



**REPORTABLE**

CASE NO: SA 25/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between

**RAPHAEL LYAZWILA LIFUMBELA**

**FIRST APPELLANT**

**CHRIS PUISANO NTABA**

**SECOND APPELLANT**

**POSTRICK MOWA MWINGA**

**THIRD APPELLANT**

**NDALA SAVIOUR TUTALIFE**

**FOURTH APPELLANT**

**RODWELL SIHELA MWANABWE**

**FIFTH APPELLANT**

**MOSES CHICHO KAYOKA**

**SIXTH APPELLANT**

**RICHARD LIBANO MISUHA**

**SEVENTH APPELLANT**

**JOHN PANSE LUBILO**

**EIGHTH APPELLANT**

**SIKUNDEKA JOHN SAMBOMA**

**NINTH APPELLANT**

**ALBERT SAKENA MANGILAZI**

**TENTH APPELLANT**

**OSBERT MWENYI LIKANYI**

**ELEVENTH APPELLANT**

**MATHEUS MUNALI PANGULA**

**TWELFTH APPELLANT**

**VICTOR MASIYE MATENGU**

**THIRTEENTH APPELLANT**

**BENNET KACENZE MUTUSO**

**FOURTEENTH APPELLANT**

**THADDEUS SIYOKA NDALA**

**FIFTEENTH APPELLANT**

MARTIN SIANO TUBAUNDULE	SIXTEENTH APPELLANT
CHARLES MAFENYEHO MUSHAKWA	SEVENTEENTH APPELLANT
ALFRED TAWANA MATENGU	EIGHTEENTH APPELLANT
FABIAN THOMAS SIMIYASA	NINETEENTH APPELLANT
BERHARD MAUNGOLO JOJO	TWENTIETH APPELLANT
KESTER SILEMU KAMBUNGA	TWENTY FIRST APPELLANT
RICHARD SIMATAA MUNDIA	TWENTY SECOND APPELLANT
AGGREY KAYABU MAKENDANO	TWENTY THIRD APPELLANT
ADOUR MUTALIFE CHIKA	TWENTY FOURTH APPELLANT
KINGSLEY MWIYA MUSHEBA	TWENTY FIFTH APPELLANT
GEOFFREY KUPUZO MWILIMA	TWENTY SIXTH APPELLANT
BOLLEN MWILIMA MWILIMA	TWENTY SEVENTH APPELLANT
SIYATA ALFRED LUPALEZWI	TWENTY EIGHTH APPELLANT
MAINGA CHARLES NYAMBE	TWENTY NINTH APPELLANT
MATHEW MUYANDULWA SASELE	THIRTIETH APPELLANT

and

**THE STATE**

**RESPONDENT**

**Coram:** SAKALA AJA, SHONGWE AJA and CHINHENGO AJA

**Heard:** 30 - August 2021- 02 September 2021; 06 – 09 September 2021; 13  
– 14 September 2021; 27-30 September 2021

**Delivered:** 22 December 2021

**Summary:** This is an appeal against convictions and sentences by the appellants on one count of high treason, nine counts of murder and ninety-one counts of attempted murder. State had filed a notice of appeal against convictions and a notice to cross-appeal against the sentences imposed by the court *a quo* but later abandoned the appeal against convictions.

Appellants convicted of high treason on the basis of a conspiracy after several meetings and gatherings inside and outside Namibia; the appellants agreed to associate with each other to secede the Caprivi Region (now Zambezi Region) from the rest of the country by violent means, particularly by using arms and ammunition obtained within and outside of the country. The conspiracy culminated in a final meeting at Makanga on the eve of 1 August 1999 at which the planned attacks on government institutions were finalised and later that night, implemented. The attacks resulted in the killings of eight innocent persons, the injury of 91 others and the destruction of property. The appellants together with ninety-two other accused were tried in the High Court and thirty of them convicted on the main count of high treason, on the nine counts of murder and ninety-one counts of attempted murder and sentenced to varying periods of imprisonment conditionally suspended.

The appellants filed notices of appeal with common grounds summarised as follows:

- (a) That the court erred in convicting the appellants on evidence predicated by findings on irregularities and defects in terms of a special entry (section 317 of the CPA).
- (b) That the court erred in convicting some of the appellants in their absence, thereby infringing the provisions of s 159 (2) (a) and s 160 of the Criminal Procedure Act of 1977 (CPA) read with the provisions of Article 12 of the Constitution of Namibia, dealing with fair trial.
- (c) That the court erred in relying on evidence of accomplices without it being corroborated by independent witnesses.
- (d) That exhibit 'F4', dealing with a previous bail application should not have been admissible to prove the truthfulness thereof.

(e) That the court misdirected itself by overlooking material contradictions between witnesses.

The court first dealt with the first common ground of appeal, *to wit*, special entry in terms of section 317 of the CPA. On this score *the court held that* an irregularity occurred when the prosecutors showed the witnesses photographs of the appellants prior to testifying in court, however, the explanation provided by them was acceptable and proved that that was not done with malice or other untoward objective.

*It was further held that* the defect or irregularity did not result in an injustice or a failure of justice and therefore not fatal to the proceedings. The effect of the irregularity should have however, been decided upon by the trial judge after it was brought to his attention because the irregularity arose during the trial, and like other interlocutory objections, such as admissibility of evidence, it was within the judge's power to make a ruling thereon.

Secondly, the court dealt with the second common ground of appeal being conspiracy, common purpose and *dolus eventualis*.

Before dealing with the common ground of appeal the Court clearly delineated between the doctrine of conspiracy and that of common purpose.

*It was held that* there is no crime named common purpose, however, there is in many jurisdictions a statutory crime named conspiracy. The court found that the crimes of high treason, murder and attempted murder were committed based on conspiracy and that the appellants are the persons who assembled in meetings to discuss the cessation of the Caprivi Region from the rest of Namibia.

*It was held that* any punishment or term of imprisonment which takes away from the offender all hope of release should be viewed as being contrary to the values and aspirations of the Constitution and more specifically the inherent right to dignity afforded to an incarcerated offender. The total effective of sentences for

murder and attempted murder amounted to 'Methuselah' sentences, which punishment would be in violation of Article 8 of the Constitution, and therefore unconstitutional.

*It was further held that* in considering an appropriate sentence, the court must, *inter alia*, take into account the triad, which consists of the seriousness of the crime, the interest of society and the personal circumstances of the accused person.

*It was held that* the court *a quo* placed more emphasis on reducing the sentences by suspending large portions thereof, the approach by the court *a quo* diminished the gravitas of the offences convicted on. This was a misdirection and therefore the Court is at large to interfere with the sentence in terms of s 322(6) of the CPA.

*It was held that the* Leaders are sentenced to an effective sentence of 29 years from which a period of 14 years that the appellants spent in custody awaiting trial is deducted.

*It was held that the* Attackers/Soldiers are sentenced to an effective sentence of 26 years, of which a period of 14 years that appellants spent in custody awaiting trial is deducted.

*It was held that* the Supporters are sentenced to an effective sentence of 21 years, of which a period of 14 years that the appellants spent in custody awaiting trial is deducted.

*It was held that* the sentences proposed would not in any case require that those that have been released be brought back into prison.

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## APPEAL JUDGMENT

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THE COURT:

## Introduction

[1] This is an appeal initially noted by thirty appellants, with leave of the court *a quo*, against their convictions and sentences by the High Court on one count of high treason, nine counts of murder and 91 counts of attempted murder, handed down on 14 September 2015 and 8 December 2015, respectively. When the appeal was heard, 27 appellants appeared before us because three of the original number had either withdrawn or abandoned their appeals. Initially, the appellants were indicted, together with 92 others, on 279 counts which included, sedition, public violence, robbery, unauthorised importation, supply and possession of fire-arms and ammunition contrary to the Arms and Ammunition Act 7 of 1996, malicious damage to property, theft and illegal exit from Namibia. They were sentenced to varying periods of imprisonment conditionally suspended. The quantum of the terms of imprisonment will be dealt with later when sentence is discussed in this judgment. The State is opposing the appeal and has also cross-appealed against the sentences.

[2] It is common cause that at the trial some of the appellants asked for further particulars, which were indeed provided. This process had the effect of amending the charge sheet to a certain extent. No appeal was noted in respect of the delivery of the further particulars in terms of s 316A read with s 85(2) of the Criminal Procedure Act 51 of 1977 (the CPA). There is nothing turning on the amendment save to state that it was followed by a summary of substantial facts and a list of witnesses in terms of the provisions of s 144(3) of the CPA. For completeness' sake the summary is quoted verbatim below:

- (a) 'Namibia became an Independent, Democratic State during elections overseen by the United Nations on 21 March 1990.
- (b) Prior to Independence, the SWAPO party, under the leadership of Mr Sam Nujoma fought an armed struggle for independence against the South African occupation of Namibia.
- (c) About 1964 Mr Mishake Muyongo decided that the Caprivi African National Union (CANU) will join SWAPO in their liberation struggle and will join under SWAPO for such cause. Mr Mishake Muyongo then also became a Vice President of SWAPO.
- (d) At a later stage Mr Mishake Muyongo left SWAPO and joined the Democratic Turnhalle Alliance (DTA) in the then Interim Government that ruled in the period prior to Independence.
- (e) The SWAPO party under President Sam Nujoma won the majority of the seats in the democratically chosen Parliament and has democratically been chosen in subsequent elections by the majority of Namibians to remain in power in the sovereign state of Namibia.
- (f) The main opposition party that contested the elections during the time of Independence was the DTA, of which the President was Mr Mishake Muyongo. Mr Mishake Muyongo also stood as a candidate for President of Namibia during the above-named elections.
- (g) It is now history that the DTA under Mr Mishake Muyongo became the official opposition in the democratically chosen Government of Namibia.
- (h) This remained the case for a number of years until approximately 1998 when Mr Mishake Muyongo and some of his followers seemed to become discontented with the "status quo". They began holding meetings in the Caprivi Region where a breakaway from the DTA was propagated as well as the idea of separating the Caprivi Region that was an integral part of Namibia, from the rest of Namibia by violent means.

- (i) People in the Caprivi Region were encouraged to flee the Caprivi Region to Botswana as part of the attempt to have the Caprivi Region separated from the Republic of Namibia. Various meetings were held throughout the Caprivi by a number of people including some of the accused before Court where the secession was planned and persons influenced and encouraged to join and/or support the secessionist. Caprivians were also encouraged to join the military wing of Mr Muyongo's movement namely the Caprivi Liberation Army (CLA).
- (j) During 1998 after the killing of Mr Victor Falali, who was a rebel who decided to leave the "army" of Mr Muyongo, the remainder of the 'army' numbering 92 persons left Namibia and crossed over to Botswana still armed as they were with weapons not legally entitled to possess and handed themselves over to the Botswana authorities, some of them are presently accused before court.
- (k) More persons were encouraged to leave the Caprivi Region for Botswana *inter alia* by some of the accused persons before court, under various pretences, *inter alia*, to secede the Caprivi Region from the Republic of Namibia.
- (l) The Namibian "refugees" were mostly kept at Dukwe refugee camp in Botswana. Some refugees were legally repatriated back to Namibia, however, some escaped the Dukwe refugee camp and went to "rebel bases" with the intent to establish an army to overthrow the Government of Namibia in the Caprivi Region. Most of the rebels also exited and entered Namibia not at ports of entry at various times.
- (m) Various rebel bases were established for the purpose of establishing and training an army and its members included *inter alia* some of the accused before court. The rebels were supported by others who supplied *inter alia* food, transport, money and weapons to them. Some of the supporters are presently accused before court. Persons were identified to acquire firearms by various means, *inter alia*, to exchanging diesel fuel for weapons with the UNITA movement.



- (n) On 1 August 1999, the rebels who included some of the accused before court who were to attack the Namibian Government in the Caprivi Region, came together at the Makanga rebel base. These rebels were divided in groups, which had to attack certain targets in the Caprivi Region.
- (o) The rebels were transported by various motor vehicles, to the various points of attack, namely Mpacha base, Katounyana Special Field Force base, Katima Mulilo Police Station, Wenela Border Post, the Katima Mulilo town centre, the Namibian Broadcasting Corporation in Katima Mulilo and the house of Sgt Liswani Patrick Mabuku.
- (p) On the morning of 2 August 1999, the rebels attacked the above-named targets with a variety of weapons.
- (q) During the attack, the rebels with the intent to kill, killed eight persons, as well attempted to kill the other persons at the target areas, and in the process wounded several persons.
- (r) The rebels robbed several persons of their property and maliciously damaged various properties.
- (s) The rebels possessed a large number and variety of weapons without being authorised and/or non-licensed to do so.
- (t) All the accused at times acted with a common purpose at the various stages to overthrow the democratically elected Government of Namibia in the Caprivi Region, which is an integral part of Namibia.
- (u) In an effort to achieve their aims, the accused committed the offence of High Treason, Sedition and all the other offence, for which they are being charged'.

### Background facts

[3] The events relevant to this appeal took place between January 1992 and December 2002 but culminated in violent attacks on 2 August 1999. The last event is summed up in the judgment of the court *a quo* in these words:

‘On 2 August 1999, during the early hours of the morning, the town of Katima Mulilo was attacked by a group of individuals, some of whom were armed with weapons of war. The following institutions were attacked namely, the Katima Mulilo police station, Mpacha military base, the offices of the Namibian Broadcasting Corporation (NBC), Katonyana police base, Wanela border post and the Bank of Windhoek branch. During the attack, a number of people lost their lives, some were seriously injured and property belonging to the State had been damaged. In the aftermath of this attack, a number of individuals had been arrested and charged.’<sup>1</sup>

[4] The allegations are that a group of persons met at various places inside and outside the country prior to the attack on 2 August 1999, had private and public meetings where a conspiracy was hatched with a view to violently secede the Caprivi Region from the rest of Namibia.<sup>2</sup> An army was formed, named the CLA, to liberate the Caprivi Zipfel from ‘the regime of Namibia’. The aim or objective was to organise and purchase arms of war to be used by the liberation army, to recruit people into the army, as a vehicle to achieve their goal. Some persons unlawfully left Namibia for Botswana under the pretext that they were going to study or find greener pastures in employment whereas they went to seek military training to return and accomplish their conspiracy to topple the legitimate Government of Namibia in the Caprivi Region. Some proceeded to Angola to

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<sup>1</sup> See para 1 – *S v Malumo & 65 others*, (CC 32/2001) [2015] NAHCMD 213 (7-14 September 2015).

<sup>2</sup> See paras 1-22 of high treason indictment on the overt acts of high treason committed by the group.

procure arms and ammunition to fight the Namibian Government. More detailed background facts may be gleaned from *Calvin Liseli Malumo*<sup>3</sup>.

