John Samboma led them into Zambia and thereafter they were led into Angola. They were informed by John Samboma that the reason why they were seeking military assistance was to secede the Caprivi 'through fighting'. They were informed that they would receive military assistance from UNITA.

[518] The evidence establishes in my view overt acts from which a hostile intention may be inferred. The evidence also establishes that the accused had knowledge of preparations to secede the Caprivi from Namibia and that he failed to report this to the authorities.

[519] The application for a discharge is accordingly refused.

I shall now deal with those accused persons who are represented by Mr Dube.

**1. Phelem Mboози Mutuwangele (accused no. 39)**

[520] Hamlet Kachibolwe Muzwakwi testified that he attended a meeting at Sibinda village where the secession of the Caprivi from the rest of Namibia was discussed. The speakers were Mishake Muyongo and Geoffrey Mwilima. A person by the name of Phelem Mutuwangele attended this meeting but he said nothing. This witness did not identify the person he referred to as Phelem Mutuwangile.

[521] Richard Sinvula Chainda testified that during August 1999 his late brother one Shadrack Chainda accompanied by a Mr Phelem Mutuwangele came on two occasions to collect water from the village. He testified that the water was taken into the bush but he did not know what was in the bush. This witness failed to identify the person he referred to in court.

[522] Eugene Mundoe Sitamulaho testified that a person by the name of Phelem Mutuwangele is his cousin and is a farmer. The witness identified the person Phelem Mutuwangele in court as accused no. 39. He testified that he was the lawful owner of a shotgun 'calibre 12 GA, single'. During the year 1998 he gave the shotgun to the accused in order to look after their cattle. The shotgun was given to the accused at the village Sibinda. He did not provide the accused with any ammunition. This witness could give no reason why the accused was provided with a shotgun without ammunition. He testified that during 1999 he sold his shotgun to Raphael Mutuwangele, the brother of the accused person. A copy of a letter which was

allegedly written by the accused person to the witness was provisionally received as an exhibit EEQ on condition that the original letter be produced which original letter according to the witness was in possession of the police. The original letter was not produced in court.

[523] Brendan Mate Lumponjani, a member of the Namibian Police holding the rank of a detective sergeant, testified that he was requested by Inspector Karstens to accompany him to Choto village in Kaliyangile where he took some photographs of points indicated by Captain Mwilima to Inspector Karstens in his presence. A negative was received and provisionally marked as Exhibit EHM.

[524] The State in their heads of argument submitted that the shotgun given to the accused was found at Kaliyangile camp on 2 September 1999 when rebels were shot and captured by the NDF.

[525] This court cannot take cognisance of the contents of exhibits handed in provisionally. There is no evidence that the shotgun given to the accused person was found at Kaliyangile camp. The witness did not testify how he came into possession of the shotgun in order to sell it to the brother of the accused person. An entry Pol 7/244/99 indicates that the name and address of the lawful owner or the accused was not known.

[526] The witness Starlife Joseph Sisinzi testified that he missed some individuals he used to chat with at Dukwe, ie Shadrick Chanda, Bernard Bwendo and Phelem Mutuwangele. He concluded that Phelem Mutuwangele escaped because he subsequently only used to chat with the other two individuals. He did not see Phelem Mutuwangele escaping. This witness did not identify the person by the name of Phelem Mutuwangele. A witness Michael Maswabi Nuwe pointed the accused out in court as an individual he had seen at Dukwe.

[527] The evidence in my view does not establish the commission of any offence by the witness.



[528] The application for a discharge is granted in respect of all the charges.

## **2. John Samati Yalubbi (accused no. 53)**

[529] Oscar Mwisepi testified that he was in a group that was formed with the task of organising the rebels. After the attack on 2 August 1999 in the execution of this task he went to Masida where he found John Samboma, Richard Samati (also known as John Samati), Bennet Mutuso, Richard Misuha and Oscar Muyuka Puteho. These individuals had fire-arms which were placed on the other side of the road. He testified that he delivered food to a place called Masokotwane

[530] It was submitted by Mr Dube that the identification of the accused is hit by the special entry of 8 December 2005 (supra). This is however not entirely correct. I have indicated (supra) that the entry in terms of section 317 of the Act only introduces, on the record, the irregularity alleged, from which no consequences flow at this stage. The witness testified that after the attack on 2 August 1999 food was left with the accused.

[531] It was submitted by Mr Dube that the evidence does not establish which of the accused was in possession of the fire-arms and that it is possible that the fire-arms were possessed by only one person or no one at all. This may be so, however at this stage the onus is not on the State to prove the commission of an offence beyond reasonable doubt. The circumstances under which the accused was found in my view requires an answer from him

[532] I am of the view that the evidence establishes at least that the accused had knowledge of treasonous activities and failed to report such information to the authorities.

[533] The application for discharge is accordingly refused.

## **3. Richard Masupa Mungulike (accused no. 34)**

[534] Oscar Mwisepe testified that Richard Masupa was one of the group of 92 members of the CLA and that he had seen Richard Masupa in Dukwe. There is no evidence that this person was identified.

[535] Kennedy Muchisani Tiyeho testified that the Richard Mungulike attended a meeting addressed by Mishake Muyongo and the topic of discussion was the separation of Caprivi from the rest of Namibia. I agree with the submission by Mr Dube that the mere attendance of a meeting does not attract criminal liability.

[536] Hobby Habaini Sinyabata testified that he observed a big vehicle a TATA, full of people which stopped near the house of Richard Mungulike who disembarked, got a lunch box and got back onto the vehicle which drove away. The next morning he was informed by Richard Mungulike that he (ie Mungulike) was fighting at Mpacha Military Base where he saw soldiers dying and some running away. This witness when given the opportunity in court to identify Richard Mungulike, whom he had claimed to be his brother-in-law, failed to identify any person.

[537] Boyd Nasilele Mambo testified about receiving information from Richard Mungulike about a vehicle in need of passengers. He testified that Richard Mungulike was one of the persons who boarded this truck which was driven to Makanga where he found people some of whom were in possession of fire-arms. From Makanga he was transported to Mpacha Military Base. He could not tell what had happened to Richard Mungulike. This witness when given the opportunity to identify Richard Mungulike in court failed to do so.

[538] There is no evidence that the Richard Mungulike who was allegedly at Makanga rebel base was the accused person before this court.

[539] The application for a discharge is granted.

**4. Fred Maemelo Ziezo (accused no. 25)**

[540] The witness Hamlet Kachibolewa Mazwakwi identified accused no. 25 as a person who was a group leader in Dukwe refugee camp. The witness was unable to provide his name. I agree with the submission by Mr Dube, that from the evidence presented, there is nothing treasonous about being a group leader in Dukwe refugee camp.

[541] Richard Suya Mutumba testified that he had a discussion with Fred Ziezo in Dukwe and he was asked to escape and to join the army in Angola. There is no connection between accused no. 25 and Fred Ziezo referred to by the witness.

[542] Samson Sijona testified that he is a teacher and had known Fred Ziezo for 15 years. During July 1999 he met Fred Ziezo and Dave Simoja at Ngwezi and he was asked to go to Botswana for the purpose of attending school. He refused. He further testified that during that same year he met three people, a Bennet Mutuso, Fred Ziezo and an unknown man at a field called Mavanga. These three individuals were asking him questions relating to the movement of soldiers and the police of which he denied any knowledge. This witness when he was given the opportunity to identify Fred Ziezo in court failed to do so.

[543] Dusken Nyambe Mutelo testified that during the year 1998 he met Fred Ziezo in Katima Mulilo who advised him to go to Botswana where he would get a good education and on his return a good job and good salary. The purpose of going to Botswana was in order to secede the Caprivi from the rest of Namibia. He was not told how the secession would be achieved.

