



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

RULING – APPLICATION IN TERMS OF S174

Case no: CC 13/2010

In the matter between:

THE STATE

and

ALBIUS MOTTO LISELI

ACCUSED

Neutral citation: *The State v Liseli* (CC 13/2010) [2013] NAHCNLD 13 (18 March 2013)

Coram: TOMMASI J

Heard: 21-23,29/09/, 01,04,05,11-15,18,19/10/2010, 18-21,26/04/, 11,18,19,
21,25,26/07/, 14/11/2011, 02,03,10/04/, 24,25/09, 01,22/2012,
22/01/2013

Delivered: 18 March 2013

Flynote: Criminal Procedure – application for discharge – credibility of witnesses warned in terms of s204– some witnesses evidence suspect – evidence of one witness distinguished — Criminal Law – State adduced no direct evidence of accused active participation – by inference concluded accused committed an overt act by omission – failing to inform the authorities of overt act committed by others with hostile intent.- having expressed hostile intent – concluded that prima facie evidence was adduced of high treason.

Summary: The accused was charge with high treason. After close of the State's case he applied for discharge in terms of s174. It was not disputed that accused owed allegiance to Namibia, a sovereign State. He disputed that he committed an overt act with hostile intent. The State adduced prima facie evidence that he was aware of others who committed overt acts with hostile intent and failed to inform the authorities which constituted an overt act of treason. He further, in a confession admitted that he shared the hostile intent of those who in his presence committed acts of treason.

ORDER

The application for discharge is refused

JUDGMENT

TOMMASI J

[1] The accused herein is charged with high treason in that he, during the period September 1998 to December 2003, at or near several places in the district of Katima Mulilo and/or the Caprivi Region in Namibia within the jurisdiction of the High Court of Namibia and/or in Botswana and/or Zambia, unlawfully and with hostile intent against the Government of the Republic of Namibia and to overthrow or coerce the Government, committed the following acts:

1. Planned a violent take-over and/or later violent take-over of the authority of the State or part thereof, and/or
2. Gathered with other persons to carry out such violent take-over and/or later violent take-over and/or

3. Gathered with other persons to arm and prepare themselves for such violent take-over and/or later take-over, and/or
4. Failed to, after the said proposed violent take-over or conspiracy came to their knowledge, report it to the authorities or the Namibian Police without further partaking therein, and/or
5. Attempted to recruit or recruited other persons for such violent take-over or to assist in such take-over and/or later take-over, and/or
6. Obtained and possessed arms, ammunition, explosives and other means for such violent take-over, and to assist or attempt to assist in such take-over and/or later violent take-over
7. Joined and/or assisted and/or associated himself with the Caprivi Liberation Army which had the purpose to secede the Caprivi Region from Namibia by violent means, and/or prolonged the existence of the said Caprivi Liberation Army, and/or;
8. Conspired to attack several Government and public places in the Caprivi Region, and/or
9. Obtained and/or possessed arms, ammunition, explosives and other means such violent take-over of the Caprivi Region, and/or
- 10 Prolonged and complicate the investigation of the matter by hiding in secret bases and involving more people for a similar or later violent take-over, and/or
11. Performed and/or neglected to perform any act resulting in procuring the or result of the conspiracy or neglecting to report the conspiracy and/or affecting the non-apprehension of the conspirators.

[2] The accused pleaded not guilty and did not give a plea explanation thus placing all the elements of the offence in dispute. At the close of the State's case he applied for a discharge in terms of s174 of the Criminal Procedure Act, 51 of 1977 which application was opposed by the State. Both counsel submitted extensive heads of argument herein and I am indebted to counsel for their assistance.

[3] This court in terms of the provisions of section 174 may discharge the accused if there is no evidence that he had committed the offence of High Treason or any offence of which he may be convicted of on the charge. Hoff J in a similar

application in *S v Mulumo and 108 Others*¹ dealt extensively with the law applicable to applications of this nature and there is no need to repeat same herein.

[4] Mr Hengari, representing the accused in essence submitted that the in this case the credibility of the witnesses should play a decisive role. In *S v Teek*² by Brand AJA stated the following:

“Over the years the trite principle has been established - both in Namibia and with reference to the identically worded s 174 of the South African Criminal Code - that no evidence in terms of the section means no evidence upon which a reasonable court, acting carefully, may convict (see eg *S v Nakale* 2006 (2) NR 455 (HC) at 457 and the authorities there cited). 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 in 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 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?”