[5] What followed was a marathon trial which started on 24 February 2004 and ended on 8 December 2015. The record of proceedings in the high court is some 360 000 pages, that in itself is a challenge to everyone involved in this appeal. It is unquestionable that this was a political trial which attracted the public eye and interest and, no doubt, a lot of emotions on the part of the accused persons and the general citizenry, especially those whose relatives were killed or injured during the attack. It is noteworthy that one judge was assigned this mammoth of a task unassisted by assessors. It was brought to the attention of this court that the accused persons did not make the task of the presiding judge any easier. Some refused to plead to the charges and dissociate themselves from the authority of the Namibian Government. The accused persons were singing and generally rowdy during proceedings thereby disrupting the hearing to an extent that some decided on their own accord to leave and absent themselves from the trial for long periods of time. The investigation by the police was also made difficult.

#### Common cause facts

[6] In preparation of the hearing of the appeal, this court directed all the legal representatives, including the State, to collectively prepare and submit common cause facts or facts not in dispute. The following were generally accepted by most of the appellants as some counsel, led by Mr Kauta who positively responded to the direction as common cause facts:

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<sup>3</sup> *Op. cit* footnote 1.

'That the Republic of Namibia is a sovereign, secular, democratic and unitary State as described in Article 1(1) of the Constitution of the Republic of Namibia.

That the national territory 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 boundary shall extend to the middle of the Orange River as stated in Article 1(4) of the Constitution of the Republic of Namibia. Consequently, that the Caprivi strip (Zipfel now the Zambezi Region) forms part and parcel of Namibia.

That 12<sup>th</sup>, 13<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> Appellants owe allegiance to Namibia.

That the Namibian High Court has territorial jurisdiction over the abovementioned Appellants. That the Republic of Namibia, has *majestas*.

That attacks on various Government institutions took place on 2 August 1999, more specifically Mpacha Military Base, Katounyana Special Field Force Base, Katima Mulilo Police Station, the offices/premises of the Namibian Broadcasting Corporation situated at Katima Mulilo, Wenela Border Post, the Central Business Area of Katima Mulilo as well as the house of Sergeant Liswaniso Mabuku.

That Victor Falali, Majority Siloiso, George Matafela, Lucas Simubali, Mabuka Jameson Matonga, Gabriel Paulus, Richard Mwakamui, Jafet Kamati and Gilbert Simukushi Tubabe were unlawfully and intentionally killed.

The following facts are either common cause or not seriously disputed:

1.1 That the Republic of Namibia is a sovereign State.

1.2 That the accused owed allegiance to the Republic of Namibia.

1.3 That the Caprivi Liberation Army was formed in 1989 with the stated objectives in Exhibit AAC.

1.4 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.

1.5 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 it killed one Victor Falali after he escaped from this camp at Linyanti. This group of 92 fled to Botswana shortly thereafter. See Exhibit EHH and AZ.

1.6 That inhabitant from the Caprivi Region started fleeing to Botswana shortly thereafter to seek education, employment and opportunity to liberate Caprivi Region by violent means.

1.7 That the conspiracy scheme to secede the Caprivi Region from Namibia continued unabated in Botswana.

1.8 That a plan was hashed (sic) in Botswana that refugees escape back to Namibia.

1.9 That at Navumbwe Island a group of approximately 100 Namibians with firearms from Angola were treated by a traditional healer in preparation for the imminent attack on the Caprivi Region.

1.10 That on 1 August 1999, the planning 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.**"

1.11 That from 31 July 1999 to 1 August 1999, people gathered at Makanga in preparation for the attack.

1.12 That at Makanga those present were transported in a government owned TATA truck. And once at Makanga, were registered in writing (EXHIBIT EGF (13) and EGK (1) and thereafter divided into various groups in order to attack specific targets.

1.13 That at Makanga after final instructions the co-conspirators were transported, and some walked, to their various destinations of attack.

1.14 That on 2 August 1999, various government institutions in the Caprivi Region were attacked with mortar and artillery amongst others.

- Katounyana Special Field Force base
- Katima Mulilo Police Station Exhibit 'M'
- Wanela Border Post Exhibit 'U'
- Katima Mulilo Town Centre (Petrus Ngoshi)
- Namibian Broadcasting Corporation in Katima Mulilo
- The house of Sgt Patrick Liswani a police officer in Katima Mulilo- Exhibit AA

1.15 That the attackers had tied red ribbons around their heads.

1.16 That as a result of the attack eight police officers lost their lives. The subjects of murder charges- (Exhibit 'AC')

1.17 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".

1.18 That after the attack people regrouped at Cameroon, Masokotwane, Malongwa Island and Kaliyangile.

- See POL 7/196/99,

- See POL 7/197/99,

- See POL 7/232/99,

- See Exhibits "EHM", "EHN" photos 8.9.14.

2. That unlawful and intentional attempts were made to kill-

2.1 Ammedius Malenga Mwangalushi ... [and others listed from para 2.2 to 2.238].

3. That no identification parades were held after the arrests of appellants represented by the undersigned legal practitioners.

4. The appellants were convicted of count 1 High Treason and the murder of the deceased in counts 5, 6, 7, 8, 9, 10, 11, 12, and 13, of the attempted murder of the Complainants in Counts 32 ... [in total 91 counts of attempted murder].

5. That with the exception of the charges the abovementioned Appellants were convicted of, as indicated in the court *a quo's* judgment, the State stopped the prosecution on the remainder of the charges in the indictment.

6. We respectfully submit that the appellants do not dispute the common cause facts set out in paragraph 1, 2 and 3 above. What the appellants put in issue is whether the State has proven beyond a reasonable doubt their complicity in the commission of the offences alleged.'

[7] These common cause facts were accepted especially by Mr *Kauta* on behalf of the 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> appellants, Mr *McNally* for 12<sup>th</sup>, 13<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> appellants and Mr *Kavendjii*, for 23<sup>rd</sup> appellant, who submitted a joint statement containing the common cause facts on 12 June 2021. State counsel, Mr *Campher*, accepted these facts as being common cause. However, he sought, in a

separate statement, to supplement the facts as set out by the three legal practitioners but could not obtain their concurrence to his reformulation of the facts and additions thereto. *Mr Muluti*, who represents 1<sup>st</sup>, 9<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup> and 26<sup>th</sup> appellants, filed his own statement of common cause facts on 14 June 2021. It is similar, in all material respects, to that of *Mr Kauta*, *Mr McNally* and *Mr Kavendjii*.

[8] It is to be noted that whilst at para 6 of the statement on common cause facts, *Mr Kauta*, *Mr McNally* and *Mr Kavendjii* state what the issue in contention between their clients and the State is, *Mr Muluti*'s issues are different. At para 1.17 and 1.18 of his statement, he states:

‘1.17 The Honourable Judge *a quo*, in convicting appellants on 9 counts of murder failed to provide a legal and factual basis for arriving at such conclusions.

1.18 The Honourable Judge *a quo* in convicting appellants on 91 counts of attempted murder failed to provide a legal and factual basis for arriving at such conclusions.’

[9] It seems to us that whilst the three legal representatives recognised the inextricable link between the high treason offence, the murder and attempted murder offences and contended that the only issue is whether their clients were implicated, *Mr Muluti* and one or two other legal practitioners took a different view. *Mr Kachaka*, for 5<sup>th</sup>, 10<sup>th</sup> and 19<sup>th</sup> appellants, appears to have shared the perspective of the three legal practitioners. He recognised that if the conviction for high treason stands, so also will those for murder and attempted murder, and that,

at best for the appellants, the convictions for murder and attempted murder will serve as aggravating factors of the high treason sentence.

[10] We need to mention that the presentation of almost all counsel was remarkably unhelpful. We understand why this had to be so. It is not easy to deal with a record of proceedings resulting into thousands of pages. Most counsel did not tabulate their grounds of appeal as would be expected or deal with them seriatim but put the grounds so wide and general to an extent that it appeared they were arguing the matter. We expected each counsel to particularly mention the ground relied upon by numbering same and showing, in his or her submissions before us whether or not each such ground was proved. In *casu*, grounds were prepared as an argument which made our task more onerous as we tried to discern exactly what the ground of appeal on each count or with respect to each appeal was. This process prolonged the time spent during presentation of each case. We hope this practice will improve with time. We may also observe that it does not seem to us counsel for all appellants had the opportunity to sit down together and plan or agree on a common approach to some or all the issues on appeal. On the whole we thank all counsel for their cooperation and assistance.

#### General grounds of appeal

[11] Aggrieved by the convictions and sentences, the appellants filed notices of appeal premised on, *inter alia*, what we refer to as general grounds of appeal, excluding the common grounds of appeal which we deal with below in this judgment. We summarise as follows:



- (f) That the court erred in convicting some of the appellants in their absence, thereby infringing the provisions of s 159 (2) (a) and s 160 of the CPA and the provisions of Article 12 of the Constitution of Namibia, dealing with fair trial.
- (g) That the court erred in relying on evidence of accomplices without it being corroborated by independent witnesses.
- (h) That exhibit 'F4', dealing with a previous bail application should not have been admissible to prove the truthfulness thereof.
- (i) That the court misdirected itself by overlooking material contradictions between witnesses.

[12] The State, on the other hand, with leave of the court *a quo*, also filed a notice of appeal in relation to conviction, which it later withdrew, as it realised that such appeal was counter-productive. What the state pursued to the end was the cross appeal on the sentences. Its general grounds of cross-appeal are as follows:

- (a) That the appellants filed a notice of appeal not due to any real misdirection or error of law or fact by the court *a quo*, but due to the fact that they have nothing to lose.
- (b) That even without the evidence ruled inadmissible, the remaining evidence against the appellants was such that the only verdict was a conviction.

- (c) That the learned judge erred or misdirected himself in law or fact when he ordered that the whole of the unsuspended periods of imprisonment on murder and attempted should run concurrently with the unsuspended period of imprisonment imposed in respect of the count of high treason.
- (d) That the whole or at least part of the unsuspended period of imprisonment could have run consecutively, with the period of imprisonment imposed in respect of the count of high treason.
- (e) Basically argued for an increase of the sentences imposed.

#### Common grounds of appeal

[13] The appellants were convicted in the court *a quo* on one count of high treason, nine counts of murder, and 91 counts of attempted murder. They all appealed against conviction. 11 of them appealed against sentence also.

[14] The following are what we consider to be common grounds of appeal. It is contended that the judge *a quo* erred or misdirected himself –

- (a) in finding that the appellants are guilty of the crimes charged, whilst predicating its finding on the evidence of State witnesses, where a special entry in terms of s 317 of the CPA was entered. Such an irregularity caused the appellants not to receive a fair trial as contemplated by Article 12 of the Constitution; and

(b) in respect of the crimes of murder and attempted murder, in finding that the State had proved beyond reasonable doubt that the appellants were guilty of murder and attempted murder by association, without evidence being led connecting the appellants to such murder or attempted murder, or proving their association with other appellants who may have been the actual perpetrators.

[15] These two common grounds are being dealt with separately here to cover all the appellants to avoid repetition. We have alluded to the fact that counsel did not sit down together and plan their approach to the appeal or seek agreement on whether or not and on what basis to pursue certain issues which were possibly applicable to all the appellants. As an example, Ms Agenbach, as we show later, became a lone ranger, so to speak, in relation to issues such as the fairness of the trial as a whole; what she termed the failure 'to keep the streams of justice pure'; her contentions that the convictions were wrongly founded on the doctrine of common purpose and that high treason 'is an absolute or pure political offence'<sup>4</sup> which lacks the essential elements of a common crime.' The end result was that she appeared as if she was pursuing issues that all other counsel did not regard as important in the appeal. Had there been general agreement on her additional contentions, perhaps we might have looked at them in a different light.

Special entry – Section 317 of the Criminal Procedure Act 51 of 1977

[16] We deal first with the ground relating to the special entry in terms of s 317 of the CPA. By agreement of all counsel, Mr Kauta argued this specific ground on behalf of all the appellants; but it must be mentioned that other counsel also

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<sup>4</sup> Para 159 of Agenbach's written submission

argued this ground in their respective heads of argument. However, their arguments are not dissimilar from those of Mr Kauta.

[17] At this juncture a brief genesis of this common ground of appeal is appropriate. During the trial in the court *a quo*, Mr Kauta, who appeared on behalf of his clients applied in terms of s 317 of the CPA on the basis that the prosecuting counsel engaged in activities during court adjournments which amounted to irregular conduct. The irregularities were enumerated as follows:

- (a) prosecutors consulted with witnesses during adjournments;
- (b) prosecutors suggested answers to witnesses in court;
- (c) prosecutors consulted with witnesses whilst those witnesses were still under cross-examination; and
- (d) prosecutors generally coached witnesses.

[18] The prosecutors denied that their activities amounted to unprofessional conduct. Two witnesses, both members of the defence team testified on behalf of the appellants and two members of the prosecution team testified on behalf of the State.

[19] It was common cause that during adjournments State witnesses met with prosecutors in the prosecutors' office. The court found this to be an unhealthy

situation since it provided an opportunity for an interaction between prosecutors and witnesses even during those stages when witnesses had been under cross-examination. The court *a quo* rejected the allegations that the prosecutors had consulted witnesses; those witnesses had been coached during adjournments; but noted the fact that witnesses generally incriminated far fewer accused persons during *viva voce* evidence than the number of accused persons mentioned in the witness statements. But the court pointed out that consultation or interviewing witnesses during adjournments and whilst the witness is in the process of giving evidence in chief is generally undesirable and should be discouraged.

[20] The prosecutors admitted the allegation that they showed photographs of the appellants to the witnesses while in their offices, which photos included names and numbers of the appellants but explained their conduct: they wanted to establish if witnesses were useful to the State and to refresh their minds. If a witness was unable to identify a person, they would not use that witness.

[21] The court *a quo* found that the practice of providing a photographic album to witnesses in which accused persons are identified prior to the witnesses identifying the accused persons in court tied in with the allegations that the witnesses were being coached and amounted to an 'irregular or illegal departure from those formalities, rules and principles or procedure in accordance with which the law requires a criminal trial to be initiated or conducted' and that such irregularity warranted a special entry on the record in terms of s 317 of the CPA. In the result, the court recorded the following special entry:

'The proceedings in connection with the trial in respect of the accused persons were irregular to the extent that there having been no identification parade held at any stage, witnesses, during the course of their testimonies, were required to identify accused persons in court whilst prior to such identification and during consultation with the prosecutors witnesses were expected to identify accused persons mentioned in their statements by reference to a photo album in which not only the photo of accused persons appear but also the identity of the persons so appearing on the photographs resulting in the fairness of trial being compromised'.

[22] It is significant to point out that after noting the special entry on 8 December 2005, the trial continued without a request from counsel for the trial judge to recuse himself. Subsequently, in its reasoned judgment, at paragraph 76, the court *a quo* said:

'It must be stated that this court to the extent that it may have created the impression by this quotation that it has in fact found that there was an irregularity and the effect thereof on the fairness of the trial, that such an impression is not correct. It is clear from the authorities that it is not the task of this court to determine whether there had indeed been an irregularity and therefore to decide on the merits and consequences thereof. This is the function of the court of appeal. The purpose of a special entry for the trial court is to record an irregularity which does not appear from the record of the proceedings; i.e. to state in what respect the proceedings are alleged to have been irregular or illegal. Should the court of appeal find that an irregularity had occurred, it must determine in accordance with the proviso to s 322(1) of the CPA whether or not the irregularity had caused a failure of justice.'