[544] Ruben Bakabuba Sikwela testified that a Fred Ziezo was one of the members of an armed group that attacked Katounyana Police Base. This witness when given the opportunity in court to identify the person he referred to as Fred Ziezo was unable to identify the Fred Ziezo in court.

[545] Robert Silofela Nyambe, a Zambian national, testified that he observed one Fred Ziezo in the company of John Samboma at the village of one Akson Liyanga Musule. The witness testified that prior to this occasion he did not know Fred Ziezo and he also did not talk to this Fred Ziezo. The witness was not able to identify Fred Ziezo.

[546] The evidence does not, in my view, establish the commission of any offence.

[547] The accused is discharged in respect of all the charges preferred against him.

**5. Richard Libano Misuha (accused no. 48)**

[548] Oscar Mwisepi testified that he was in a group that was formed to organise the rebels in preparation of a second attack and was given the task to go to Masida to meet the group of John Samboma. He found 5 individuals who had fire-arms. One of the persons in this group was Richard Misuha. This witness did not identify Richard Mishua in court.

[549] Michael Maluboke Ziezo testified that he attended a meeting at Masida where one of the speakers was Mishake Muyongo and who had addressed the attendants about education in order for Caprivi to stand on its own. The witness testified that Muyongo asked those who wanted to follow him to raise their hands and that a Richard Misuha raised his hand in agreement. This witness did not testify that Muyongo spoke of seceding the Caprivi Region by military means. This witness was unable to identify Richard Misuha in court.

[550] Walters Mwei Sikochi was warned in terms of the provisions of section 204 of the Act. He testified that he was taken in the dead of night and transported to a place called Makanga. At Makanga he found a number of people one of whom was Richard Misuha who was unarmed. This witness correctly identified Richard Misuha as accused no. 48 in court.

[551] Mr Dube submitted that the testimony is inadmissible as it offends Articles 8(2) (b) and 12(f) of the Constitution of Namibia and the Convention Against Torture (CAT). The evidence by this witness is that he made two statements to the police one during November 2000 and one during March 2001. The witness testified that in his first statement he did not inform the police that he participated in an attack. The police afterwards on numerous occasions approached him and encouraged him to tell the truth. He recounted one incident where he was collected by police officers at his mother's house and taken deep into the bush near Zambezi Vocational Training Centre in Katima Mulilo. There the police officers told him to tell the truth, 'if not we do not know what will happen', and pulled out their pistols from their holsters. He testified that he told them that they would not get anything from him if they think they could collect him in order to kill him in the bush. He testified that he told them that they should go to his mother and report that they have killed him. Whereupon the police officers told him to get back into the vehicle and they drove back.

[552] The witness recounted another incident just prior to making his statement when the police officers approached him with certain information and showed him a document containing a list of names on which his name also appears. This document was apparently found on the body of Shadrick Chainda.

[553] This witness during cross-examination stated that he was aware of the fact that suspects had been assaulted by the police simply because they had been in Botswana. This witness conceded that before he made his statement on 16 March 2001 he was aware that he could be tortured for no other reason than the fact that he had been in Botswana; he conceded that he could be arrested and send to jail for no other reason than going to Botswana; and he conceded that he knew that he could be tortured because he had actually participated in the attack on Katima Mulilo. This witness was asked what then 'persuaded' him on 16 March 2001 to disclose everything to which the witness replied that it was because the police had information about his involvement in the attacks. He testified that the statement was given voluntarily; that the police provided him with a list of names and asked him whether he knew the persons whose names appeared on the list; that his name

appeared on the list and he then told them that he was at Mpacha on the night of 2 August 1999. The witness testified that he had no 'escape route' but disclosed to the police what had happened. The witness agreed that the name of Richard Misuha (accused no. 48) appeared on the list.

[554] It was put during cross-examination that the accused denied that he was seen by the witness at Makanga to which the witness responded by reminding counsel not to 'dig gravel on a concrete place', saying that such a statement was untrue. It was put to the witness that the accused will say that he was not in Botswana at that stage. This was denied by the witness. It was further put to the witness that he was merely implicating the accused because he just confirmed what the police had told him. This was also denied by the witness.

[555] I have referred (supra) to the inadmissibility of evidence obtained by means of assault and torture. However each case must be considered on its own merits. I am of the view that the second statement given to the police and the subsequent testimony of this witness in court do not violate the provisions of the Constitution of Namibia referred to and do not violate CAT. I shall therefore accept the evidence of this witness as admissible evidence against the accused person.

[556] A number of other witnesses also testified about the involvement of this accused in the preparations of and the attack on 2 August 1999 most of whom did not identify the accused person.

[557] I am of the view that the evidence establishes that the accused was present at Makanga on 1 August 1999 where the final preparations were made for the attack the next morning on Katima Mulilo.

[558] The application for a discharge is accordingly refused.

**6. Moses Chicho Kayoka (accused no. 47)**

[559] Ackson Liyenga Masule, a Zambian national and a witch doctor told the court that he treated a number of persons at Navumbwe Island for the secession of Caprivi. It was submitted by Mr Dube that when this witness was given the opportunity to look at the accused person in order to ascertain whether he could see anyone of those he had treated on the Island he pointed at accused no. 47 and shouted 'Moses Kayoka'. Mr Dube stated that the witness prior to this identification twice pointed to the other side of the courtroom and said that is where Kayoka was seated. This in my view does not detract from the fact that the witness correctly identified the accused in court.

[560] Advocate Nyamabo Tubazibale testified that at a place called Kandiyana village he met certain individuals who were armed with fire-arms, one of those individuals was Moses Kayoka. This witness could not point out the Moses Kayoka he referred to in court.

[561] Luwate Oscar Simbulu testified about an incident during October 1998 where he was a passenger in a motor vehicle driven by Thaddeus Ndala at the night. At one point they stopped and Ndala blew a whistle. A number of men emerged from the bushes carrying travel bags on their backs. He recognised John Samboma, Moses Kayoka and Gilbert Poshowe. This group of men boarded the vehicle and they departed and subsequently near Singalamwe they were offloaded. John Samboma led them into Zambia on foot. On the way they heard two gunshots. Samboma told them it could be members of the Special Field Force shooting. They ran towards Zambia. From Zambia they went to Angola where John Samboma went to a UNITA camp. Samboma told them that they needed military training in order to fight the Government of Namibia. This witness identified Moses Kayoka as accused no. 47.

[562] Christian Ndemufayo Munyika, a member of the NDF, testified that on 1 September 1999 at Kaliyangile he observed two suspects. He asked them to identify themselves. The one person identified himself as Moses Kayoka and the other one as Ernesto Lifasi. They were in possession of two AK 47s.

[563] The evidence in my view establishes overt acts from which a hostile intent may be inferred. Furthermore it establish that the accused was part of preparations made in order to secede the Caprivi from Namibia and by inference must have had knowledge in this regard, which he failed to disclose to the necessary authorities.

[564] The application for a discharge is accordingly refused.

## **7. Gilbert Kasiyana Poshowe (accused no. 51)**

[565] Memory Kahimbi Matemwa testified that when she was fetching water one day she was confronted by Gilbert Poshowe who wanted to know about the whereabouts of Dascan Nyoka and Lascan Sikosi. Gilbert Poshowe had a dirty face as if he had put charcoal on his face. This witness was unable to identify Gilbert Poshowe in court.

[566] Lascan Sikosi testified that a Gilbert Poshowe had asked him to 'join them in the bush'. He refused. The witness testified that Gilbert Poshowe said that he was from a camp in Cameroon. This witness did not identify Gilbert Poshowe in court.

[567] Luwate Oscar Simbulu testified that one of the persons who come out of the bush was Gilbert Poshowe accompanied by John Samboma who eventually travelled to a UNITA camp in Angola. This person did not identify Gilbert Poshowe in court.