[5] The accused did not dispute the averment by the State that the Republic of Namibia is a sovereign state and that he, at all relevant times, owed allegiance to the Republic of Namibia. He however disputed that he committed an overt act as alleged by the State with the hostile intent to overthrow or coerce the Government of the Republic of Namibia to secede the Caprivi Region from the rest of Namibia.

[6] At the outset it must be stated that the State adduced evidence of the existence of an organisation, the Caprivi Liberation Army, an affiliate of UDP which had as its objective the secession of the Caprivi Region from the rest of Namibia. The existence and objective of such an organisation was not disputed by the accused. The evidence that the members were building a military organisation outside the State's military force by recruiting and training persons in the use of weapons and explosives, that these activities were hidden from Government security

¹ Unreported Judgment Case no 11/2001 delivered on 11 February 2013

²2009 (1) NR 127 (SC) page 130 - 131 ,paragraph 7

forces, that a group of its members were travelling across the border to neighbouring countries to secure arms, ammunition and explosives, were also not disputed. It was further not disputed that members of this group killed a person who tried to escape from the group by shooting him and that an armed attack was launched by members of this organisation on 1 August 1999 on the town of Katima Mulilo.

[7] I find it useful at this stage to incorporate the law applicable to high treason as set out by Hoff J in *S v Muluma and 108 others*, supra, in paragraphs 71 – 73

“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.’

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).

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).”

[8] The issue for consideration is whether the State adduced evidence to the effect that the accused had committed an overt act with hostile intent or had formed common purpose with those who had committed an overt act with hostile intent. Mr Hengari submitted that the averment of common purpose was not an averment contained in the indictment. I am not entirely persuaded that this is the case. I shall for the purposes hereof deal with the averments as contained in the indictment.

[9] The indictment averred inter alia that the accused did unlawfully and with hostile intent against the State and to overthrow or coerce the State committed an overt act by planning such a violent take-over of the authority of the State; gathered with other persons to prepare and carry out such violent take-over; failed to inform the authorities of the proposed conspiracy; joined and/or assisted and/or associated himself with the Caprivi Liberation Army which had the purpose to secede the Caprivi Region from Namibia by violent means, prolonged the existence of the said Caprivi Liberation Army; and obtained and possessed arms, ammunition, explosives and other means for such violent take-over.

[10] In support of these allegations the State adduced the evidence of Oliver C, Oliver M, Stanly Micheal and Albert. All these witnesses were warned in terms of s204 of the Criminal Procedure Act, 51 of 1977.

[11] No evidence was adduced by these witnesses that the accused was part and parcel of the group of persons who crossed into Angola and Zambia to secure weapons. There is thus no evidence that the accused had committed this overt act.

[12] It was however the testimony of Oliver and Albert that the accused was present at Sachona which was a temporary base of the Caprivi Liberation Army where they were trained to operate fire-arms and handle explosives. This would constitute an overt act if proven that the accused participated in these activities and had the requisite hostile intent.

[13] Mr Hengari submitted first and foremost that there was no evidence that the accused participated in these activities whereas Mr Shileka urged the court to, by inferential reasoning conclude that he indeed participated in the activities which took place at Sachona. It is trite law that a court, in order to draw an inference from the

circumstantial evidence adduced, may only do so if the 'two cardinal rules of logic' as set out in R v Blom 1939 AD 188, have been satisfied i.e that (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

[14] Both these witnesses testified they were located in the bush near Sachona Village where they would not be detected by the Security Force of the Government of the Republic of Namibia. The main activity was the training in handling of firearms and explosives. According to Albert, in addition to learning how to handle firearms, they were also tasked to guard the camp and do domestic chores. Both Albert and Oliver testified that they were divided into groups which fell under the command of John Samboma. According to Albert the accused was a leader of a subsection and the objective was to have better control on the movement of persons present in the group. Oliver testified that his presence there was secured by means of false pretences and that he was somehow forced by circumstances to remain at Sachona whereas Albert was recruited and voluntarily joined the group.