[23] Then, at paragraph 78 of the judgment, the court *a quo* stated:

'This court had stated the following on 11 February 2013 in the application brought in terms of s 174 of the CPA. The provisions of section 317 only introduce the irregularity. 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. In my view therefore those positive identifications of accused persons in court prior to the ruling on 8 December 2005 remain as evidence presented by the state and should be considered in this application.'

[24] It must be mentioned that Mr Kauta attacked the foregoing as a misdirection and an incorrect approach to the interpretation and application of s 317. We agree with him as we show later. Mr Kauta, however, indicated that having had the benefit of listening to the submissions of his colleagues, he was approaching the appeal differently by proceeding on three chapters: his roadmap being, chapter 1 dealing with the indictment itself and judgment; chapter 2 dealing with what he called the correct approach to s 317 of the CPA and contending that the court *a quo's* approach constituted a misdirection; and chapter 3, as his alternative argument, contending that even if the court did not agree with him on chapter 2, the appellants he himself is representing can never be convicted of murder and attempted murder. Mr Kauta then informed the court that in summary he was relying on two grounds of appeal, namely the correct approach to s 317 of the CPA and the misdirection of the court *a quo* in convicting his clients of murder and attempted murder. For now we deal with special entry only.

[25] Mr Kauta argued that the court *a quo* having noted a special entry failed to correctly assess the effect of an irregularity in terms of the common law which is to ask whether a failure of justice had resulted from the irregularity or defect. He submitted that the court was wrong to hold that the effects and consequences of a special entry are determinable by the court of appeal; contending that this was a

misdirection. Mr Kauta submitted that the case of *S v Shikunga & others*<sup>5</sup> (*Shikunga*) was the main authority on special entry.

[26] Mr Campher submitted that the court *a quo* noted the special entry but ruled that it was the Supreme Court to decide whether there was an irregularity, or the appellants suffered injustice, or such irregularity resulted in failure of justice. Counsel referred to the cases of *S v Botha*<sup>6</sup> (*Botha*) and *S v Alexander & others*<sup>7</sup>. He submitted that there was no irregularity and therefore no prejudice. He submitted that the explanation by the prosecutors was clearly that they wanted to eliminate those witnesses who were unable to identify any of the appellants. He argued that the case of *Shikunga* did not deal with special entry. He disagreed with Mr Kauta that one must read s 317 of the CPA together with the provisions of Article 12 of the Namibian Constitution (the Constitution).

[27] It is common cause that a special entry, in terms of s 317 of the CPA, was made during the course of the trial and not, as often happens, after the trial and resultant judgment. The allegation was that the prosecutors in their offices showed photographs of the appellants to the witnesses, which photographs included names and numbers of the appellants. The prosecutors admitted the allegation and explained their conduct: they wanted to establish if the witnesses were useful to the State and to refresh their minds. If a witness was unable to identify a person, they would not use that witness. It is also common cause that the State did not conduct any identification parade. It must be remembered that

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<sup>5</sup> 1997 NR 156 (SCA).

<sup>6</sup> 2006 (1) SACR 105 (SCA) at 110a.

<sup>7</sup> 1965 (2) SA 796 (A).



the State had lined up about a thousand witnesses. However, it ended up calling only 379 of them. At the commencement of the trial there were 122 accused persons. Counsel argued that the court *a quo* should not have attached any weight to the dock identification as it was tainted.

[28] On the other hand, some of the witnesses called by the State and were shown photographs, were unable to identify any appellant, which to some extent, diminished the value of showing the photographs to potential witnesses. Some of the witnesses knew the appellants from long ago; some were related to some appellants, others were brothers, sisters, cousins and/or nephews and uncles, which indicated lack of prejudice to the appellants. After noting the special entry, the court, at the stage of the application for a discharge, in terms of s 174 of the CPA, revisited the special entry relying on the authority of *Botha*<sup>8</sup> and *S v Kroon*<sup>9</sup>, by taking the view that it was not its task to make the finding of irregularity. It held that it was the task of the appeal court to determine whether or not there had been an irregularity and thereafter to decide on the merits and consequences thereof. In other words, the court reviewed its earlier ruling.<sup>10</sup> Counsel submitted that the court erred by reviewing its earlier decision. He argued that the court should have made a finding on the irregularity and further decided on the merits of the representation on this issue by counsel. Counsel contended that the court *a quo* should have found that the irregularity violated the appellants' right to a fair trial as contemplated in Article 12(1) (e) of the Constitution. Although not specifically argued by counsel, it seems to us that they would have wanted the court to

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<sup>8</sup> Op cit footnote 6.

<sup>9</sup> 1997 (1) SACR 525 (SCA) at 530b-c.

<sup>10</sup> See para 76 of the judgment *a quo*.

declare there and then that a mistrial had resulted from the acknowledged irregularity.

[29] This court accepts that an irregularity occurred when the prosecutors showed the witnesses photographs of the appellants prior to testifying in court. We, however, also accept the explanation advanced by them, that the purpose was to sift witnesses and exclude those who were unable to identify anyone to avoid wasting time with witnesses who could not assist the State's case. The explanation is reasonable and shows that the prosecutors, in showing the photographs were not actuated by malice. The complaint is that the showing of the photographs took place in secret in the absence of the defence. Whilst this complaint has some substance in that the exercise should not have been conducted behind closed doors, we however find that the nature of the irregularity is not prejudicial to the appellants. Some of the witnesses could not identify any of the accused persons in court even after they were shown the photographs. The exercise was that each witness was shown photographs of 122 accused persons, and thereafter the witness would be called into court to testify. For some witnesses, as it transpired, it was still difficult for them to remember the photographs or memorise them within such a short space of time, hence they failed to identify some of the witnesses. The situation was unlike where one photo of the accused person was shown to a witness consistently over a period of time.

[30] This court finds that the defect or irregularity did not result in an injustice or a failure of justice and therefore not fatal to the proceedings. The case against the appellants did not rest solely upon the identification evidence of the witnesses, it

was bolstered by the documentary evidence found in the possession of some of the appellants, the arms and ammunition captured, the meetings where secession was discussed and agreed upon and the arrest of some of the appellants at the scenes of the attack and the bare denials proffered in defence by some of the appellants.<sup>11</sup>

[31] We agree with counsel that the judge should have decided on the effect of the irregularity which had been drawn to his attention and accepted by him during the course of the trial or in his judgment. This is so because the irregularity arose during the trial, and like other interlocutory objections, such as admissibility of evidence, it was within the judge's power to make a ruling thereon. It was not an irregularity that became apparent after the trial or judgment, which in terms of s 317(1) can be noted as a special entry for the decision of the appeal court. Had he done so, he would have come to the same conclusion as us. The fact that he convicted the appellants in spite of the irregularity, means that he considered that it was not such as resulted in a miscarriage of justice, even though he did not say so. The essential question is whether the verdict has been tainted by such irregularity. Our substantive reason for the finding that the verdict was not tainted by the irregularity is based on the fact that not all breaches of constitutional or procedural rights have the same consequence. It all depends on the nature of the right at issue. In *Shikunga* it was held that:

‘...where the irregularity was so fundamental that it could be said that in effect there had been no trial at all, the conviction should be set aside. Where the

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<sup>11</sup> See *S v Shipanga & another* 2015 (1) NR 141 (SC) para 13 which also referred to *S v Charzen & another* 2006 (2) SACR 143 (SCA).

irregularity was of a less severe nature, then depending on the impact of the irregularity on the verdict, the conviction should either stand or an acquittal on the merits should be substituted therefor... Two equally compelling claims had to be balanced: the claim of society that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity was of a fundamental nature or where the irregularity, though less fundamental, tainted the conviction, the latter interest prevailed. Where however, the irregularity was not of a fundamental nature and did not taint the verdict, the former interest prevailed.'

[32] In *casu* accordingly, the court *a quo* did not rely on the evidence of witnesses impacted by the irregularity, the conviction of the appellants was based on other reliable evidence and facts which were common cause, therefore the trial cannot be said to have been unfair.

[33] We adopt the common law approach by accepting the two categories delineated in *Shikunga*. Being the general category and the exceptional category. In other words, we agree with Mr Kauta's submission that we should apply the general category, under which the test is whether, on the evidence and findings of credibility unaffected by the irregularity or defect, there was proof beyond reasonable doubt of the appellants' guilt. We conclude that, yes, there is such proof.

[34] We have, above, already shown that the question whether the court *a quo* misdirected itself by relying on *Botha (supra)* and concluding that the question of irregularity should be decided by the appeal court instead of itself, was a misdirection in the circumstances of the case. The court *a quo* adopted an incorrect approach. It should have decided whether or not there was an irregularity

and dealt conclusively with the nature of the irregularity or defect and also its effect. By deciding the special entry the court was not making a judgment which had a final effect, it was an interlocutory ruling which it was entitled to alter. The principle of *functus officio* was therefore not applicable.

Conspiracy, common purpose and *dolus eventualis*.

[35] We now turn to deal with the second common ground of appeal relating to convictions for the crimes of murder and attempted murder.

[36] The court *a quo*, before considering an appropriate sentence, made it clear that the appellants had been convicted of one count of high treason, nine counts of murder and 91 counts of attempted murder on the basis of conspiracy. The conspiracy was to secede the Region of Caprivi from the rest of Namibia by violent means. It did not say or found the convictions on the basis of common purpose. It then becomes necessary and important for this court to clearly delineate between the doctrine of conspiracy and that of common purpose.

[37] As far as we can ascertain, nowhere in the body of the judgment of the court *a quo* does the court refer to common purpose, save in the beginning of its judgment on conviction where certain legal principles of law are discussed in general. There is no crime named common purpose, however, in some jurisdictions there is a statutory crime named conspiracy. What must remain clear from the onset is that the word conspiracy may be used in its ordinary sense and also in its technical sense denoting a crime of conspiracy. Some people use conspiracy interchangeably with common purpose. It becomes essential to note

the context in which it is used. In *S v Banda & others*<sup>12</sup>, Friedman JA, explained the doctrine 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'.

[38] The existence of an agreement, in pursuit of a common purpose, may be proved by way of an inference from the facts and the circumstantial evidence<sup>13</sup> it was said that in the absence of proof of a prior agreement, certain prerequisites must be satisfied before a person can be said to have been affected by the doctrine of common purpose. For example, in a case of murder or assault, the person must have been present at the scene, he must have been aware of the assault, he must have intended to make common cause with the others, he must have manifested his sharing of the common purpose by himself performing some act of association and lastly he must have had the requisite *mens rea*, in this case, of murder, and he must have intended to kill and performed his own act of association with recklessness as to whether or not death was to ensue.

[39] In *casu*, the court *a quo* was dealing with a case involving conspiracy in the sense of an agreement to commit a crime of high treason, specifically the commission of an overt act with a hostile intent. It is not in dispute that meetings were held in various venues where cessation of the Caprivi Region from the rest of Namibia was discussed. The means through which this conspiracy would be

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<sup>12</sup> 1990 (3) SA 466 (B).

<sup>13</sup> See *Magmoed v Janse van Rensburg* 1993 (1) SA 67 (A) and in *S v Mgedezi* 1989 (1) SA 687 (AD).

achieved, the acquiring of weapons and the preparation of the attack on certain government installations and property, were discussed. These preparations culminated in the attack at Katima Mulilo on 2 August 1999.

[40] It is significant to note that, unlike with common purpose, where there is a plot or conspiracy between two or more persons to murder a victim, it is not necessary that every conspirator should commit an act which contributes to the death of the victim. Each one will still be liable for the death, even if he does not participate in the commission of the offence, and even if he is not present at the scene of the murder. Where the State relies on a conspiracy, it must prove beyond reasonable doubt that there was a meeting or assembly at which a decision was taken to kill the deceased, that the terms of the decision were clear, and that the accused were present at the meeting and participated in the making of the decision. Where a conspiracy has been proved, the doctrine of common purpose has no application. It is important not to equate the two phenomena.<sup>14</sup>

[41] Therefore, we agree with the findings of the court *a quo* that considering the summary of the evidence, the crime of high treason has been committed and that the appellants are the persons who assembled in meetings to discuss the cessation of the Caprivi Region from the rest of Namibia.

#### Criminal legal principles relevant to this appeal

[42] The court *a quo* convicted the appellants on high treason based on conspiracy and also on murder and attempted murder. One of the common grounds of appeal against the conviction on murder and attempted murder is that,

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<sup>14</sup> See *S v Nooroodien & another* 1998 (2) SACR 510 (NC).

there is no evidence linking the appellants with the murders and attempted murders. In other words, it is contended that they were found guilty by association without evidence connecting them to such murders. Ms Agenbach went to the extent of submitting that the conviction on murder and attempted murder was based on the doctrine of common purpose. That submission is clearly wrong and unfounded. The submissions that the appellants were convicted without evidence connecting them to the murders and attempted murders is based on what the court *a quo* said at para 1111 of the judgment *a quo* that:

‘. . . In my view, the co-conspirators, and those who became aware of the aim to secede the Caprivi Region by violent means and failed to report it to the authorities had foreseen that violence would be inevitable and that it would invariably result in the killing of human beings and associated themselves with such an eventuality.’

Thus, counsel concluding that the appellants were found guilty of murder in that they had the necessary intention in the form *dolus eventualis*. Hence, counsel concluded that the court *a quo* was wrong.

[43] It is wise to define murder at this stage, it is the unlawful and intentional killing of another person. In order to prove the guilt of an accused, the State must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*. There are principally two forms of *dolus* which arise in a murder charge: *dolus directus* and *dolus eventualis*. A person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring but nevertheless continues to act appreciating that death might well occur. It therefore consists of two parts:



foresight of the possibility of death occurring and reconciliation with that foreseen possibility. In other words, the test is a subjective one not an objective test. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent. The identity of the victim is not essential, the intent maybe in the form of the so-called '*dolus indeterminatus*', that is, killing of an indeterminate person, meaning that the perpetrator's intention is directed at an unknown person or persons.<sup>15</sup>

[44] The subjective state of mind of an accused person is an issue of fact that can often be inferred from the circumstances surrounding the infliction of the fatal injury, the inference to be properly drawn must be consistent with all the proved facts. It is thus trite that a trial court must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved. Nugent J in *S v Van der Meyden*<sup>16</sup> held that:

'The proper test is that the accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be born in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'<sup>17</sup>

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<sup>15</sup> See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA).

<sup>16</sup> 1999 (2) SA 79 (W).

<sup>17</sup> See also *S v Sigwahla* 1967 (4) SA 566 (A) at 570C-E.