[568] Alfred Kupulo Kupulo testified that he was with Gilbert Poshowe at Mahalape Prison in Botswana. He was unable to identify the accused in court.

[569] Joseph Naikuti testified that he is a member of the Namibian Police Force and was part of a group of soldiers who arrested one Gilbert Poshowe on 28 August 1999 near the Cameroon rebel base. The witness testified that by the time he had reached Gilbert Poshowe he had no fire-arm in his possession.



[570] Ruben Nathanael Hanghome, an Inspector in the Namibian Police Force testified that he did not see Gilbert Poshowe holding a fire-arm.

[571] These two police officers did not identify Gilbert Poshowe in court.

[572] A fire-arm attributed to Gilbert Poshowe is before court as Exhibit 13(c) and was recorded in the police register, Pol 7/232/99. In this register an entry was made that the owner or accused person was unknown and the name and address of the finder of the fire-arm was entered as 'Popiyanawa, Nampol, Windhoek. There is no evidence that sergeant Popyeinawa was at the Cameroon bushes on 28 August 1999 and there is no evidence from where sergeant Popyeinawa got this fire-arm.

[573] I am of the view that the evidence does not establish that the accused committed any of the offence preferred against him, neither does it show that he was involved in a common criminal enterprise with other persons.

[574] The application for a discharge is granted in respect of all the charges against him.

I shall now deal with the accused persons who are represented by Mr Kavendjii.

**1. Fredrik Kabatondwa Lutuhezi (accused no. 22)**

[575] The State in their heads of augment submitted that the name of the accused appear on the deployment list. The evidence of the contents such a list is inadmissible.

[576] Primus Vitsentsius Amwaama testified that he is a member of the Namibian Police Force and that he arrested the accused person on 14 April 2000 at Muyakale village. The house of the accused was searched and nothing suspicious was found.

[577] The evidence does not establish that the accused person committed any offence.

[578] The application for a discharge is granted in respect of all the charges preferred against him.

## **2. Victor Tumoni Lunyandile (accused no. 56)**

[579] Mwanawina Masikilo Whisky Lufumile testified that when he arrived in Botswana he was welcomed by Lunyandile Victor who is his mother's brother. He testified that he did not see Victor Lunyandile again after he had come back from Dukwe.

[580] Ruben Bakabuba Sikwela testified that he was in a group that went to attack Katounyana police base and that Victor Lunyandile was in that group and had a fire-arm. When he was requested to identify the people in court who went with him to Katounyana base he could not identify a single person.

[581] The testimony of this witness was also that he was severely beaten by the police when a witness statement was extracted from him. The witness testified that he gave two statements to the police. In the first statement he did not state to the police what they wanted. He gave the second statement because he was frightened because the police officers had a tendency of severely beating the villagers. He testified that prior to giving his second statement he was severely beaten by police officers because he did not give them a satisfactory version the first time. The witness testified that he was severely beaten with a whip by those police officers.

[582] The testimony given by this witness in this court should for this reason be disregarded.

[583] The remaining evidence does not establish the commission of any offence by the accused person.

[584] The application for a discharge is granted in respect of all the charges.

### **3. George Masialeti Liseho (accused no. 15)**

[585] Dominicus Mwaposi Liseli, a police officer attached to the Special Field Force testified that he was stationed at Ngoma Border Post on 2 March 2000 when he was approached by 2 people wearing the uniform of Rhino Security Company. They had a shotgun. One person identified himself by way of an identity document and the other person gave his name as George Liseho Masialeti. George Liseho Masialeti informed him that he was from Makanga and that he left for Botswana on 12 December 1998 via Linyanti and was informed by Muyongo fight in order to cut Caprivi from Namibia. This person was injured on his leg and mouth and said he was shot at Mpacha by the military. This evidence was not linked to any accused person before court.

[586] During cross-examination the witness admitted that he was a police officer who had elicited a confession from this person, that this person had not been warned in terms of the Judges Rules, that the confession had not been reduced to writing before a magistrate and that he did not inform this person of his right to legal representation. It appears from the evidence that the witness told George Liseho that he would not let him go because he had refused to tell the witness his name. The statement elicited from this accused by the police officer amounts to an inadmissible confession.

[587] Ruben Bakububa Sikwela testified that he was in a group which attacked Katounyana police base. As indicated previously this witness was severely beaten by the police before he gave his second statement. During cross-examination the witness stated that the police gave him a list containing names and told him what those persons allegedly have done namely to cut Caprivi from Namibia through violence. The witness testified that he sustained serious injuries as a result of those assaults and that he was afraid of the assaults and that is why he gave the police the

statement. This witness showed a number of injuries and visible scars in court. This witness testified that the prosecution team informed him not to bring the assault matter to court when testifying. The witness testified that he feared that after he had testified he may be visited by either the military or the public to be beaten up again. The testimony of this witness is to be disregarded by this court.

[588] Bornbright Mutendelwa Kufwa testified that he saw George Liseho at Makanga on the night of 1 August 1999 and that he was in possession of a fire-arm. This witness identified the accused in court. The police approached him on 22 August 1999. He was not interviewed but assaulted, arrested and thrown into a well where he remained for nineteen days. He was not interviewed or asked anything relating to the attack and was released. The witness testified that he suffered an injury to the knee and showed the injury to court. There is in my considered view no indication that this witness provided any statement to the police as a result of any assault perpetrated on him. There is no evidence that the assaults were perpetrated for the purpose of obtaining from this witness information or a confession, neither does the evidence indicate that Constitutional provisions had been violated. I shall therefore for the purpose of this application have regard to the testimony of this witness.

[589] Fredrick Nkongo Muhupulo testified that he attended the funeral of one Freddie Liseho. After the funeral George Liseho gave him an AK 47. He was arrested during March 2000 for the unlawful possession of a fire-arm and was convicted. He testified that the fire-arm which caused him to be convicted he had received from one George Moniker. It appears from his testimony that George Liseho and George Moniker are two different persons. The witness testified that the fire-arm which was collected by the police is the one which he had received from George Moniker.

[590] Given Lufela Ndungati testified that he saw George Liseho at Makanga. This witness recognised the accused person as the George Liseho who was at Makanga during the period when he was there.

[591] Hasting Kufwa Kambukwe testified that he was at Makanga on 1 August 1999 and that one George Liseho was one of the persons at Makanga. He testified that his statement was not made freely because he was beaten by the police. This witness failed to identify the accused after having been afforded the opportunity to do so. It was also the testimony of this witness during cross-examination that the police gave him details of events which they knew and all that they wanted from him was confirmation thereof. It was apparent from the cross-examination that this witness was brutally beaten. The witness testified that he had informed the prosecutors that he had been assaulted by the police during the recording of his statement, but that they had informed him to concentrate on the events of 2 August 1999.

[592] Ivan Jona Twabulamayo Mate testified that he recognised George Liseho at Sachona where he was with others in order to secede the Caprivi from Namibia. This witness identified George Liseho as the accused person before court. During cross-examination he testified that before he gave his statement he was assaulted by the police with a sjambok and that he was having scars caused by the sjambok. He testified that the police told him that they knew what transpired and they wanted him just to confirm the story. The witness stated that he was still in fear when he testified in court. This testimony of this witness cannot be considered by this court in this application.

[593] The evidence establishes that the accused was at Makanga on 1 August 1999 during the final preparations for the attack on Katima Mulilo the next day. It establishes an overt act from which a hostile intent may be inferred. It also establishes common purpose.

[594] The application for a discharge is accordingly refused.