[15] Both testified that they moved from there to the village of Chief Mamili. They eventually settled in a base camp at Liybu-Liybu where they continued with the same activities as in Sachona. Albert testified that he wanted to escape but the accused reported him to the leaders who threatened to kill him if he should attempt an escape. They remained there until some members of their group escaped and one of them was shot and killed. The leaders hereafter decided they should flee to Botswana. They obtained refugee status in Botswana and were taken to Dukwe refugee camp. Albert testified that they were 91 in number and that the accused was amongst the group of 91 persons who crossed the border.

[16] The accused made a statement before a magistrate which the court ruled to have been admissible as evidence. Herein the accused admitted that he left his house in order to fight for "Caprivi to become a separate country". He further

admitted that he was at Liybu-Liybu and that he joined the a group of 91 who eventually crossed the border into Botswana.

[17] Mr Hengari submitted that the evidence of both these two witnesses were of such a poor quality that it cannot be accepted as evidence. Mr Shileka conceded that there were contradictions between the evidence of the two witnesses but submitted that the credibility of the witnesses should play a limited role at this stage of the proceedings.

[18] Mr Hengari cited *S v Agliotti*³ in support of his argument that the court should not rely on the evidence of these two witnesses. In this case it was held that the startling similarities between the statements indicated that there could have been collusion between them in the compilation of those statements; the timing of the supplementary affidavit, which belatedly tended to implicate the accused, pointed at manipulation and recent fabrication; that witnesses testified about matters not covered in their s 204 statements showed a semblance of interference on the part of either the investigating or prosecuting team; cajoling witnesses into implicating the accused where the witnesses did not spontaneously implicate the accused. The court concluded that the manner in which the prosecution was conducted violated the accused's right to a fair trial and the accused in that case was discharged in terms of s 174.

[19] Oliver M did not mention the name of the accused in his initial statement and only later supplemented his statement to incorporate the accused. His testimony and that of some of the other witnesses bears similarity in the approach adopted in the aforementioned case. They testified that the police came to them after the arrest of the accused and they only thereafter recalled details of the accused's involvement. This approach is indeed very suspect and reminiscent of manipulation of evidence.

[20] This however was not the case with Albert. Mr Hengari's criticism was that the role that the accused played was not contained in his initial statement and his evidence contradicted that of others. What however became evident during his testimony was the fact that he as early as during the year 2000 mentioned the material fact the accused was amongst the persons who was at Sachona and Liybu-

³2011 (2) SACR 437 (GSJ)

Liybu. His evidence in this regard is partly confirmed by the admissions made by the accused. The evidence adduced by this witness does not fall within the same category of the other witnesses and is not of such a poor quality that it cannot be accepted as evidence. This court is of the view that his credibility as a witness should play a limited role at this stage of the proceedings.

[21] The contents of the confession and the pointing out by the accused would in the absence of evidence rebutting it, become conclusive evidence that the contents thereof was correctly recorded. The material admissions made therein was furthermore confirmed by Albert.

[22] The prima facie evidence adduced by the State was that the accused: was present at Sachona, was a section leader, remained with the group until they fled to Botswana, reported Kupulo when he wanted to escape, admitted to having entertained a hostile intention and that the movements of the group and the different locations were shrouded in secrecy. Given these facts the inescapable conclusion is that the accused knew or ought to have known that members of the group were building a military organisation outside the military forces of the Government of the Republic of Namibia and that they shared his hostile intent to fight for the secession of the Caprivi from the rest of Namibia. The State urged the court to infer that the accused participated in the activities but as correctly pointed out by Mr Hengari, the prima facie evidence, although consistent with such an inference, is not the only reasonable inference to be drawn.

[23] The accused omitted to report these activities to the authorities and such an omission constitutes an overt act. Given his expressed hostile intent, I am satisfied that the State adduced prima facie evidence of treason.

[24] Having thus concluded, I am of the view that it would not necessary at this stage to deal with the further overt acts averred by the State in the indictment.

[25] The application for discharge is refused.

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MA Tommasi
Judge

APPEARANCES

STATE : Mr. Shileka
Of the Office of the Prosecutor-General, Oshakati.

ACCUSED: Mr. Hengari
Of Hengari, Kanguuehi & Kavendjii Inc., Windhoek.