[45] Mr Kavendjii for the 23<sup>rd</sup> appellant, succinctly stated in his heads of argument that:

‘A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim but he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused; and he reconciles himself to this possibility.’<sup>18</sup>

[46] By being part of the conspiracy to commit the crime of high treason, the knowledge that arms and ammunition will be procured and agreeing in the greater scheme of seceding the Caprivi Region, the knowledge of the attack on 2 August 1999, cumulatively the appellants foresaw as something that will occur. One must remember that the State of mind of the accused person is a matter of fact that can be inferred from the surrounding circumstances. We conclude that the appellants were, on the evidence as a whole properly convicted of the murders and attempted murders.

[47] We now proceed to deal with each counsel’s clients in relation to the evidence that was before the court *a quo*.

Mr Muluti’s clients (Raphael Lifumbela, John Samboma, Bennet Mutuso, and Charles Mushakwa)

[48] Mr Muluti was supposed to represent six appellants. In regard to two of them, Geoffrey Kupuzo Mwilima (‘Geoffrey Mwilima’) (26<sup>th</sup> appellant) and Osbert Mwenyi Likanyi (11<sup>th</sup> appellant) he informed the court that the former preferred to

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<sup>18</sup> Para 62.

be represented by Mr Nyoni, who had represented them before and the latter had withdrawn his appeal and, is therefore, not proceeding with it.

[49] On behalf of the 1<sup>st</sup>, 9<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> appellants (Raphael Lifumbela, John Samboma ('Samboma'), Bennet Mutuso ('Mutuso') and Charles Mushakwa ('Musakwa'), respectively) Mr *Muluti* submitted that no evidence was led by the State that appellants committed the offences of murder and attempted murder and that the court *a quo* did not, in its judgment, indicate what each appellant did in respect of those offences. He argued that there is no evidence connecting any of his clients to the murders and the attempted murders. All his clients had been convicted of high treason based on conspiracy, murder and attempted murder and had been granted leave to appeal against both convictions and sentences.

[50] The grounds of appeal advanced by the appellants against conviction were generally related to dock identification in that the court *a quo* misdirected itself in law and/or fact in respect of high treason in finding that the 1<sup>st</sup> appellant was identified by State witnesses as having been captured at Mpacha military base on 2 August 1999. Further that the court erred in two other respects – in finding that despite the fact that 1<sup>st</sup> appellant was absent during the trial when witness Fabian Libebe testified, it nonetheless accepted that Libebe's evidence of identification was uncontroverted. That the court also erred in not attaching weight to the fact that the State failed to produce photographs of the capture of the 1<sup>st</sup> appellant at Mpacha military base.

[51] The other grounds of appeal against conviction are that the court *a quo* erred in finding the 1<sup>st</sup> and 9<sup>th</sup> appellants guilty of high treason whilst predicating its

findings on State witnesses' evidence impacted by the special entry made in terms of s 317 of the CPA; it failed to invoke s 159(1) and (2) as read with s 160 of the CPA resulting in the 1<sup>st</sup> and 9<sup>th</sup> appellants not receiving a fair trial as contemplated by Article 12(1) of the Constitution; it erred and/or misdirected itself in respect of the nine counts of murder and the 91 counts of attempted murder by finding that the State had proved its case beyond a reasonable doubt and that the 1<sup>st</sup> and 9<sup>th</sup> appellants were guilty by association, without evidence being led connecting them to such murder and attempted murder or proving their association with other appellants.

[52] On the question of the absence of the 1<sup>st</sup> appellant from court, it was argued that the court *a quo* breached s 160(1) read with s 159(1) and (2) and as a result the appellant did not receive a fair trial. In this case it must be made clear that the court, at no stage, did it order the appellant to leave the court room. The appellant decided on his own accord, together with other appellants, to leave the court. It is not in dispute that the court *a quo* did warn the appellants collectively that their conduct was prejudicial to themselves and to the public interest. The behaviour of the appellant clearly made it impractical for the proceedings to continue in an orderly manner. The appellant cannot be heard to complain about his rights to a fair trial when he brought it upon himself to waive his right. Even when he returned to court, at no stage did his legal representative apply to court to recall the witnesses who identified him.

[53] Several witnesses, including Captain Haufiku and Fabian Libebe, were independent witnesses and knew the appellant long before the attack. They used

to work together for the South African Defence Force (SADF). The court *a quo* relied on their evidence as truthful when convicting him of high treason. We are unable to find any misdirection on the part of the court *a quo* in this regard and therefore confirm the conviction as proper.

[54] Against the 9<sup>th</sup> appellant, Samboma, the defence argued that the court *a quo* relied on exhibit 'F4' to convict him. Exhibit 'F4' contains the proceedings of a bail application by Aggrey Kayabu Makendano (Makendano), who confirmed that the 9<sup>th</sup> appellant was their leader and also trained them in Zambia, and that he was a member of the Caprivi Liberation Movement (CLM). The court *a quo* used exhibit 'F4' as it was handed in in terms of s 235(1) of the CPA. The court *a quo* reasoned that the purpose of s 235(1) is to make it unnecessary to call officers of the court to testify in order to prove that judicial proceedings had been correctly recorded. Reference was made to *S v Nomzaza*<sup>19</sup> in which it was held that s 235(1) merely creates a mechanism for proof of judicial proceedings and does not provide finality regarding what testimony is admissible or not. We find no substance in counsel's submissions as the State proved beyond reasonable doubt that the appellant was part of the conspiracy to secede the Caprivi Region from the rest of Namibia by violent means.

[55] The ground of appeal relating to evidence impacted by the special entry was, by agreement with all counsel, except *Ms Agenbach*, left to *Mr Kauta* to make submissions in that regard. This has been dealt with earlier in this judgment.

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<sup>19</sup> 1996 (2) SACR 14 (A).

[56] On behalf of 14<sup>th</sup> appellant, Mutuso, it was submitted that the court *a quo* convicted him on the evidence of an accomplice and also on the evidence impacted by the special entry. The court *a quo*, indeed, convicted the 14<sup>th</sup> appellant on the evidence of Oscar Mwisepi (Mwisepi) and documents found in a bag presumed to belong to 14<sup>th</sup> appellant, which bag was found at Mpacha military base, when the rebels were arrested in the morning of the attack on 2 August 1999.

[57] Mr *Muluti* contended that Mwisepi was warned as an accomplice in terms of s 204 of the CPA, therefore it was unsafe to accept his evidence without any corroboration. The State contended that Mwisepi's evidence was corroborated by documentary evidence and proved that the documents were written by the 14<sup>th</sup> appellant. The State tendered the uncontroverted expert evidence to show that it was 14<sup>th</sup> appellant's handwriting on the documents. Books and plates, with the name of the 14<sup>th</sup> appellant, found in the bag at Mpacha, was circumstantial evidence to show the 14<sup>th</sup> appellant's association with the attackers of Mpacha military base. The State further argued that the 14<sup>th</sup> appellant placed himself at the scene at Mpacha by authoring the deployment list containing places to be attacked, which places were indeed attacked.

[58] The court *a quo* concluded that the evidence presented by the State is of such a nature that it begs an explanation from the appellant. The court was satisfied that in the absence of any contradictory evidence by 14<sup>th</sup> appellant, the State succeeded to prove beyond reasonable doubt the overt acts and reasonable inference that same were committed with the necessary hostile intent. We are

unable to find any ground upon which to upset the factual findings of the court *a quo* and counsel for the defence was unable to point to reasons to persuade us otherwise.

[59] On behalf of 17<sup>th</sup> appellant, Mushakwa, it was submitted that the court *a quo* convicted him on the evidence of an accomplice without any independent evidence to corroborate same. It was submitted that the court relied on the evidence of Christopher Siboli (Siboli), Mbulunga, Mwisepi and Bernard Kanzeka (Kanzeka). The State argued that the contents of exhibit 'EGL', a diary of a deceased co-accused, contained executive statements which were admissible as evidence against the appellant.

[60] It is significant to note that the court *a quo* warned itself of the cautionary rule necessary to evidence of accomplices and the required corroboration of independent witnesses, see *Mulaudzi v S*<sup>20</sup>, where reference was made to *R v Ncanana*<sup>21</sup>. It was held that 'by corroboration is meant other evidence which supports the evidence of the accomplice and renders the evidence of the accused less probable on the question in issue'. Also significant is that the appellant *in casu*, who should have tendered his version but elected not to testify, makes the State's version uncontroverted.

[61] Mr *Muluti* proceeded to address the court on s 322(6) of the CPA read with s 19(b) of the Supreme Court Act 1990 (No 15 of 1990). He further confirmed that this Court, in a nutshell, confirmed that it is empowered by the section mentioned

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<sup>20</sup> [2016] (768/2015) ZASA (20 May 2015) paras 11 to 12.

<sup>21</sup> 1948 (4) SA 399 (A) at 405.

above to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.

[62] Counsel proceeded to address the court on his understanding of the court *a quo*'s order in respect of sentence. He submitted that in his view the effective term of imprisonment in respect of the charge of high treason is 18 years in relation to the so-called leaders of the group convicted of high treason, the effective term of imprisonment in respect of the charge of murder is also 18 years and that the sentence in respect of attempted murder is 10 years. He noted that the court *a quo* ordered that the unsuspended periods of imprisonment in respect of murder and attempted murder will run concurrently with the unsuspended period in respect of the charge of high treason – hence he submitted that effectively the so-called leaders were sentenced to 18 years.

[63] In response to a question by the court on whether the order on sentence specifies that the sentence in respect of murder is 30 years imprisonment on each count of murder which means it is 30 years multiplied by 9, as they were convicted of nine counts of murder, counsel submitted that the court *a quo* did not specify that the sentences will run consecutively. It was brought to his attention that the orders say on each count, meaning the sentence should be multiplied by the number of counts.

[64] This court's understanding is that each appellant was sentenced to 30 years imprisonment less the numbers of suspended sentences multiplied by 9 in



respect of murder as there were nine counts of murder. It is the same understanding in respect of attempted murder. That will effectively mean a term of 162 years' imprisonment for each so-called leader. The question whether 162 years is considered inappropriate, or an inordinately long period of imprisonment is a different one, which does not appear to have been raised in the sentence proceedings. Counsel appeared to concede that his understanding of the sentence may be erroneous. He remained doubtful because, as he said, the order did not state the effective term of imprisonment.

[65] Counsel also submitted that the period awaiting trial must be taken into account when considering the appropriate term of imprisonment. He was unable to refer this court to any authority which is to the effect that the appellate court must take into consideration the awaiting trial period. This court agrees that the period awaiting trial is one of the factors to be considered in the determination of an appropriate sentence. The case of *S v Gaingob*<sup>22</sup>(*Gaingob*) referred to by counsel is no authority on whether or not the court must take into consideration the period of awaiting trial. It may well be the counsel misunderstood the order in that case where the court upheld the sentence on counts 1 and 2 and then stated, as part of the order, that –

'The sentences imposed on those counts are set aside and in each case replaced with a sentence of life imprisonment on each count which is to run concurrently in respect of each appellant and is backdated to the date of sentencing, namely 8 February 2002.'

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<sup>22</sup> 2018 (1) NR 211 (SC).

[66] This clearly was not a backdating of a sentence in the sense of putting an earlier date than the actual one but a replacement or substitution of the sentence of the lower court.

[67] It was confirmed by Mr *Muluti* that no evidence was led on which it could be found appellants committed the offence of murder or attempted murder and the court *a quo* did not specify what each appellant did in respect of murder and attempted murder. Counsel referred to paragraph 43 of the court *a quo*'s judgment and submitted that it is the only instance when the court *a quo* made mention of murder and nowhere else is the word 'murder' used by the court *a quo*. Counsel concluded by asking this court to set aside the conviction on murder and attempted murder because there is no evidence connecting his clients to those offences.

[68] Mr *Muluti* then dealt with the evidence of Kanzeka who testified on 8 November 2005. He was warned in terms of s 204 of the CPA. His evidence was impacted by the special entry. He submitted that the court *a quo* did not rely on any evidence *aliunde* except that of accomplices. Lastly, he referred to his heads of argument and exhibit 'F4', the bail application of Makendano, an appellant in this appeal, and submitted that the court *a quo* erred in relying on exhibit 'F4' as corroboration against 9<sup>th</sup> appellant. He submitted that the evidence of Makendano was hearsay.

[69] Mr *Campher* opposed the appeal of 1<sup>st</sup>, 9<sup>th</sup>, 14<sup>th</sup>, and 17<sup>th</sup> appellants. He referred to the common cause facts and argued that the court *a quo* had excluded

evidence which could have strengthened the State case, such exhibit 'EGK'. He later abandoned this line of argument as it was counter - productive to the respondent's case and accordingly abandoned a portion of his heads of argument.

[70] He submitted that the conviction of the appellants was based on common purpose and conspiracy and referred, *inter alia*, to *S v Safatsa & others*<sup>23</sup>. He dealt with the applicable principles and case law on common purpose. He pertinently submitted that there was an agreement amongst the appellants to commit acts of high treason.

[71] He dealt with the question raised by Mr *Muluti* that the 9<sup>th</sup> appellant Samboma did not have an opportunity to cross examine Makendano during his bail application. He submitted that the evidence of Makendano cannot be used against Samboma as a stand - alone but the court may refer to it as part of the record. He proceeded to deal with the witness Siboli who testified that Samboma donated money for the acquisition of weapons from UNITA. He countered Mr *Muluti's* contention that a court cannot convict on the evidence of an accomplice. Mr *Campher* argued that a court may convict on the evidence of a single witness and that nothing prohibits the acceptance of an accomplice's evidence. He submitted that it is trite law to accept the evidence of a single competent witness – and that the mere say-so of Mr *Muluti* does not change the trite law. He went on and submitted that diaries of other appellants were legitimately referred to and that the authors thereof never expected those diaries to be used as evidence in court. He submitted that exhibit 'ETC' referred to documents relating to the struggle for

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<sup>23</sup> 1988 (1) SA 868 (A).

liberation and that those statements were classified as executive statements. The exhibit had been admitted as uncontested evidence. He referred this court to paragraphs 940 – 963 of the judgment of the court *a quo*. He argued that eight witnesses altogether testified against these appellants of which four of them were independent witnesses. He made an example of Beauty Munyanda, a niece of Samboma who saw Samboma with others carrying weapons on their way to Namibia a few days before the 2 August 1999, the day of the attack. He contended that there was adequate evidence to convict Samboma. He argued that sufficient corroboration could be found from the independent witnesses together with the uncontested exhibit 'EGF8', diary of Stephan Malimi, who subsequently died, and exhibit 'EGF7' were accepted in the absence of the appellants, in particular Samboma. He argued that the absent appellants had themselves to blame for being absent without the court's permission.