#### **4. Austen Lemuha Ziezo (accused no. 121)**

[595] Mukushi Events Kaine Zorrow was warned in terms of the provisions of section 204 of the Act. The witness testified that he was taken to Makanga by Kenneth Samulandela, Thaddeus Muzumai and an unknown person where he saw

approximately 50 persons in the bush. He recognised Austen Ziezo. He testified he was in a group and was dropped at the NBC and informed by Kenneth Samulandela to stay in their positions until they hear gunshots. The witness was given the opportunity to identify Austen Ziezo but failed to do so.

[596] Ruben Bakabuba Sikwela testified about the events which developed on 1 August 1999. This witness gave incriminating evidence regarding the involvement of the accused person whom he had identified in court. This court cannot for the reasons mentioned earlier consider the testimony of this witness in this application.

[597] Bornbright Mutendelwa Kufwa testified that on the night of 1 August 1999 Richard Misuha and his friend requested him to go with them. These persons carried weapons. They went to the bush of Makanga. He was in a group assigned to attack Wanela Border Post. He boarded a motor vehicle Toyota Hilux white in colour and they were dropped at Engen Service Station in Katima Mulilo. There they were informed to go to the shopping centre. Some of those individuals in his group were armed others were unarmed. During his evidence-in-chief he was asked to name people coming from his area who were at Makanga on 1 August 1999. He mentioned Austen Ziezo amongst other names. Austen Ziezo was also identified by him in court. It emerged during cross-examination that this witness had been assaulted. For the reasons mentioned (supra) I shall accept the testimony of this witness as evidence in this application.

[598] Given Lufela Ndungati testified that he was at his village when Brian Muyambano collected him during the night to go to Makanga bush where he was assigned with others to attack the police station. He was asked during evidence-in-chief to name the people at Makanga coming from his village. He did not mention the name of the accused person. He however identified the accused as one of the persons he had seen at Makanga bush by pointing him out in court. However later during his evidence-in-chief he changed his testimony saying that he doesn't know Austen Ziezo and that he did not see him at Makanga bush.

[599] Thomas Franco Mukoya testified that on 1 August 1999 he was asleep when he was awoken by a knock. His son Austen Ziezo was with him inside the house. Two people with fire-arms were outside the house and threatened them. He recognised these two persons as David Mumbone and Richard Misuha. He testified that these two people told them that should they refuse to go with them they would die in the same way that the person at Linyanti had died. He was horrified when he heard this. He testified that he, himself and the accused had no idea where they were being taken to. They followed the two men because they were afraid. At Makanga he was assigned to the group destined to attack Mpacha Military Base. The accused person was in the same group. At the military base there was an exchange of fire. He, himself, and the accused person, (whom he had identified in court) remained in a hiding place with five other persons. He testified that he got into the vehicle at Mpacha under coercion.

[600] During cross-examination the witness testified that before his statement was taken he was severely assaulted. The police officers Simasiku and Haipa handed him over to officer Chizabulyo who assaulted him with a sjambok, kicked him, poked a pen into his eye, and an inflated motor vehicle tyre was put on his head whilst his hand were tied. He testified that they did this because during March 2001 they were still looking for rebels. This witness showed the scars in court which he said were a result of assaults perpetrated on him by the police. The witness testified that he was assaulted for a whole day because he had denied knowledge of the attack, that he gave the statement as a result of severe beatings and stated the obvious, namely that the statement was not given voluntarily. The witness testified that the police had informed him to stick to his statement when he appears in court. The testimony of this witness and for the reasons given (supra) will be disregarded for the purpose of this application.

[601] John Mulauti Mwabela testified about events on 1 August 1999 at Makanga and the persons he had observed there. This witness failed to identify the accused in court.

[602] Michael Maluboka Ziezo testified about a meeting attended by Austen Ziezo addressed by Muyongo. According to him the accused raised his hand in agreement. This witness did not identify Austen Ziezo in court when given the opportunity to do so.

[603] Theophilus Kamati testified that he is a member of the Namibian Police Force holding the rank of Detective Chief Inspector. During the year 2000 he was assigned to the 'High Treason Investigating Team'. On 3 March 2000 he was on duty when George Liseho was brought to his office whom he interviewed since he was a suspect in a charge of high treason. The witness testified that he informed him of his right to remain silent, his right to legal representation and that he may be provided with legal aid. They conversed in English and this person understood his rights as explained to him. He put certain questions to him and this person acknowledged that he was a member of the Caprivi Liberation Army, he admitted that he took part in the attack on 2 August 1999 on certain institutions in Katima Mulilo. This person admitted that he took part in the attack on Mpacha Military Base, but informed him that he was not in possession of a fire-arm. This witness further testified that an AK 47 was discovered on the strength of information provided by this individual.

[604] The evidence establishes that the accused person was at Makanga bush on 1 August 1999 where the final preparations were made for the attack the next day on Katima Mulilo. The evidence in my view establishes an overt act from which hostile intent may be inferred.

[605] The application for a discharge is accordingly refused.

##### **5. Aggrey Kayabu Makendano (accused no. 11)**

[606] Ruben Bakabuba Sikwela testified that he saw the accused at Makanga rebel camp and that he had a fire-arm which looked like an AK 47. This witness identified Aggrey Makendano in court. This witness however testified that he had been



severely assaulted by the police prior to giving his statements. This evidence will be disregarded.

[607] John Mulauti Mwabela testified that on the night of 1 August 1999 he was in the group assigned to attack the town centre. He recognised Aggrey Makendano. This witness failed to identify the accused person in court.

[608] Hastings Kufwa Kambukwe testified that he was collected from his house by one Osbert during the night of 31 July 1999. At Makanga he was placed in the group that went to attack Mpacha. He testified that Aggrey Makendano was also at Makanga. This witness failed to identify Aggrey Makendano in court. The witness also testified that he had been severely assaulted prior to giving his statement to the police.

[609] Thomas Franco Mukoya testified that he was collected from his village during the night of 1 August 1999. At Makanga he was allocated to the group which was to attack Mpacha Military Base. Aggrey Makendano was also there at Makanga. This witness identified Aggrey Makendano in court. This witness testified that he had been severely assaulted prior to giving his statement to the police.

[610] Given Lufela Ndungati testified that at Makanga he was allocated to the group which was destined to attack the police station. Aggrey Makendano was the leader of this group and he was armed. This witness failed to identify Aggrey Makendano in court.

[611] Lovemore Lutumbo Litabula testified that on 1 August 1999 he was on duty as a police officer at Katima Mulilo Police Station from the morning until 02h00. Constable Pangula was the shift driver. He was later taken home. He was on his way to Danbar Mushwena's house when he saw Danbar Mushwena driving a Ford bakkie belonging to Richwell Matengu. He drove with Mushwena to a T-junction and Mushwena left him in the vehicle with some beers. Mushwena later returned. A TATA truck belonging to the Government arrived there and stopped at a distance. The

truck was driven by Simiyasa. Mushwena went to the truck but he could not hear the conversation. Some time later between 24h00 and 01h00 he saw 10 to 15 people got onto the load box of the bakkie. Whilst driving Mushwena opened the side window between the cabin and the load box and he heard someone calling his name. He recognised this person as Aggrey Makendano. Later the vehicle stopped at a T-junction. The police station was about 300 m from the T-junction. Aggrey Makendano introduced him (ie the witness) to the other people who were with him. He observed that these persons including Aggrey Makendano had fire-arms. He testified that he then proceeded to go home. He heard shots coming from the side of the shopping centre as well as from the police station. In the morning he went to the police station because he was on duty where he observed blood in the charge office. This witness identified Aggrey Makendano in court as accused no. 11.

[612] During cross-examination the witness was taken to task for not reporting what he had observed since he knew well that people were on their way to attack the police station. The witness denied that he had concealed a crime stating that he had feared for his life. The evidence shows that this witness did not tell anybody about this crime, until he was approached by the police in the year 2001.

[613] Peter Siswaniso Munenda testified that during the year 1998 he was approached by Aggrey Makendano who had asked him to go to Dukwe with the purpose of liberating Caprivi. He was informed that when he returned they would fight the Government of Namibia. He testified that Aggrey Makendano was from Sachona village and a teacher. He was not asked to identify Aggrey Makendano.

[614] Kennethy Malumo Matengu testified that during the year 1998 Muyongo resigned from the DTA and he addressed a public meeting at Sachona where he gave reasons for his resignation. During 1999 he saw his uncle Oscar Puteho Muyuka coming from Zambia and entered his (ie Muyuka's ) house. There were other people inside the house including one Aggrey Makendano. Puteho informed them about his group in Zambia who were soldiers destined to fight for Caprivi. Puteho and Aggrey Makendano told them that their idea was to look for a camp at

Sachona from where they could fight. Inside the house they concealed fire-arms in the witness's bedroom. Aggrey Makendano was in possession of an AK 47 and two extra magazines. The witness testified that he knew Aggrey Makendano, and that he is from Sachona. This witness when given the opportunity to identify Aggrey Makendano failed to do so.

[615] The evidence in my view establishes that the accused actively participated in a attempt to secede the Caprivi from Namibia by violence. The evidence establishes an overt act from which hostile intent may be inferred.

[616] The application for a discharge is accordingly refused.

I shall now turn to those accused persons who are represented by Mr Muluti.

**1. John Sikundeko Samboma (accused no. 54)**

[617] Christopher Siboli was warned in terms of the provisions of section 204 of the Act. This witness testified that he was present during the year 1989 at a meeting held at the DTA office in Katima Mulilo where the issue of seceding Caprivi by means of fighting with fire-arm was discussed. Amongst the attendants were John Samboma, Geoffrey Mwilima, Thaddeus Ndana, Alfred Twana and Mishake Muyongo. This witness identified the person John Samboma in court. He testified about another meeting which took place in 1989 at DTA office involving ex SWAFT members where a committee called Kopano ya Tou was formed. The accused was present. He testified that the CLA was formed during the year 1989. The people present at this formation were *inter alia* Thaddeus Ndala who was the leader of the CLA and the accused person John Samboma. The witness testified that the accused person recruited members for the CLA.

[618] The witness testified that during the year 1992 two meetings took place at the office of the DTA in Katima Mulilo where the issue of the secession was discussed and how fire-arms were to be acquired. At the first meeting chaired by Muyongo it was decided that the weapons would be acquired from Angola and that the accused

person and Thaddeus were appointed to go to Angola in order to acquire the weapons. The accused at this meeting said that he wholeheartedly accept the idea of seceding the Caprivi from the rest of Namibia. At this meeting Geoffrey Mwilima gave the instruction that fire-arms were to be obtained from UNITA. He testified that at the second meeting the accused amongst others donated money for the acquisition of weapons.

[619] During the year 1993 a meeting took place at DTA office in Katima Mulilo where the issue of secession was discussed. The accused was one of the attendants. During the year 1997 a meeting took place at DTA office in Katima Mulilo attended by the accused person. The witness testified that the accused and Thaddeus Ndala acquired one RPG 7, one machine gun and a 60 mm mortar pipe. The witness testified about various meetings at various villages where the issue of recruitment of people were discussed.

[620] The witness testified that during the year 1998 he attended several meetings at different venues. At the first meeting at the DTA offices attendants amongst others by the accused, an amount N\$3000 was raised for the purpose of acquiring weapons.

[621] The witness testified about a meeting at Shell Filling Station in Katima Mulilo where vehicles arrived and where drums were filled with diesel to be exchanged for fire-arms with UNITA and a number of persons had to be conveyed as well. The accused was present when this convoy left the filling station for Singalamwe where these persons had to be offloaded. He testified that the accused was the commander at Singalamwe.

[622] Mr Muluti in his heads of argument criticised the fact that the prosecutor who led the evidence of this witness asked a number of leading questions. It was also submitted that this witness contradicted himself and is an unreliable witness. I need at this stage do no more than to refer to the authorities (supra) regarding the role credibility plays in an application as the present one. I am of the view that mere

contradictions do no warrant the rejection of the witness's testimony at this stage and the testimony of this witness will be considered as evidence in this application.

[623] Luwate Oscar Simbulu testified about an incident when he was a passenger in a motor vehicle driven by Steven Kwala. The vehicle stopped and a whistle was blown. It was during the night. A number of people emerged from the bushes including John Samboma. They were led into Zambia by John Samboma and thereafter into Angola in order to receive military training from UNITA and to acquire weapons in order to secede Caprivi from Namibia.

[624] Oliver Munyandi Mbulunga testified that he became aware of the idea to secede the Caprivi from Namibia during the year 1998. He testified about an incident during October 1998 when he was picked up during the night and driven to Masida where he found between 40 and 50 people in the bush. At some stage John Samboma arrived there in a motor vehicle. Thereafter the persons there boarded two motor vehicles. John Samboma told them that they were heading to Angola for training. They drove to Singalamwe from where they entered Zambia and eventually into Angola. This witness identified John Samboma in court as accused no. 54.

[625] Thomas Franco Mukoya testified about his presence at Makanga bush on 1 August 1999 and the subsequent developments. I had ruled that the evidence of this witness is to be disregarded.

[626] Progress Munsu Mulonga testified about the involvement of John Samboma at meetings where the issue of secession was discussed. This witness however failed to identify John Samboma in court.

[627] Robert Silofela Nyambe testified that during the years 1998 to 1999 he was resident at a place called Imusho, in Zambia. He knew John Samboma since Samboma had grown up in his village. The witness recounted that during the winter in 1999 he had observed John Samboma going around in the villages collecting food which he took to Nambumbwe Island and observed that Samboma went to and from

Namibia. He observed that John Samboma was in possession of a fire-arm, an AK 47. This witness identified John Samboma in court.

[628] The evidence in my view establishes that the accused was actively promoting the secession of Caprivi and that he participated and played a leading role towards the attainment of this idea. The evidence establishes overt acts from which a hostile intention may be inferred. It also establishes that the accused was involved in a common criminal endeavour.

[629] The application for a discharge is accordingly refused.

**2. Raphael Lyazwila Lifumbela (accused no. 6)**

**3 Sylvester Lisuku Ngalaule (accused no. 8)**

[630] Lemmy Kasoondaha Haufiku testified that during the year 1999 he was employed by the Ministry of Defence at Mpacha Military Base and was holding the rank of captain. On 2 August 1999 the military base came under attack. There was an exchange of fire. Subsequently four persons were captured namely Raphael Lifumbela, Musheba Mwiya, Chris Ntaba and Sylvester Ngalaule. Raphael Lifumbela was requested to identify three corpses which he did. Certain captured materials were also seized. He personally interrogated the captured persons.

[631] Fabian Simana Libebe testified that he is employed by the Namibian Defence Force and holds the rank of full Corporal. On 2 August 1999 about 03h00 he was awoken by the sound of gun fire. He testified that he was informed that people had been arrested and were being kept in the conference room. Inside the conference room he recognised Raphael Lifumbela because they worked together in the South African Defence Force from 1981 until 1989 at Mpacha Military Base. The accused did not cross-examine the witness because the accused person excused himself without leave of this court. This accused person together with a number of other accused persons have absented themselves from the proceedings in spite of the fact that this court has on more than one occasion impressed upon them the importance

of their presence in criminal proceedings, and in spite of the fact that they were informed of the provisions of section 159 of the Act, they absented themselves. The effect of the absence of those accused persons referred to was that State witnesses who testified subsequently were not in a position to identify them.