[72] Mr *Campher* submitted that 14<sup>th</sup> appellant Mutuso was properly convicted even if the evidence of Mwisepi were to be excluded – there was other acceptable evidence. He referred to paragraph 899 of the judgment of the court *a quo* that he was identified in court, that he was part of a group who wanted to secede, that documents found at Mpacha Military Base were proved to have been in his handwriting and the flag of the UDP was found in the bag together with plates with Mutuso's name and exhibit 'Q', material found in the bag e.g. mortar shells and other weapons. The question as to who brought the bag was irrelevant in his opinion. He argued that the common cause facts were evidence *aliunde* and an admission of high treason even though there was no admission of their complicity. The items found in the bag were admitted as evidence as well as the deployment

list that was found in the bag indicating which names of persons and places to be attacked. He submitted that appellant Mutuso implicated himself by authoring the documents and that he was not arrested at Mpacha Military Base is irrelevant as he placed himself at the scene.

[73] Mr *Campher* proceeded to deal with 17<sup>th</sup> appellant Mushakwa and referred to paragraph 917 of the judgment of the court *a quo*. He submitted that Mwisepi identified him as one who went to Zambia although he was arrested on 18 June 1999. He dealt with the evidence of witness Siboli and argued that he was a credible witness. Witness Mbulunga identified Mushakwa in court and exhibit 'EGL' implicated Mushakwa, even though the author died. Witness Kanzeka identified Mushakwa as one who attended the meeting where secession was discussed. Mushakwa was known to him as a teacher. Mr *Campher* referred to paragraph 923 of the judgment of the court *a quo* in this regard.

[74] Mr *Muluti*, in reply, brought to the attention of the court that the court *a quo* did not admit the bail application of Mushakwa and did not refer to it and that the State did not cross-appeal against the conviction. Mr *Muluti* further submitted that admission of the diaries of deceased persons offends the right to a fair trial in terms of Article 12 of the Constitution. He referred to the case of *Mulaudzi v S (supra)* at paragraphs 10 - 12 dealing with the evidence of accomplices. He argued that in convicting appellant Samboma, the court *a quo* relied on three of the accomplices referred to at p 53 of his heads of argument. He submitted that exhibit 'EGF' 8 is the diary of a co-accused and an accomplice. We find that the conviction was in order as there is sufficient credible evidence beyond reasonable

doubt that these appellants were party to various meetings where secession with hostile intent was discussed and agreed upon. On the basis of conspiracy, the court *a quo* was correct to convict them of high treason, murder and attempted murder based on *dolus eventualis*. They should have known in fact they knew that people may be injured and even killed while executing their plan to secede the Caprivi Region. Alternatively, they had knowledge of the unlawful attack but failed to alert the authorities. They would be equally guilty.

Mr Neves' Clients (Moses Chicho Kayoka, Richard Libano Misuha, Adour Mutalife Chika and Kingsley Mwiya Musheba)

[75] Mr Neves represented the 6<sup>th</sup> appellant, Moses Chicho Kayoka, 7<sup>th</sup> appellant, Richard Libano Misuha ('Misuha'), the 24<sup>th</sup> appellant, Adour Mutalife Chika ('Adour Chika') and 25<sup>th</sup> appellant, Kingsley Mwiya Musheba ('Musheba').

[76] On behalf of the 6<sup>th</sup> appellant, counsel submitted that the court *a quo* misdirected itself and/or erred in disregarding the importance and/or effect of the special entry made in terms of s 317 of the CPA. He submitted further that there is no admissible evidence that connects the appellant to the attacks on 2 August 1999, and there is no evidence that places the appellant in the group of 92 men who crossed the border to Botswana with arms of war.

[77] In the court *a quo* witness Masule, the so-called witch-doctor, identified the appellant as one of the rebels he treated before the attack on 2 August 1999, including the 9<sup>th</sup> and 14<sup>th</sup> appellants. Witness Simbulu was a passenger in a vehicle which when it came next to a bush, the driver whistled and out came the

6<sup>th</sup> and 9<sup>th</sup> appellants from the bush and joined in the said vehicle. This witness identified the 6<sup>th</sup> appellant in court. Munyika, a member of the Namibian Defence Force (NDF), saw the 6<sup>th</sup> appellant in possession of an automatic rifle (AK47).

[78] The court *a quo* found that what is not in dispute is the fact of arrest of the appellant and that he was in possession of an AK47. The court concluded that this evidence stands uncontroverted because at no stage was it submitted that the witness was untruthful.

[79] On the question of disregarding the importance of the special entry, this court has dealt with it collectively at an earlier stage in this judgment, as all appellants have taken issue with it as a ground of appeal.

[80] In conclusion, the court *a quo* found that the appellant elected not to testify on his behalf, therefore the court was satisfied that there is proof beyond reasonable doubt that the appellant committed overt acts and had the required hostile intent. It is trite that the onus to prove beyond reasonable doubt rests on the State and not on the accused person. However, the court may convict if there is uncontroverted, credible and admissible evidence before it. We are not persuaded why we should interfere with the findings of the court *a quo*. Therefore, the conviction stands.

[81] On behalf of the appellant, Misuha, counsel advanced the ground that there is no evidence that the appellant conspired with others to secede the Caprivi Region from the rest of Namibia. Counsel further submitted that the court *a quo*

erred and/or misdirected itself in finding that the State proved beyond reasonable doubt that the appellant is guilty of the nine murders and attempted murders. The witness, Ziezo, testified that he attended a meeting at Masada where Muyongo asked those who attended the meeting, and wanted to follow him to raise their hands and Misuha raised his hand in agreement. Another witness Sikochi identified the appellant in court as one of those who attended at Makanga, though he was unarmed. The witness Kaine also confirmed he saw the appellant at Makanga holding a firearm and added that the appellant was his cousin. Various witnesses corroborated each other on his presence at Makanga where final preparations were made for the attack on Katima Mulilo the next day.

[82] Mr Neves in this Court conceded that in an attack there will be consequences that the killing of persons and damage of property may ensue. Counsel also submitted that if high treason is proved, the murder and attempted murder would be the consequence of the attack. He further submitted that the court *a quo* should not have convicted his clients of murder and attempted murder separately – however he argued that the killing would be an aggravating factor in the high treason charge. The State on the other hand submitted that the appellant did not testify in his defence in the face of serious allegations against him.

[83] The court *a quo* found that there was direct evidence implicating the appellant in the offence of high treason. The court was satisfied that the State had succeeded in discharging its onus of proving beyond reasonable doubt the commission of the offences. We find that there is no reason to interfere with the findings of the court *a quo* and confirm the conviction.



[84] In respect of the 24<sup>th</sup> appellant, Adour Chika, he was mainly convicted on the evidence of two witnesses, John Libuku ('Libuku') and George Sizuka ('Sizuka'). The court *a quo* also accepted the evidence of Mwisepi who identified the appellant as someone he met in Botswana. Sizuka testified that he was in Botswana in November 1998 and returned to his village Gungwe in Namibia. While in his village, the appellant in the company of Rodwell Sihela arrived. They asked him and his brother Libuku to accompany them to Gweze to look for piece jobs. Sizuka refused the offer. On the second occasion, the two above mentioned persons came and asked him to join their friends so that they cut Caprivi Region, he again refused. He further testified that on 2 August 1999, he heard a gun battle and the police came and arrested the appellant and Sihela. Prior to their arrest he had seen them looking dirty and appeared frightened, their clothes were soiled with dirt and had something around their necks. Sizuka knew Sihela as his cousin. He, Sizuka identified the appellant in court as accused no 2 and Sihela as accused no 30, although the next day he could not identify the appellant, it appeared he had changed his looks by cutting his hair and wore glasses. The defence denied that the appellant was arrested on 2 August 1999.

[85] The witness Libuku testified that his village was Gunkwe, some 15 km from Katima Mulilo. He admitted that he was in Botswana having been recruited by Crispin Mandiole, and that in Botswana he trained militarily. When he went to Botswana in the vehicle he boarded, Sihela, his cousin was also in the same vehicle. Libuku returned to Caprivi Region in July 1999, and the appellant, in the company of Sihela, came to the village and asked him and Sizuka to go to town in

order to prepare militarily for a fight in order to get Caprivi (their nation). The request to join militarily was made twice.

[86] On 2 August 1999, he saw the appellant and Sihela, they appeared soiled with dirt and saw a black thing around their necks. They said they had gone to fight at the police station and that the fight did not last long as they were few. He testified that a few days later, the two appellants were arrested in the village. The State did not dispute that they were arrested on 10 August 1999. These two witnesses corroborated each other on all material facts. There is no reason to doubt or reject their evidence.

[87] Against this evidence the appellant testified in his defence. He admitted being in Botswana having left illegally in November 1998 for educational purposes and returned to Namibia in July 1999. He denied the evidence of the policeman that he had a haircut and wore glasses to avoid being identified. He further testified that as from 31 July 1999 he was at his sister's place. On 8 August 1999 he went to his aunt's place and on 9 August 1999 he was at Gunkwe and arrested on 10 August 1999. The court *a quo* found that the evidence of Libuku was never controverted and accepted it as the truth.

[88] Mr Neves argued that Sizuka was not telling the truth as he testified that the events referred to took place in 2002 when the appellant had been in prison for almost three years. The appellant denied that Sizuka was known to him.

[89] The court found that the vein of the discussions with the appellant and Sihela in the presence of Libuku and Sizuka corroborated the two witnesses. The evidence of the appellant on the purpose of his going to Botswana was found to be unlikely especially that he was evasive and argumentative. Having considered the evidence in totality, and the poor quality of the appellant's evidence, the court concluded that the appellant participated in the conspiracy with a hostile intent with the aim to secede the Caprivi Region from the rest of Namibia by violent means or, at the very least, had knowledge thereof and failed to report to the relevant authorities. There are no reasons to upset the verdict of the court *a quo*. Therefore, the conviction stands.

[90] The 25<sup>th</sup> Appellant, Musheba's conviction was based on the evidence of Captain Haufiku, a member of the Namibian Defence Force (NDF), Corporal Libebe and Major Johnny Shapaka both independent witnesses. Captain Haufiku is the one who captured 'four' of the 'enemies' and interrogated them. The appellant was one of them and he identified himself. Some material including a military bag were confiscated from the captured rebels, a list of names, an AK 47 rifle, a 60mm mortar. Libebe also acted as an interpreter from Lozi language to English. The witness Kennedy Teyeho testified that the appellant attended a meeting in Kahenda in 1998 where secession was discussed. Another witness Mambo testified that he was together with the appellant driving from Makanga to Mpacha military base on 1 August 1999, although he was unable to identify him in court. It is significant to note that Haufiku and Shipaka's evidence that appellant was arrested at Mpacha military base and not at Cowboy compound was not disputed under cross-examination.

[91] During his testimony, the appellant testified that he was arrested in Cowboy compound on 2 August 1999. He denied having been arrested in Mpacha military base. He alleged that he was assaulted and denied having been in Dukwe and attending any political meeting. Under cross-examination it transpired that he instructed the Legal Assistance Centre (LAC) to pursue a civil action against the Minister of Home Affairs and others for unlawful assault and unlawful arrest. What is significant is that he alleges having been arrested on 2 August 1999 at BP Service station in Katima Mulilo and no longer at Cowboy compound and denied his signature on one of the affidavits. In a letter of demand, he alleges that on 2 August 1999 he was arrested at his home in Kayenda village, a clear contradiction. The court concluded that he was lying to avoid the fact that indeed he was arrested at Mpacha military base. He pleaded not guilty without disclosing his *alibi*: he only raised it when he was giving his evidence in chief. It is said that proof of a false *alibi* affects the credibility of an accused person.<sup>24</sup>

[92] The appellant admitted that photograph 32 exhibit 'Q' taken at Mpacha which depicted him as the person arrested at Mpacha on 2 August 1999. This evidence was never disputed. On the other hand, he denied knowing a person by the name Musheba. The court *a quo* rejected his version that he was arrested at Cowboy compound. The court was satisfied that there is proof beyond reasonable doubt that the appellant was one of the persons arrested at Mpacha military base on 2 August 1999, that an overt act was proved and that the only reasonable inference to be drawn is that he had the necessary hostile intent. We are

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<sup>24</sup> See *R v Clerghorn* 1995 3 S.C.R and *S v Thebus & another* 2003 (6) SA 505 (CC).

convinced that the State succeeded to prove beyond reasonable doubt that the crime of high treason based on conspiracy, murder and attempted murder were committed based on *dolus eventualis*. Alternatively, the appellants had knowledge of the unlawful attack and secession of the Caprivi Region from the rest of Namibia by violent means and failed to report to the relevant authorities.

Mr Nyoni's client (Geoffrey Kupuzo Mwilima)

[93] Mr Nyoni on behalf of the 26<sup>th</sup> appellant Geoffrey Kupuzo Mwilima addressed the court on the conviction and sentence. In his grounds of appeal against conviction filed on 16 May 2016, he did not enumerate the grounds but stated them broadly. Firstly, he said the court *a quo* attached more weight to the evidence of dock identification before the special entry was entered. Secondly, that the appellant's right to appear before an independent and impartial court as enshrined in Article 12(1) of the Constitution was violated. Thirdly, that the court *a quo* misdirected itself in convicting the appellant of murder and attempted murder when there was no evidence linking him to the said offences. Fourthly, that the court *a quo* paid insufficient regard or none at all when considering an appropriate sentence, and that the State, through its agents, inflicted terrible bodily pain and injury to the appellant, by fracturing his lower jaw, among other injuries.

[94] Counsel, when addressing this Court, in his heads of argument then added new grounds of appeal without formerly amending his original grounds of appeal. He subsequently applied for condonation and amendment of his grounds of appeal, which application was granted unopposed. He added that the court *a quo* misdirected itself by hearing two bail applications by the appellant during the trial.

Although both were refused, the judge proceeded with the trial too. He submitted that the appellant did not receive justice as the court carried with it an unconscious bias in the trial. In the second bail application, which was opposed, the appellant was thoroughly cross-examined during which the merits of the offences charged were extensively dealt with. He argued that the conviction and sentence should be set aside solely based on this ground. He contended that the judge by hearing the bail application and continuing to hear the trial as well became privy to information which could subconsciously prejudice the appellant. He contended that the judge's conduct denied the appellant a fair trial as contemplated in Article 12(1) of the Constitution.<sup>25</sup> It was held in *Bruinders* that, in such circumstances the presiding judge should ordinarily recuse himself/herself to avoid a challenge to the proceedings later, as *in casu*, on the basis of reasonable apprehension of bias. In the *Dzukuda* the Constitutional Court in South Africa reminded us that 'at the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done.'

[95] Mr Nyoni submitted that his client did not appear before an independent and impartial court, therefore his right to a fair trial was once more violated. He referred to *Smyth v Ursher*<sup>26</sup> and contended that the court should have stopped the proceedings after noting the special entry as the impartiality of the court was lost. It must be noted that neither of the defence counsel applied for the recusal of the presiding judge, after the noting of the special entry. And also after the judge head the bail application and continued to hear the trial as well.