[632] Moses Mulemwa Sesa testified that he was a member of the Namibian Defence Force stationed at Katima Mulilo during 1999. On 2 August 1999 he identified Raphael Lifumbela as one of the person captured at Mpacha Military Base. He testified that Lifumbela was his best friend, that they worked together and that Lifumbela had been employed as a radio operator in the SADF. He testified that the late Captain Mwilima disposed Lifumbela of his weapon. There were about 8 cartridges in the weapon. The witness identified Raphael Lifumbela in court.

[633] Oscar Mwisepi identified Sylvester Ngalaule in court as a person that he came to know during the year 1998 at Liselo.

[634] The evidence establishes that the accused person Rapahel Lifumbela and Sylvester Ngalaule were two of the attackers who had been captured at Mpacha Military Base. The evidence establishes overt acts from which hostile intent may be inferred.

[635] The applications for a discharge is accordingly refused.

#### **4. Ernest Lolisa Lifasi (accused no. 32)**

[636] Christian Ndemufayo Munyika a warrant officer in the NDF testified that on 1 September 1999 at a T-junction near Kaliyangile he was together with other members of the NDF when he saw two suspects. He asked them their names. The one suspect introduced him as Moses Kayoka and the other one introduced himself as Ernest Lifasi. They were in possession of two AK 47 fire-arms and red ribbons were tied around their heads. The witness identified Moses Kayoka as accused no. 47 but was unable to identify the person he referred to as Ernest Lifasi.

[637] Advocate Nyamabo Tubazibale testified that during the night of 1 August 1999 one Joseph Kaliyangile called them to come out of the house. Outside the house he observed three other persons, namely, Johnny Masake, Ernst Manyando and Lolisa Lifasi. The witness testified that Joseph Kaliyangile told them whilst still inside the house that if they did not come out the same fate would befall them as what happened to one Falali. They were driven in a motor vehicle to Makanga where he met a number of persons. The witness was unable to identify the person he referred to as Lolisa Lifasi.

[638] The evidence does not establish the commission of any offence being committed by this accused person.

[639] The application for a discharge is accordingly granted.

#### **5. Charles Kalipa Samboma (accused no. 119)**

[640] Lascan Sikosi testified that during June 1999 on occasion he met one Patrick Nchindo and who was in the company of Charles Samboma. They asked for donations in order to assist those people in the bush. The witness testified that Charles Samboma said: 'those people who gave help immediately when Caprivi will get independence they will get better jobs'. This witness did not identify the person he referred to as Charles Samboma because of an 'eyesight problem'.

[641] The evidence does not establish that the accused committed any of the charges preferred against him.

[642] The application for discharge is accordingly granted.

#### **6. Kisko Twaimango Sakusheka (accused no. 19)**



[643] Joyce Mwiya Sheka testified that she did not know where her son was. The last time she saw him was on the day that he was arrested.

[644] Mary Bekele Basunzi the common law wife of the accused testified that the accused was at the village during the year 1998 to 1999, until such time that he went to Dukwe. She was not sure of the precise date he left. He returned through repatriation. She testified that the accused had informed her that he went to Dukwe in order to seek employment. She testified that she heard about the attack on Katima Mulilo whilst she was in Ngwezi during the period 1<sup>st</sup> until 4<sup>th</sup> August 1999. She testified that the accused was at the village when she left for Ngwezi and upon her return she found him at the village.

[644] There is no evidence that the accused committed any of the charges preferred against him.

[645] The application for a discharge is accordingly granted

I shall now deal with those accused persons who are undefended at this stage. It must be stated that all the accused persons had legal representation from the inception of this trial. At some stage after the unsuccessful challenge of the jurisdiction of this court to hear this case counsel withdrew on the instructions of the accused persons.

### **1. Joseph Kamwi Kamwi (accused no. 3)**

[646] Christopher Siboli testified that he saw Joseph Kamwi during the attack on 2 August 1999 with a fire-arm at the shopping complex in Katima Mulilo. This witness identified the accused person in court. This accused was arrested early in the morning on 2 August 1999 in Katima Mulilo. He was in possession of bandages and ointment and was in the company of Brian Mushandikwe who possessed similar items.

[646] The evidence establishes an overt act from which hostile intent may be inferred.

[647] This court cannot *mero moto* discharge this accused person.

## **2. Herbert Mboози Mutahane (accused no. 5)**

[648] Walters Mwezi Sikochi testified that one Herbert Mutahane was at Makanga bushes on the night of 1 August 1999 and that this individual participated in the attack on Katima Mulilo the next day. This witness identified the accused person. The accused was arrested in the bushes near Caprivi Toyota in Katima Mulilo on 2 August 1999. Hieronymus Bartholomeus Goraseb a member of the Namibian Police holding the rank of Chief Inspector and the Regional Commander in Caprivi, testified about an incident on 2 August 1999 where he was in the company of constable Kashere. The accused and Derrick Ndala had been arrested by the other members of the Police Force. The accused led them into the bushes towards a small dry river and started removing leaves and twigs from the ground. Here they uncovered a RPG 7 rocket launcher, one unfired RPG 7 shell, and AK 47 rifle with a magazine containing eight cartridges and a shotgun.

[649] The evidence establishes an overt act from which a hostile intent may be inferred.

[650] The accused cannot be discharged.

## **3. Chris Puisano Ntaba (accused no. 7)**

[651] Bornbright Mutendelwa Kufwa testified that the accused was present on the night of 1 August 1999 at Makanga bushes where the final preparations were made for the attack the next day on Katima Mulilo. This witness identified the accused in court.

[652] Walters Mwezi Sikochi testified that the accused was at the Makanga bushes on the night of 1 August 1999 and that the accused had participated in the attack the next day on Katima Mulilo. This witness identified the accused person in court. The accused was captured on 2 August 1999 at Mpacha Military Base.

[653] The evidence establishes an overt act from which hostile intention may be inferred.

[654] This accused cannot be discharged.

**4. Davis Chioma Mazyu (accused no. 16)**

[655] Walters Mutendelwa Sikochi testified that Mazyu Davis was with him at Makanga bushes on 1 August 1999 when the final preparations were made for the attack on Katima Mulilo the next day. This witness identified the accused in court.

[656] The evidence establishes an overt act from which hostile intent may be inferred.

[657] The accused cannot be discharged.

**5. Francis Buitiko Pangala (accused no. 17)**

[658] Walters Mutendelwa Sikochi testified that Pangala Francis was at the Makanga bushes on 1 August 1999 when the final preparations were made for the attack the next day on Katima Mulilo. This witness identified the accused person in court.

[659] This accused person is not discharged.

**6. Roster Mushe Lukato (accused no. 18)**

[660] Euster Lmamaemo identified Roster Lukato as his brother and that during 1998 – 1999 his brother stayed at the village Chisozu at his mother's courtyard. During December 1998 the accused went missing from the village and only returned during June 1999 by way of repatriation.

[661] David Ashipala testified that he is a member of the Namibian Police Force. On 15 April 2000 early in the morning (around 04h00) they departed for a specific village with the aim of tracing people who allegedly participated in the attack on 2 August 1999. He was in the company of other members of the Police Force as well as members of the Special Field Force. Near a village in the Makanga area one group remained at the roadside and another group went into the village. He was in the group who stayed behind. Those who went into the village later returned with a suspect together with a AK 47. This AK 47 was covered in sand. The suspect later became known to him as Roster Lukato. Three other suspects namely, Francis Pangala, Fredrik Lutuhezi and Kisko Twaimango Sakusheka were also arrested. Police officer Kanyetu was the person who had led this group into the village.

[662] Bonafatius Kanyetu testified that he is a member of the Namibian Police Force who held the rank of warrant officer during the year 2000. He corroborated the evidence of officer David Ashipala. He testified about another suspect one Davis Mazyu who was also arrested. He testified that he arrested Roster Lukato in the village and seized an AK 47 which he had received from Mazyu. This AK 47 was hidden outside the courtyard in nearby bushes. Inside the room of Roster Lukato he seized ammunition for R1 rifle.