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<sup>25</sup> See *S v Bruinders* 2012 (1) SACR 25 (WCC). See also *S v Dzukuda & others*; *S v Tshilo* 200 (2) SACR 443 (CC), 2000 (4) SA 1078.

<sup>26</sup> 1998 (2) BCLR 170 at 174F-J.

[96] He argued that there was no single piece of evidence linking his clients to the murder and attempted murder charges. He submitted that the court *a quo* misdirected itself in convicting the appellant of murder and attempted murder. He further contended that the court *a quo* paid insufficient consideration or none at all when considering an appropriate sentence and that the State, through its agents inflicted bodily pain and injury upon his client.

[97] The next issue was whether or not the search by the police of the appellant's house was lawful. He argued that the police had no warrant of search and that the appellant's wife did not consent to the search. Certain documents were found in the house, which the appellant denied having seen before, though he admitted some which were found in a khaki envelope, which documents were not incriminating at all. He contended that his client was convicted on evidence of accomplices without any independent corroboration thereof. The appellant is alleged to have been the leader of the secessionists, a member of the UDP, which later formed the CLA, with the purpose to secede the Caprivi Region from the rest of Namibia by violent means. The evidence shows that he recruited people to go to Botswana for military training. It is common cause that he was a prominent person and a member of parliament. It was alleged that he was a close confidant of Mishake Muyongo ('Muyongo'), the leader of UDP, who eventually absconded to Norway up to date.

[98] Against sentence he contended that 35 years' imprisonment would have been appropriate.

[99] Mr Campher submitted that the appellant's defence is a bare denial. He conceded that the judge presided in the bail applications as well as in the trial but did not see anything wrong as this happens all the time. He argued that bail proceedings are admissible in the subsequent trial, therefore the judge presiding in a trial will of necessity have access to the bail proceedings. He further contended that the appellant was not prejudiced more so that he was legally represented by an eminent counsel, and that no application for recusal was brought at any stage.

[100] In respect of the witness Mwisepi, Mr Campher submitted that the witness referred to the appellant as a parent which implies that he knew him long before testifying. He argued that the special entry did not impact on his evidence of identification. He contended that the search of the appellant's house was perfectly legal as provided for in s 22 of the CPA and that the appellant's wife was present and gave consent for the search to proceed, alternatively, the police believed on reasonable grounds that a further delay in obtaining a warrant would defeat the purpose of the search. He submitted that the evidence against the appellant stands on various legs and not only on the evidence of the three witnesses, Mwisepi, Matome and Mulunga, as argued by the defence. On the other hand, the appellant was declared untruthful and that he contradicted himself.

[101] Regarding the question whether or not the conviction on murder and attempted murder was justifiable, it may be so that there is no direct evidence linking the appellants to the murder and attempted murder, however the court *quo* convicted the appellants of high treason, murder and attempted murder based on conspiracy. Evidence abound, in fact it is common cause, that public and



private meetings were held where the appellants were identified as having attended those meetings and agreed to secede the Caprivi Region from the rest of Namibia by violent means. Arms and weapons of war were acquired from Angola. People were recruited to leave the Caprivi Region to go to Botswana and Zambia for military training. Indeed, on 1 August 1999, a final meeting in preparation of the attack was held in Makanga. The attack was executed and implemented as planned on the early morning of 2 August 1999. Some of the appellants were arrested at Mpacha military base where an attack took place. Those who were arrested and were part of the conspiracy to commit a crime should have foreseen and indeed foresaw that during the attack, using firearms, people would be injured and/or killed in the process. They therefore made themselves guilty of murder and attempted murder based on *dolus eventualis*. The State proved the conspiracy beyond reasonable doubt, therefore there was no need to tender evidence directly linking the individual appellants to murder and attempted murder.

[102] We now deal with the question whether or not the judge *a quo* should have recused himself after hearing the two bail applications against the 26<sup>th</sup> appellant. On the authority of *Bruinders (supra)* the judge should ordinarily have recused himself to avoid a challenge based on reasonable apprehension of bias. It is trite that each case should be judged on its merits and that the courts should protect the rights enshrined in the Constitution. Firstly, we should determine whether what happened here was an irregularity, a defect or an illegality. Secondly, we should determine whether a failure of justice had resulted from the defect, irregularity or illegality. On the authority of *Shikunga (supra)* the assumption that the breach of every constitutional right had the same consequence might be mistaken. Much

might depend on the nature of the right in question. It was held that even if it were assumed that the breach of every constitutional right had the same effect, it did not follow that in all cases the consequence should be the setting aside of the conviction. We are of the view that the fact that the judge heard the two bail applications and also presided in the trial was not of such a nature that it tainted the verdict of the court eventually. Overwhelming evidence was adduced on the preparation and implementation of the conspiracy to secede the Caprivi Region from the rest of Namibia. In *Shikunga*<sup>27</sup> it was held that two equally compelling claims had to be balanced: the claim of society that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. As we are of the view that the verdict was not tainted by the defect in the sense of it being less fundamental, we are of the view that the claim of society that a guilty person be convicted should prevail. Therefore, the conviction should stand.

Mr McNally's clients (Matheus Munali Pangula, Victor Masiye Matengu, Alfred Tawana Matengu, Berhard Maungolo Jojo and Richard Simataa Mundia)

[103] We now analyse the prosecution evidence against each of the appellants represented by Mr McNally and ascertain each appellant's involvement in the case and their respective evidence in defence. These appellants are: 12<sup>th</sup> Appellant Matheus Munali Pangula (Pangula), 13<sup>th</sup> appellant Victor Masiye Matengu (Victor Matengu), 18<sup>th</sup> appellant Alfred Tawana Matengu (Alfred Matengu), 20<sup>th</sup> appellant Berhard Maungolo Jojo (Berhard Jojo) and 22<sup>nd</sup> appellant Richard Simataa Mundia.

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<sup>27</sup> *Op cit.* footnote 4.

[104] These appellants appealed against conviction only on the murder, attempted murder and high treason charges. On 8 July 2016, Mr McNally filed a notice of appeal on behalf of all the five appellants consisting of 25 grounds of appeal against conviction of murder, attempted murder and high treason. We note that grounds numbered 1-13 are common to all the five appellants and relate to the conviction on murder and attempted murder charges, while grounds numbered 14-25 are specific and individual to each appellant, respectively and relate to the conviction on the high treason charge.

[105] Mr McNally submitted that the State failed to prove the elements of common purpose against the appellants. He argued that *ex facie* the judgment of the court, there is no basis set out upon which the court convicted his clients. In this court, while making his submissions, in a dramatic turn-around, Mr McNally informed the court that his clients will no longer contest the conviction of high treason as they accept the conviction, but contest the conviction on the murder and attempted murder charges. Later, while still making submissions, there was another twist. Counsel further informed the court that he was abandoning ground numbered 11 and grounds numbered 14-25. These were grounds challenging the conviction on the high treason charge by each of the appellants. The grounds of appeal that remained are common to all the five appellants and against only conviction on murder and attempted murder charges. Effectively, the appeal against conviction on the high treason charge was abandoned. That conviction, therefore, stands.

[106] It is now unnecessary to delve into the submissions challenging the conviction for high treason. The only issue for determination now is whether the State proved beyond reasonable doubt the five appellants' complicity in the commission of the nine murders and the 91 attempted murders.

[107] We take note that before abandoning the appeal against the conviction on the high treason charge, and before abandoning some grounds of appeal, Mr McNally made brief combined submissions which were general to all the five appellants. The gist of Mr McNally's general submissions is that while each appellant was convicted of three crimes, each crime had to be proved against each appellant. He submitted that there was no evidence that each appellant had the *mens rea* to kill each of the nine deceased persons and to commit the 91 attempted murders. He contended that the court *a quo* made sweeping statements and made no specific findings of what each appellant did in the commission of the offences.

[108] We take note, however, that the court *a quo* in considering the doctrine of conspiracy, earlier in its judgment, referred to the case of *S v Cooper & others*<sup>28</sup> where the following appears: ' . . . although the common design is the root of conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution.' To the extent that Mr McNally submitted that the court convicted the five appellants on conspiracy and not common purpose, we agree with him. We are, therefore, satisfied that the trial court was alive to the principles governing the applicability of the doctrine of conspiracy.

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<sup>28</sup> 1976 (2) 875 (TPD) at 879 E-F.

[109] To resolve the issue of *mens rea* or the complicity of each appellant in the commission of the murders and attempted murders, we must take a holistic approach of the events, the evidence, the facts and the circumstances leading to the commission of these offences. The five appellants abandoned the appeal against conviction for high treason. But the facts leading to the commission of high treason are, in our view, relevant in determining the complicity of each appellant in the commission of the murder and attempted murder charges. These murders were as a result of pursuing a conspiracy scheme to secede Caprivi from the rest of Namibia by violent means. In other words, these murders and attempts were committed in the course of committing high treason, for which those who committed the high treason must be responsible and criminally liable.

[110] Before the court *a quo* the following facts were common cause or not in serious dispute - that in 1989, a group of people from Caprivi Region, in pursuance of a conspiracy scheme to secede the Caprivi Region from Namibia, formed the CLA with stated objectives; that various public and private meetings were held in different places in the Caprivi Region between 1992 to 1998 at which secession of the Caprivi Region by either violent or diplomatic means was discussed; that Muyongo's army set up camp in October 1998 at Libyu Libyu on the eastern side of Linyanti in preparation of liberating Caprivi Region by violent means and that it killed Victor Falali after he escaped from this camp at Linyanti; that the group of 92 men fled to Botswana shortly after; the planning culminated in a meeting held at Makanga 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'. It was also

common cause that from 31 July to 1 August 1999, people gathered at Makanga in preparation for the attack; that on 2 August 1999, various government institutions in Caprivi Region were attacked with heavy mortars and artillery, amongst other equipment; that as a result of the attacks eight police officers lost their lives, the subject of the murder charges; and that unlawful and intentional attempts were made to kill the people, the subject of the attempted murder charges. We take these facts into account as evidence *aliunde* in determining each appellant's complicity in the crimes. The fact of attacks on government's institutions was common cause. In attacks, there are consequences and killing is one of them. The attacks here resulted in the death of eight people with 91 injured.

[111] In respect of the 12<sup>th</sup> appellant, Pangula, the prosecution evidence was that he was one of the persons who was looking for people to join the CLA; he donated money during a meeting in order to acquire weapons, and he attended a meeting at Muyongo's new house during 1997 at which the issue of secession was discussed and agreed upon. There was further evidence in respect of the 12<sup>th</sup> appellant of his confession in which he explained his role in transporting armed rebels to Katima Mulilo police station and the Namibia Broadcasting Corporation premises (NBC) on the evening of 1 August 1999. It was common cause that these two places were attacked.

[112] In his evidence, the 12<sup>th</sup> appellant denied attending any political meeting; he denied transporting rebels to various places of attack; that at the time of the attack he was home and never participated in the attack. He admitted making a confession in order to save himself from further beatings by Inspector Lifasi. The

appellant denied the evidence of Siboli that he attended a political meeting and stated that Siboli testified against him for money and that all state witnesses who testified were paid. The court noted that from the averments made, the appellant must have referred to the normal witness fees paid to state witnesses who testify in criminal proceedings. The appellant conceded in cross-examination that in the civil claim against the government there was no allegation that inspector John Lifasi had assaulted him.

[113] The court *a quo*, after having had regard to the totality of the evidence, rejected the several contentions of the appellant as not reasonably possibly true. The court was satisfied that the State succeeded in proving that the appellant had the necessary hostile intent, committed an overt act and committed the charges preferred against him. We find no basis of disturbing these findings and conclusions of fact.

[114] On the evidence and on the common cause facts, we are satisfied that the 12<sup>th</sup> appellant, Pangula, was one of the conspirators and part of a scheme of seceding Caprivi Region by violence. In our view, he must have foreseen the possibility that during the attacks some people would be killed or injured. Indeed, people were killed and injured. These were clearly murders with criminal intent in the form of *dolus eventualis*. The 12<sup>th</sup> appellant's appeal against conviction for murder and attempted murder is dismissed.

[115] In respect of the 13<sup>th</sup> appellant, Victor Matengu, the prosecution evidence was that he was a member of the CLA; he recruited persons for the CLA; he was a

mobilizer of persons for the secession of Caprivi Region; he donated money to acquire weapons in Angola; he attended a meeting in 1992 and was willing to go to Angola for military training and acquisition of weapons; and that he attended a meeting at the new house of Muyongo in 1997, where secession was discussed and agreed upon.

[116] In his evidence, the 13<sup>th</sup> appellant testified that he was arrested on 12 August 1999. He denied recruiting persons in Caprivi Region to flee to Botswana in order to liberate the Caprivi Region from the rest of Namibia by military means; that he was a member of the DTA; and attending DTA meetings; that he departed with a group under the command of Samboma to Angola via Singalamwe in order to get fire-arms; that he on 6 October 1998 returned to Namibia under the command of Samboma in order to establish a rebel base at Sachona. He denied being a camp leader at Dukwe or being a member of the CLA as testified by Siboli. He denied attending meetings during 1992 indicating willingness to go to Angola for military training and the acquisition of weapons, and he denied attending a meeting during 1997 at the house of Muyongo where the issue of secession was discussed.

[117] The court *a quo* accepted the evidence of Siboli that the 13<sup>th</sup> appellant was a member of the CLA and attended two meetings where secession was discussed. The court *a quo* found that the implication of this evidence is that the appellant was at the very least aware of the treasonous activities and failed to report to the authorities. It accepted that the evidence of Siboli was the only evidence directly implicating the appellant in the commission of the crime of high treason, murder



and attempted murder charges. The court *a quo* found that appellant's denial that he knew witness Siboli, was merely to disassociate himself from an admitted secessionist agenda and any complicity in secessionist activities, which was inescapable. The court found the appellant to be a poor and evasive witness and that the evidence of Siboli should not be disregarded in *toto*.

[118] The court *a quo* pointed out that there is incriminating evidence against the accused; that the defence of the accused is a bare denial, and that the court had indicated on more than one occasion that the accused is an untruthful witness. The court concluded that the denial by the appellant that the witness Siboli was unknown to him is rejected and also his evidence that he returned to the Caprivi Region on 7 July 1999. The court was satisfied that the appellant had at the very least known about the treasonous activities and failed to report same to the authorities at a time when any law abiding citizen would have done so. We find no basis to fault the trial Judge.

[119] We are satisfied that the 13<sup>th</sup> appellant, Victor Matengu, was one of the conspirators and part of a scheme of seceding Caprivi Region from Namibia by violent means. In our view, he foresaw the possibility that during the attacks some people would be killed or injured. Indeed, people were killed and injured. These were clearly murders and attempted murders with criminal intent in the form of *dolus eventualis*. The 13<sup>th</sup> appellant's conviction for the murders and attempted murders is confirmed.

[120] In respect of the 18<sup>th</sup> appellant, Alfred Matengu, the prosecution evidence was that the appellant attended a meeting at Liselo in the year, 1998 where the resuscitation of the UDP was discussed as well as the formation of an army; that the appellant was an interpreter at meetings addressed by Muyongo and that he never missed meetings convened by Muyongo. The appellant was identified in court. The appellant also attended a meeting in 1989, when the CLA was formed. He was also present when an answer was received from Angola that weapons could be provided from UNITA in Angola and that people could go there in order to receive military training. The court also accepted that the appellant donated money.

[121] In his defence, the 18<sup>th</sup> appellant testified that he was a member of the DTA and was the Vice-President. In 1996 he was employed at Local Government and Housing; that a person with a name similar to his, namely; Alfred Matengu, worked at the Government Garage. He denied attending a meeting at Liselo as testified by Mwisepi or attending meetings at the different places as testified by Siboli. He denied being an interpreter at a meeting at Linyanti in 1998 as testified by Mwisepi. He denied being present when CLA was formed in 1989 as testified and being present when an answer was received from Angola that weapons would be provided from Angola and that people would go to Angola for military training. He stated that these were stories made up by Siboli. He denied donating money and attending a meeting during 1998 at the DTA office chaired by Muyongo where the acquisition of weapons from Angola was discussed. He denied that he recruited people or being a mobiliser for the CLA.

[122] The court *a quo* rejected as false the 18<sup>th</sup> appellant evidence that he heard of the CLA for the first time in court. The court found that the accused's defence was a bare denial and that, in addition, his explanation why state witnesses testified against him was unsubstantiated and baseless.

[123] The court *a quo* found that the 18<sup>th</sup> appellant was very evasive during cross-examination. The court rejected the appellant's evidence that he did not know about the aims and objectives of the CLA. The trial judge was satisfied that the State succeeded in proving beyond reasonable doubt the charges preferred against the accused person. We cannot disturb these findings.

[124] We are satisfied that the 18<sup>th</sup> appellant, Alfred Matengu, was one of the conspirators and part of a scheme to secede Caprivi Region from Namibia by violent means. In our view, he foresaw the possibility that during the attacks some people would be killed or injured. Indeed, people were killed and injured. These were clearly murders and attempted murders with criminal intent in the form of *dolus eventualis*. The 18<sup>th</sup> appellant's conviction for the murders and attempted murders is confirmed.

[125] In respect of Bernhard Jojo, the 20<sup>th</sup> appellant, the prosecution evidence was that the appellant was a person who frequently attended Muyongo's meetings where the issue of secession was discussed. He was identified in court; he was a member of Kopano ya Tau; attended a meeting during 1991; looked for people to join the CLA; transported people to go to Botswana; was present at the new house of Muyongo in 1997, where the issue of secession was discussed; and he attended a meeting during November 1998 at the DTA office addressed by

Geoffrey Mwilima where the issue of secession was discussed and money was donated. The appellant was identified in court.

[126] In his defence, the 20<sup>th</sup> appellant testified that he was arrested on 5 August 1999, that by 12 March 2013 he was 72 years old; that he had been employed as a driver at Local Government and Housing; that he is a member of the DTA party; that he never influenced anyone to go to Botswana; that he never provided firearms to the rebels and never encouraged anyone to join the rebels in the bush, and that he never transported rebels to Botswana. He denied transporting Siboli to Lizanli. He denied recruiting Kingsley Kalunda to go to Botswana for military training. He denied seeing G3 and AK47 rifles being off-loaded at his house. He denied attending a meeting in November 1998 at the DTA office, and he denied that any DTA meetings took place in Katima Mulilo. In cross-examination, the appellant denied knowing Siboli and said that he had never met him before.

[127] The court found that the 20<sup>th</sup> appellant's defence was a bare denial; that his evidence was contradictory on material points, evasive and highly unlikely. The court rejected it as false. The court, however, found that a large number of the further particulars provided by the State were not supported by any evidence, but nevertheless still found that there was evidence beyond reasonable doubt supporting the other particulars. The court held that the State succeeded in proving the required hostile intent, alternatively, that the accused had known about the treasonous activities and failed to alert the authorities. We are unable to disturb these findings.

[128] We are satisfied that the 20<sup>th</sup> appellant was one of the conspirators and part of a scheme to secede the Caprivi Region from Namibia. In our view, he foresaw the possibility that during the attacks some people would be killed or injured. Indeed, people were killed and injured. These were clearly murders with criminal intent in the form of *dolus eventualis*. The 20<sup>th</sup> appellant's appeal against conviction for murder and attempted murder is dismissed.

[129] In respect of the 22<sup>nd</sup> appellant, Richard Simataa Mundia, the prosecution evidence was that the appellant was a person who was willing to see the region secede. He was a member of 'Kopano ya Tau' and a recruiter and transporter. He attended a meeting during 1998 at Lisikili where the issue of secession was discussed; he was one of the persons who recruited people to be taken to Angola for acquisition of weapons and military training during the year 1997; he was employed at the Ministry of Education and attended a meeting where the theft of diesel from a government facility was discussed which diesel was to be exchanged for weapons in Angola; that during 1998 the appellant arrived at Zambezi filling station with a Government order book for fuel which was filled in 6x200 litres drums, which book was signed by accused No.93.

[130] In his defence, the 22<sup>nd</sup> appellant testified that he was arrested on 26 August 1999. He was employed by the Ministry of Education as a senior driver and was a member of the DTA. He denied attending political meetings during 1997 and 1998 where it was conspired to overthrow the Government of the Republic of Namibia by violent means. He denied influencing people to go to Botswana in pursuance of a conspiracy to secede the Caprivi Region from Namibia; he denied

transporting persons to the Namibia/Botswana border in pursuance of the conspiracy; and denied donating diesel to be exchanged for firearms. He denied the evidence of Siboli that he was a member of 'Kopano ya Tau'. He denied attending a meeting in 1998 at the DTA office where there was a discussion that people should steal diesel. He denied that he had a fuel order book at Shell filling station. He denied attending a meeting at Lisikili where an agreement was reached to secede the Caprivi Region through fighting. The appellant denied the evidence of Nosco Chombo that he, the appellant had informed him that Caprivi would be cut. He stated that he did not have any knowledge of a possible attack in Caprivi or plans to violently secede the Caprivi Region and that he never recruited people to go to Botswana or to join a military force.

[131] The court *a quo* found that the evidence of Nosco Chombo that the appellant had informed him that the Caprivi Region would be cut from Namibia was never challenged during cross-examination. The court further found that the defence of the appellant was not only merely a bare denial of all incriminating evidence against him, but denied any knowledge of occurrences which were not in dispute, e.g. that there was an exodus of people to Botswana. The court found that the evidence of Nosco Chombo was never seriously challenged during cross-examination, save for the statement that the accused would deny transporting the witness to Masokotwani. The court found no reason to reject the evidence of Nosco Chombo. It found that this witness testified in fair detail what was said during their conversation, by whom, described the journey until the point where they were loaded; and testified that the appellant was not present when they crossed the river into Botswana. The court pointed out that if Nosco Chombo ever

had a reason to falsely implicate the appellant, he could have for example, exaggerated the involvement of the appellant by stating that the appellant himself assisted them to cross the river. The court found the evidence of witness Chombo satisfactory in all material respects.

[132] The court approached the evidence of witness Siboli that the appellant was a member of Kopano ya Tau with caution in view of the appellant's evidence that he was not in the army. However, the court found the appellant to have been a poor witness, who was on a number of occasions during cross-examination unable to explain contradictions, ascribed anomalies to either typing errors or to interpreters not translating what he had said; admitted indirectly to dishonest conduct and all times gave nonsensical answers. The court noted that the appellant had no reasonable explanation for incriminating evidence; and that his ignorance of the attempted secession was gainsaid by a statement of co-conspirators and co-accused to the effect that he participated in that attempt. The court concluded that the 22<sup>nd</sup> appellant's evidence could not be reasonably possibly true and rejected it as false and that at the very least the appellant knew about the attempted secession and failed to inform the authorities about it. We find no basis to fault the trial Judge on these findings.

[133] We are satisfied that the 22<sup>nd</sup> appellant was one of the conspirators and part of a scheme to secede the Caprivi Region from Namibia. In our view, he foresaw the possibility that during the attacks some people would be killed or injured. Indeed, people were killed and injured. These were clearly murders and attempted murders with criminal intent in the form of *dolus eventualis*. The 22<sup>nd</sup>

appellant's appeal against conviction for murder and attempted murder is dismissed.

Mr Kavendjii's client (Aggrey Kayabu Makendano)

[134] The 23<sup>rd</sup> appellant, Makendano, appealed only against conviction on one count of high treason, nine counts of murder and 91 counts of attempted murder.

[135] On 16 June 2021, Mr Kavendjii filed an amended notice of appeal amplifying the four principal grounds. In this Court, counsel started his submissions by sounding a word of caution that high treason is a serious and unique crime; that this was a very protracted trial which lasted more than ten years where the appellants were waiting trial for more than 15 years; that the record of proceedings is more than 45 000 pages; that a number of interlocutory rulings were made, and that the whole task of adjudicating the trial was on the shoulders of one judge with no assessors; that mistakes may have been made; and that they should be rectified. That the appellant applied for leave to appeal five years ago.

[136] Mr Kavendjii lamented the fact that the respondent failed to specifically deal with his client's grounds of appeal and that he took that failure as a concession and that the case for the appellant was unassailable and must carry the day. He explained that his heads of argument from pages 1-4 were a repetition of the grounds and that he was to deal with those grounds except for the ground on special entry to be dealt with by Mr Kauta. These grounds of appeal against conviction advanced by the appellant attack the trial judge's analysis of the prosecution evidence.



[137] In respect of the conviction on the high treason charge, the complaint was that the learned judge misdirected himself, alternatively erred in law and/or facts when he convicted the 23<sup>rd</sup> appellant of high treason in that in his analysis of the evidence, whilst acknowledging that the evidence of the State through the three witnesses leaves much to be desired and that those testimonies must be approached with caution, nonetheless he went ahead and convicted the 23<sup>rd</sup> appellant on the basis of exhibit 'F4', and on the 23<sup>rd</sup> appellant's various addresses in court; that the court *a quo* failed to appreciate and take into account that exhibit 'F4' was ruled to be inadmissible in respect of certain accused persons, alternatively the court *a quo* failed to warn and/or assist the 23<sup>rd</sup> appellant as an unrepresented accused person about the consequences pertaining to the inadmissibility of exhibit 'F4'.

[138] Further that the learned judge misdirected himself, alternatively, erred in law and/or in fact when he convicted the 23<sup>rd</sup> appellant on nine counts of murder and 91 counts of attempted murder; and in concluding that the case against the 23<sup>rd</sup> appellant had been proved beyond a reasonable doubt on the basis of *dolus eventualis* when there was not an iota of evidence presented by the State that the 23<sup>rd</sup> appellant was present during the commission of these offences or associated himself with the actual perpetrators; and in failing to appreciate that the State failed to adduce evidence that the 23<sup>rd</sup> appellant attended any meetings where conspiracy to secede the Caprivi Region was hatched or discussed and misapplied the elements of *mens rea* and *actus reus*.

[139] The other grounds of appeal against conviction are that the learned judge misdirected himself by making adverse inferences against the 23<sup>rd</sup> appellant

because he elected to remain silent and failing to indicate the evidence supporting the conclusion that the 23<sup>rd</sup> appellant had a case to answer, alternatively failed to indicate the circumstantial evidence indicating that the appellant had a case to answer without regard to two cardinal rules of logic propounded in the case of *R v Blom*;<sup>29</sup> namely: ‘ . . .that all inference sought to be drawn must be consistent with all proved facts: if it is not, the inference cannot be drawn’; second rule being that ‘ . . . proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. . .’ If these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[140] Counsel argued that the State simply regurgitated what the court *a quo* found in its judgment. Counsel submitted that his case hinges on identification of accused persons and that identification without putting a face to a name is no identification at all. Mr Kavendjii submitted that his case was grounded on the evidence of three witnesses, namely; Sikochi, Liatabula and Siboli; that it is clear from the judgment of the court *a quo* that there were other witnesses who testified against the appellant 23, though some of the witnesses’ testimony was disregarded and excluded for various reasons i.e., that they were assaulted by the police and that some witnesses failed to identify the appellant in court.

[141] Counsel pointed out that in paragraph 1006 of the judgment of the court *a quo*, the judge mentioned that the evidence of the three witnesses had much to be desired and that their testimony must be treated with caution and their testimonies considered in view of what is explained in exhibit ‘F4’, being the evidence of

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<sup>29</sup> 1939 AD 288 at 202 – 203.

appellant 23 during his bail application in the lower court; and that the court also considered that the appellant elected not to testify and that the court was of the view that the evidence against him required an answer.

[142] Mr Kavendjii contended that if exhibit 'F4' collapses there is no evidence to convict appellant 23; submitting that the court *a quo* misapplied the doctrine of conspiracy and that of common purpose and contending that the State failed to prove high treason arising from conspiracy.

[143] Mr Campher on the other hand, submitted that exhibit 'F4' was properly handed in terms of s 235 of the CPA. He pointed out that appellant was properly represented at his bail application and that exhibit 'F4' was evidence against him and it was admitted without objection. Further, counsel contended that the three witnesses' evidence was treated with caution but never discredited or excluded. Mr Campher pointed out that appellant was the spokesperson of the other 31 accused persons to the effect that they would withdraw their respect for the court and would boycott the hearings. He handed up the appellant's two letters to court, one addressed to the President of Namibia and the other to the Chief Justice, protesting the jurisdiction of a Namibian court and advocating that they are Caprivians and not Namibians.

[144] Mr Campher argued that the evidence of the appellant's utterances in court established his state of mind. He submitted that the court *a quo* accepted the evidence of the three witnesses, the evidence of exhibit 'F4' and the evidence of utterances in court. He submitted that the conviction can stand on the evidence of the three witnesses alone. Mr Kavendjii had nothing in reply.

[145] We take note that in the court *a quo*, the prosecution adduced evidence against the 23<sup>rd</sup> appellant from about ten witnesses. But the court agreed with the submission of Mr Kavendjii that from all the witnesses called by the State, the court needed only to consider the evidence of three witnesses, namely Walter Sikochi, Lovemore Liatabula and Siboli. This the court did with caution.

[146] Witness Sikochi testified that he was at Makanga bush on the evening prior to the attack where he saw the appellant and saw him again the next day. Liatabula in his evidence identified the appellant in court as the person who was near the police station that evening together with other individuals and that the appellant was armed. He subsequently heard gunshots coming from the direction of the police station. Siboli testified that in 1991, the appellant attended a meeting of EX-SWATF/Kopana ya Tau where secession was discussed and he supported it. This witness identified appellant in court. The evidence of other witnesses was rejected. That of these three was not rejected.

[147] The court noted that the addresses by the appellant in court that Caprivi Region is not part of Namibia; that they are not part of the trial; and that they should not be called to cross-examine witnesses, were said by the appellant as a spokesperson on behalf of the previously undefended accused persons. That what was said by the appellant must be seen in context, the underlying fact being the attack on Katima Mulilo on 2 August 1999 as a consequence of a political agenda of UDP and in particular its leader at that stage, Muyongo.