[663] The accused is one of those persons who had absented themselves from the proceedings without the permission of this court and he was therefore not present when the two police officers gave their testimonies.

[664] The evidence establishes at least that the accused had contravened the provisions of the Arms and Ammunition Act.

[665] The accused is not discharged.

## **7. Postrick Mowa Mwinga (accused no. 23)**

[666] Oscar Mwisepi testified that the accused was in Dukwe. This witness identified accused no. 23 as Postrick Mwinga. This witness testified that after the 'shootings' on 2 August 1999 the accused identified himself on the NBC Radio Station (Silozi section) calling on his fellow rebels to come back home and that 'they should not go ahead with rebelling against the State'.

[667] Shailock Sinfwa Sitali identified the accused person as one of the attendants at a meeting during the year 1998 at the Regional office of the DTA where Mishake Muyongo informed the gathering that the UDP separated from the DTA and the Caprivi will be seceded from Namibia.

[668] Christopher Siboli identified the accused in court as a person who had attended a meeting during the year 1991 where ex-SWATF member discussed the secession of Caprivi from Namibia by violence. This witness testified that the accused was in favour of seceding the Caprivi Region in this manner.

[669] Willem Eiman testified that during the year 2000 he was a member of the Namibian Police stationed at Katima Mulilo as a fingerprint expert. On 20 January 2000 he accompanied Inspector Francis and .Postrick Mwinga and took photographs of pointings-out made by the accused to Inspector Francis. It was the evidence of this witness that amongst the various places pointed out by the accused person included Makanga base from where the attack was launched and Katounyana Police Camp which was one of the institutions which had been attacked on 2 August 1999.

[670] The accused person is not discharged.

**8. Ndala Saviour Tatalife (accused no. 24)**

[671] Harrison Mufungulwa Sikumba testified that the accused is his brother and accused person was missing from their village since 1998 and was only seen about a week after the attacks on Katima Mulilo when the accused informed him that he had returned from Botswana. The testimony of this witness is that the accused informed him that he was forced by his leaders to join the CLA, that he was at Katounyana where the shootings took place and that he managed to escape from Katounyana. The accused requested to be taken to his father in order for the father to take him to the Chief. The Chief was informed, who in turn sent police officers to arrest him. This witness testified that after the arrest of the accused he discovered an AK 47 rifle, a magazine, a camouflage trouser and brown cloth and a rug found in the courtyard of the accused person. This discovery was made after the accused had written a letter from prison in which he indicated where these items could be found.

[672] Jacobus Hendrik Karstens testified that during August 1999 he was a member of the Namibian Police Force with the rank of Detective Inspector and was stationed at Katima Mulilo. On 17 August 1999 he was requested by Inspector Sydney Philander to accompany him to a pointing-out. Police Officer Luponjani, a photographer, also accompanied him. Near Makanga in the bushes the accused pointed-out a rebel base. The witness testified that he observed that people had stayed there from the way the bushes had been arranged. He observed *inter alia* a fire place, places where people had slept, empty cantines, water cans, torches, various household utensils, a 210 litre green drum, a pair of black shoes, loose bandages and 14 bags of 'Namibian Sun' maize meal. The evidence in my view establishes the active participation of the accused in an attempt to secede the Caprivi Region from the rest of Namibia by violent means.

[673] The accused is not discharged

**9. Andreas Puo Mulupu (accused no. 26)**

[674] Isaih Siyobo Malupa testified that the accused person is his brother and that the accused went to Botswana during the year 1998. This witness testified that he himself did not go to Botswana. During the year 1999 after his brother had returned from Botswana he went to his brother who informed him as follows: 'We were shooting'. The witness testified that his brother said that the shooting took place in Katima Mulilo.

[675] Ackson Liyenga Masule testified that he is a witchdoctor. During the year 1999 John Samboma, accompanied by Andreas Mulupu and one Mutuso, approached him at Imushu, Zambia where he resided and requested that the witness should organise medicine for them since they wanted to secede the Caprivi. The witness testified that he subsequently treated a number of persons on the Island Navumbwe.

[676] Ruben Bakabuba Sikwela testified that the accused was in the group that attacked Katounyana base and that the accused was in possession of a fire-arm. I have indicated (supra) that I shall disregard the evidence of this witness for the reasons provided.

[677] In my view the evidence establishes an overt act from which a hostile intention may be inferred.

[678] The accused is not discharged.

**10. Brighton Simisho Lielezo (accused no. 31)**

[679] Beauty Mukelabai Munyandi testified about a meeting which she had attended which had been convened by Induna Imushu in Zambia. Councillor Conrad Walvifa said in this meeting that the children of Caprivi and the children of Zambia should

join and form one State. She further testified about an incident when she saw John Samboma in Imushu together with 12 other men. John Samboma was in possession of two AK 47 rifles. She testified the accused person was one of the persons who had carried food to Navumbwe Island in Zambia and that the accused was in the company of John Samboma when she had seen Samboma with AK 47 rifles.

[680] Naseb Kambindo Thihumisa testified that the accused is his brother. On 27 July 1999 the accused approached him and tried to persuade the witness to join the rebels in the bush.

[681] The evidence in my view establishes overt acts from which a hostile intention may be inferred. Furthermore the accused failed to report treasonous activities of which he had been aware of to the relevant authorities.

[682] The accused is not discharged.

#### **11. Genese John Kabotana (accused no. 35)**

[683] Kennedy Muchisani Tiyeho testified that on 1 August 1999 Fabian Simiyasa (accused no. 96) came to his village at Sikelenge where he had discussion with John Lubilo. Thereafter Fabian Simiyasa came to him and told them that they should gather that evening at the village because he would come to get them. He testified that Simiyasa subsequently arrived there with a white TATA truck, the property of the Government of Namibia and they boarded the vehicle. Johnny Kakotana was one of those who boarded the vehicle and they departed. At Kaliyangile three young men boarded the truck one of whom was in possession of a fire-arm. They proceeded to Makanga where there were a lot of people. A certain Chainda registered them. He boarded a certain vehicle there together others and left for Waya-Waya destined for Mpacha. The witness was unable to identify the person he referred to as Johnny Kabotana.

[684] The evidence further is that this accused person was in Dukwe and returned to Namibia through the process of repatriation.



[685] There is in my view no evidence that the accused person committed any of the charges preferred against him.

[686] This court accordingly *mero motu* discharges the accused person in respect of all the counts.

## **12. John Panse Lusilo (accused no. 50)**

[687] Hobby Habaini Sinyabata testified that on 2 August 1999 his brother-in-law Richard Masupa Mungulike (accused no. 34) told him that he was with his friends at Mpacha Military Base where there was fighting and that soldiers died. This witness testified that John Panse Lusilo was shot in his big toe. He testified that he later went with his brother-in-law to John Panse Lusilo who is an Induna in the village of Sikelenge. There, he himself, saw that John Panse Lusilo was wounded on his big toe.

[688] Jacobus Hendrik Karstens testified that on 1 September 1999 he was approached by sergeant Chizabulyo who informed him that the accused person, John Panse Lusilo was prepared to make a pointing-out. The witness testified that he identified himself to the accused person and informed him of his right to remain silent and his right to legal representation. The witness testified that he informed the accused person that should he wish to continue to make a pointing-out, photographs would be taken which would be used as evidence against him in a court of law. He testified that the accused understood what was explained to him. Thereafter on the instructions of the accused person they proceeded to Kaenda area. They stopped next to the road and the accused led them a few hundred metres into the bush where he pointed out a spot between two small trees. The accused was instructed to remove what was buried there. The accused dug a hole and remove a white plastic bag. Inside this bag was a G3 rifle and a magazine. Photos were taken by officer Mbinge. Thereafter they returned to the police station.

[689] The evidence establishes the involvement of the accused person in the attack at Mpacha Military Base.

[690] The accused is not discharged.

### **13. Rex Lumponjani Kapanga (accused no. 63)**

[691] Shailock Sitali Sinfwa testified about a meeting during the year 1994 addressed by Mishake Muyongo where he stated that the UDP has separated from the DTA, that he was going to meet the Chief of Lozi people and the idea was secede the Caprivi from Namibia. This witness testified that Muyongo also stated that the Caprivi should be part of the Western Province of Zambia. This witness identified the accused person as one of the attendants of that meeting.

[692] Bernard Bareka Kanzeka testified that he attended a secret meeting during December 1998. Mishake Muyongo was the speaker. The testimony was that the Caprivi Region had to be seceded from Namibia through violence. I dealt with the testimony of this witness in respect of this meeting (supra). The accused was identified as one of the attendants of this meeting.

[693] The accused owes allegiance to the State of Namibia. The evidence establishes that he had knowledge of treasonous activities and that he failed to report such activities to the relevant authorities.

[694] The accused is not discharged.

### **14. Thaddeus Siyoka Ndala (accused no. 70)**

[695] Christopher Lifasi testified and identified the accused person in court as a person who was actively involved in the secession of the Caprivi from Namibia in the following ways: he attended a meeting of a committee in 1998, at the DTA office, Katima Mulilo where Mishake Muyongo and Geoffrey Mwilima (accused no. 68) had

discussions on the secession of Caprivi from Namibia by violent means and that the accused supported this idea; that the accused was present when the CLA was formed in 1989 and that he has recruited persons for the CLA; that at a meeting in the year 1992 chaired by Mishake Muyongo he was identified and accepted to go to Angola to acquire fire-arms for the purpose of seceding the Caprivi; that he donated money to acquire fire-arms in Angola; that during the year 1997 he attended various meetings at the DTA office, at the old house of Muyongo, at Liselo village at Masokotwane where the secession of the Caprivi was discussed.

[696] Eimo Dumeni Popyeinawa testified about a document which was found in the possession of the accused person at the time of his arrest in which numerous war materials were noted, in which the journey of Muyongo, the Chief and the group of 92 were narrated in which suitable bases were identified inside Namibia and the targets to be attacked. The evidence further is that the accused was arrested in Zambia.

[697] The evidence establishes overt acts from which a hostile intention may be inferred.

[698] The accused is not discharged.

#### **15. Martin Siano Tubaundule (accused no. 71)**

[699] Rassen Lusiezi Kumana testified that the accused used his motor vehicle to transport the witness and other persons to Botswana.

[700] Simeon Nghinomenwa Kaipiti a member of the Prison Services testified about a diary obtained from the accused in which the accused *inter alia* indicated that he joined the CLA on 16 December 1998 for the armed liberation of Caprivi, that he spent the night at Sibinda cross way and that he arrived in Gaborone, Botswana on

17 December 1998 where he surrendered himself to the Botswana police; that the CLA fled the country and entered Botswana; that Mishake Muyongo addressed them on 1 January 1999 and mentioned *inter alia* that they should fight the Ovambo Administration and that the key of the struggle is the armed struggle. The contents of the diary was read into the record.

[701] The evidence in my view establishes an hostile intent together with an overt act. The accused owes allegiance to the Namibian State and he was aware of treasonous activities which he failed to report to the relevant authorities.

[702] The accused is not discharged.

**16. Brendan Luyanda Luyanda (accused no. 120)**

[703] Bornbright Mutendelwa Kufwa testified that Luyanda Brendan was one of the persons present on the night of 1 August 1999 at the Makanga bushes where the final preparations were made for the attack the next day on Katima Mulilo. This witness identified the accused in court as accused no. 120.

[704] Michael Maluboka Ziezo testified about an incident after the attack on Katima Mulilo where he was in the company of one Chikomozo O'Brien Mafendo when they observed Brendan Luyanda with a 'bandage' on his head. The witness testified that he asked Brendan where he was coming from and Brendan replied that he was coming from Ngwezi and then Brendan proceeded walking. They followed him to his house. The witness testified that here he again asked Luyanda where he was coming from. Brendan replied that he was coming from Mpacha Military Base which they had attacked. When he was asked how it went he replied that it did not go well. Brendan further informed them that he had a fire-arm but that he did not shoot anybody.

[705] The evidence establishes overt acts from which an hostile intention may be inferred.

[706] The accused is not discharged.

**17. Frans Muhupulo (accused no. 122)**

[707] Given Lufela Ndungati testified about the events of 2 August 1999. According to him one Adams Muyumbano came to his village, 'collected' him and forced him to Makanga bushes where the final preparations were made for the attack the next day on Katima Mulilo. He observed Frans Muhupulo as one of those present there.

[708] Kruger Chasunda testified that in August 1999 he was at his village Sivanga when Frans Muhupulo arrived at his courtyard and requested a fire-arm from him. The witness testified that Frans Muhupulo knew that he had an R1 rifle. The witness testified that his father and the father of Frans Muhupulo are brothers. The witness testified that Frans Muhupulo informed him that he needed the fire-arm for a short while in order to hunt. He gave him the fire-arm which was in good operational condition together with two rounds of ammunition. The witness testified that at later stage he received information that the police were looking for Frans Muhupulo. He went to him (ie Frans) and asked him why the police were looking for him. Frans replied that the police were suspecting that he took part in the attack. When he asked Frans Muhupulo whether this was true Frans gave no answer. He remained silent.

[709] The evidence in my view establishes a overt act from which a hostile intention may be inferred.

[710] The accused is not discharged.

[711] The accused persons mentioned in this judgment whose applications for discharge are successful together with the one undefended accused whom this court has discharged *mero motu* are found not guilty in respect of all the charges preferred against them.

[712] In respect of those applicants whose applications are unsuccessful, if not mentioned when I dealt with the individual applications, are refused in respect of all the charges preferred against them.

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E P B HOFF  
Judge

APPEARANCES

1, 14, 20 & 112 APPLICANTS:	Mr H Kruger Instructed by Directorate of Legal Aid
2, 9, 28, 29, 37, 40, 68 & 75 APPLICANTS:	Mr J Neves Instructed by Directorate of Legal Aid
6, 8, 19, 32, 54 & 119 APPLICANTS:	Mr P Muluti Instructed by Directorate of Legal Aid
10, 43, 69, 72 & 73 APPLICANTS:	Mr J Samukange Instructed by Directorate of Leal Aid
11, 15, 22, 56 & 121 APPLICANTS;	Mr C Kavendjii Instructed by Directorate of Leal Aid
25, 34, 39, 47, 48, 51 & 53 APPLICANTS:	Mr C Dube Instructed by Directorate of Legal Aid
27, 42, 52, 58, 59, 60, 61, 64, 66, 67, 74, 76, 77, 79, 91, 97, 98 & 104 APPLICANTS:	Mr P McNally Instructed by Directorate of Legal Aid
30, 36, 38, 45, 55, 94, 97, 102, 107, 108, 111 & 115 APPLICANTS:	Mr V Kachaka Instructed by Directorate of Legal Aid
33, 41, 44, 46, 49, 57, 88, 89, 103 & 110 APPLICANTS:	Mr G Nyoni Instructed by Directorate of Legal Aid
65, 80, 81, 82, 83, 84, 85, 86, 87, 90, 93, 95, 99, 100, 101, 116 & 118 APPLICANTS:	Mr P Kauta Instructed by Directorate of Legal Aid
RESPONDENT:	H January (with him T July & A Adams)

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Of the Office of the Prosecutor-  
General