[148] The court also noted that appellant testified in his bail application that he went to Botswana in order to achieve his ultimate aim, namely, the attainment of the independence of Caprivi Region.

[149] While the court agreed with Mr Kavendjii that the evidence of the three witnesses left much to be desired and that those testimonies must be approached with caution, the court went further to say that their testimonies must be considered in view of what is contained in exhibit 'F4'. Exhibit 'F4' was bail application proceedings in which the appellant was a party. In our view, although the bail proceedings were ruled inadmissible in respect of some other accused persons, they were properly admitted against the appellant, who was legally represented and a party during those proceedings.

[150] The court found that there was uncontroverted evidence that accused 54 was the leader of a group of men referred to as the group of 92 and a member of CLA; that appellant referred to accused 54 as his leader in his bail application. The court asked itself the question: In what respect was he led by accused 54? After pointing out that the appellant elected not to testify, the learned judge held:

'I am of the view that the evidence against the accused required an answer from him. I 'am further satisfied that the State had succeeded to prove the commission of the offences set out hereunder beyond reasonable doubt.'

In our view, this was within two cardinal rules of logic propounded in the *Blom* case.

[151] We are satisfied that after a critical analysis of the prosecution evidence, the court *a quo* relied on the evidence of three witnesses, the contents of exhibit 'F4', and the evidence of the utterances of the appellant in court, when convicting him of high treason, murder and attempted murder. We cannot fault him.

[152] We must emphasize that to convict the appellant for murder and attempted murder on the basis of *dolus eventualis* the appellant needed not have been present at the scene during the commission of the offences or be associated with the actual perpetrators in regard all the elements of the *actus reus*. There was here ample evidence from Liatabula, who identified the appellant and who saw the appellant around or near the police station during the evening of the attack. There was also evidence from Sikochi who testified seeing appellant at Makanga bush on the evening prior to the attack. There is further evidence of Siboli that the appellant attended a meeting where secession was discussed and he supported it. Above all, there was evidence by way of exhibit 'F4', bail application proceedings in which the appellant was a party. During these proceedings, the appellant was legally represented. In those proceedings, the appellant testified that he went to Botswana in order to achieve his ultimate aim, namely the attainment of the independence of the Caprivi Region; that as a member of the CLA he was prepared to make his own contribution through the 'barrel of the gun'. It was his testimony in the bail proceedings that he left Dukwe refugee camp and crossed illegally into Zambia as a member of the CLA. In Zambia, he and others received training from a co-accused, Samboma.

[153] The court *a quo* approached the evidence of the three prosecution witnesses with caution and considered it in view of what was contained in exhibit 'F4'. We are of the view that the court *a quo* did not make an adverse finding against the appellant for exercising his right to remain silent. The conviction was based on the totality of the evidence and the common cause facts before the court. We are, therefore, satisfied that the 23<sup>rd</sup> appellant, Makendano, was one of the conspirators and part of a scheme of seceding Caprivi Region by violence. In our view, he foresaw the possibility that during the attacks some people would be killed or injured. Indeed, people were killed and injured. These were clearly murders with criminal intent in the form of *dolus eventualis*. We are unable to disturb the conviction for high treason, murder and attempted murder. We confirm the conviction.

Mr Kauta's Clients (Bollen Mwilima Mwilima, Siyata Alfred Lupalezwi, Mainga Charles Nyambe and Mathew Muyandulwa Sasele)

[154] Mr Kauta represented the 27<sup>th</sup> appellant, Bollen Mwilima Mwilima ('Bollen Mwilima'), 28<sup>th</sup> appellant, Siyata Alfred Lupalezwi ('Siyata'), 29<sup>th</sup> appellant, Mainga Charles Nyambe ('Nyambe') and 30<sup>th</sup> appellant, Mathew Muyandulwa Sasele ('Sasele').

[155] These appellants were all convicted in the court *a quo* on one count of high treason, nine counts of murder and 91 counts of attempted murder. They all appealed only against conviction.

[156] On 5 July 2016, Mr Kauta filed a notice of appeal on their behalf consisting of fourteen grounds of appeal. On 10 June 2021, counsel advised this Court that the grounds of appeal earlier filed remain unchanged. These consist of general grounds covering all the appellants and specific grounds relating to each of the appellants. We must mention here that Mr. Kauta, representing all the four appellants informed the court that appellant no 28, Siyata, had been released and therefore his appeal is abandoned.

[157] The general grounds are that the judge *a quo* erred in convicting the appellants on the nine counts of murder on the basis that they 'became aware of the aim to secede the Caprivi Region by violent means and failed to report to the authorities when they had foreseen that violence would be inevitable that it would invariably result in the killing of human beings and associated themselves with such an eventuality'; that on the 5<sup>th</sup> count involving the death of Victor Falali when the evidence showed that the killing was 'on the spur of the moment' by those in the group of 92 who soon thereafter fled to Botswana; and there was no evidence that the appellants were part of the group of 92 or that they made common cause with the killing of the deceased in that count; that on the other 8 counts of murder and all the counts of attempted murder, there was no evidence that the appellants were at any meeting which resolved that the secession would be carried out by violent means and when the court did not assess the degree of complicity, if any, of each appellant as shown by the absence in the judgment of any finding that the appellants attended any meeting at which it was resolved to secede by violent means or any finding that the appellants joined in or were complicit in a conspiracy to kill or attempt to kill any victim.



[158] Further general grounds are that the trial judge erred in that, after accepting that the appellants were not present at the commission of the murders and attempted murders, he found, nonetheless, that they were guilty of the offences on the basis of *dolus eventualis* when the conspiracy alleged and charged by the State was not at all proved, and in the absence of any evidence indicating what act each of the appellants did in pursuance of common purpose to kill or attempt to kill each of the victims. The judge failed to state whether his finding of guilty 'was based on the doctrine of common purpose or on the strength of a conspiracy to which each of the appellant was a participant' and erred by likening the *animus hostilis* essential to withstand a conviction on a charge of high treason with *mens rea* required to withstand a conviction on a charge of murder and attempted murder.

[159] The specific grounds are that the court *a quo* erred in convicting the appellants on the count of high treason:

- (a) In respect of the 27<sup>th</sup> appellant; Bollen Mwilima in finding that he had the requisite hostile intent or had known about the treasonous activities and failed to alert the authorities, and relying on exhibit 'EGL1', 'EFG7', and 'EGO2' to convict him when those exhibits were not put to him in cross-examination as well as in deciding that the 'Exhibits were executive and not narrative statements'; in rejecting, on probabilities, as not being reasonably possibly true, appellant's version as to why he went to Botswana when he, the judge, had accepted the evidence of a co-accused who travelled with

him to Dukwe Refugee Camp, Gabriel Mwilima, which rendered inconsistent with available evidence the inference that the appellant went to Dukwe in order 'to relay information and assistance to refugees from Caprivi' and also rendered it not the only inference to be drawn from the accepted facts; and in accepting the uncorroborated evidence of a single accomplice witness and only paying lip service to the need to warn himself as required by law.

(b) In respect of the 29<sup>th</sup> appellant, Nyambe, that the court erred in finding that he supported the idea of secession, had knowledge about the impending attack by the CLA and failed to inform the authorities; in failing to warn itself of the contradictions in the evidence of the single witness, Richard Mbala, which it accepted; in relying on the meeting of 15<sup>th</sup> March 1999, despite two material contradictions relating to absence of reference to it in the witness statements and the content thereof; and generally, inferring hostile intent from the evidence in the record.

(c) In relation to the 30<sup>th</sup> appellant, Sasele, that the court erred in finding him guilty of high treason on the evidence of Mwisepi, Siboli and Kanzeka which it held was not challenged in cross-examination: the court had found Kanzeka to be unreliable and that the evidence of Mwisepi and Siboli was uncorroborated single witness evidence and in doing so, the court failed to appreciate that there is no legal duty on an accused person to prove his innocence.

[160] Before making his submissions, Mr Kauta informed the court that having had the benefit of listening to the submissions of his colleagues, who submitted before him, he was approaching the appeal of his clients differently. He indicated that his roadmap was to proceed on the basis of dividing his submissions into three chapters, namely: Chapter 1, dealing with the indictment and judgment itself; Chapter 2 dealing with the correct approach to section 317 of the CPA; and Chapter 3 being his alternative argument, pointing out that if the court agreed with him on chapter 2, the appellants he is representing can never be convicted of murder and attempted murder. We have already disposed of the common ground based on s 317 of the CPA. Our conclusion applies here as well.

[161] Mr Kauta pointed out that despite narrowing the issue, it was important to understand the high treason charge. He outlined the elements of a high treason charge to include overt acts, unlawfully committed, by a person owing allegiance, *majestas* and with a hostile intent. He contended that conspiracy or common purpose are not elements of high treason, but that regrettably the court *a quo* used these doctrines interchangeably. He submitted that there is no offence in law called conspiracy or attempted high treason and that if one relies on common purpose then an accused person must be placed at the scene of the offence. He submitted that the appellants can only be found guilty on the basis of conspiracy to secede using violence. He contended that the appellants were not involved in the decision to kill Falali.

[162] Counsel referred to volume 1 page 7 of the indictment; alerting the court that he had requested for further particulars, which were furnished by the State.

That the further particulars had the effect of amending the alleged overt acts in relation to his clients in terms of s 86 of the CPA. He referred to volume 2, page 133 in respect of the 27<sup>th</sup> appellant, to page 163 in respect of the 29<sup>th</sup> appellant, and to page 176 in respect of the 30<sup>th</sup> appellant.

[163] Mr Kauta submitted that the State failed to prove the further particulars. Counsel then submitted that in summary, he relied on two grounds of appeal, namely, the special entry and the misdirection of the court in convicting his clients of murder and attempted murder. As already indicated the common ground based on special entry has been dealt with. Here, we shall only deal with the ground relating to alleged misdirection of the court *a quo* in convicting Mr Kauta's clients of murder and attempted murder.

[164] We have taken note here that despite Mr Kauta having informed the court earlier that the grounds of appeal filed on 5 July 2016 remained unchanged, the summarised grounds of appeal in our opinion amounted to an amendment of the grounds filed earlier.

[165] Mr Kauta submitted in respect of the 27<sup>th</sup> appellant that the only allegations against him were that he provided food to the co-conspirators; that he attended a meeting and that he assisted people to flee to Botswana. He contended that his clients were never placed at any meeting and therefore could not be convicted of murder or attempted murder. Counsel pointed out that the State used a deceased person's diary to prove high treason, the same being a diary by someone who was not charged as well as a diary of one of the appellants, Thaddeus Ndala (Ndala). He submitted that no evidence was led to connect the 27<sup>th</sup> appellant with the offences charged. Counsel pointed out that the court *a quo* found the 27<sup>th</sup>

appellant to have been part of the conspiracy to secede on the basis of Mwisepi's evidence and that the three exhibits corroborated Mwisepi's evidence and yet there was no evidence linking the 27<sup>th</sup> appellant to those documents. Counsel submitted that this court should approach the evidence of Mwisepi on the basis of *Shikunga* case as it is only Mwisepi who identified the 27<sup>th</sup> appellant. Mr Kauta argued that in the case of the 27<sup>th</sup> appellant, the irregularity in identification caused a failure of justice because the court relied on Mwisepi's evidence without a proper assessment of it.

[166] Mr Kauta submitted that if the identification evidence by Mwisepi is taken out and a correct approach followed, there is no evidence to convict the 27<sup>th</sup> appellant.

[167] Mr Kauta submitted in respect of 29<sup>th</sup> appellant, that the court *a quo* inferred his guilt. After referring to paragraph 238, and paragraphs 198-199 of the court *a quo*'s judgment, counsel pointed out that the court *a quo* relied on the testimony of Mwisepi for identification of the appellant and that he was a '*supporter of the issue*'; further that the court relied on the testimony of Siboli in relation to the identification of the appellant having attended two meetings in 1991, as an ex-SWATF member, where the issue of secession was raised and that a movement called 'Kopano ya Tau' was on standby to secede and fight at any time using firearms.

[168] Mr Kauta submitted that there was no evidence corroborating the evidence of Richard Mbala, Regina Sinvula or Raymond Sezuni. Counsel contended that a finding based on the evidence of witness Mbala was not proof beyond reasonable

doubt because Mbala was not warned and he was a single witness and an accomplice, yet the court inferred a hostile intention from his evidence.

[169] In respect of the 30<sup>th</sup> appellant, Mr Kauta referred to paragraph 5.9.4 of his heads of argument and page 32 of his heads, paragraph 62 and paragraph 312 of the judgment of the court and paragraphs 302-314 of the same judgment. He submitted that the court *a quo* based its findings on the evidence of Mwisepi, Siboli and Kanzeka. He pointed out that Siboli testified to so many meetings but the court made no finding. He submitted that although the evidence of the three witnesses was not rejected, the same was impacted by the special entry.

[170] Turning to chapter 3 of his roadmap, the alternative argument, Mr Kauta informed the court that he joined Mr McNally on all fours in relation to the conviction for murder and attempted murder counts; that there is no evidence of participation by the appellants and that the trial court ended wrongly by convicting the appellants without making a finding of fact on *dolus eventualis*. Counsel concluded by submitting that the court *a quo* made no findings on murder and attempted murder; that the appellants knew of the impending attack and that they knew in 1999 of the murder in count 5 which had already taken place by the time of their arrest. Mr Kauta contended that, apart from foreseeability, there is nothing else connecting the 29<sup>th</sup> appellant to the murders and that knowledge of high treason alone cannot be the basis for conviction on murder charges unless there is something more.

[171] It is significant to observe at this stage that much of Mr Kauta's submissions put a lot of emphasis on the impact of the special entry on the

prosecution evidence relating to identification. In discussing the common ground based on special entry, we have accepted that an irregularity occurred. We have also accepted the explanation advanced by the prosecution. We have indicated that the explanation was reasonable and without malice. But we have, however, found that the nature of the irregularity was not prejudicial to the appellants. We have further found that the defect or irregularity did not result in an injustice and that therefore not fatal to the proceedings since the case against the appellants did not rest solely upon the identification evidence of the prosecution witnesses. We have further found that *in casu* the verdict was not tainted by the irregularity. It follows that all of Mr Kauta's submissions based on the impact of the irregularity on the prosecution evidence are, in our opinion, untenable. It follows that our findings on the common grounds based on special entry apply to all the appellants in this appeal. There was an irregularity; but for the reasons already set out earlier in this judgment, the appellants did not suffer any prejudice and the irregularity did not result in a failure of justice.

[172] Mr Campher, on the other hand, in responding to the submissions of Mr Kauta, argued that witness Kanzeka identified the appellant after the special entry was made, and that not all the witnesses were able to identify the appellants. In response to the question by the court whether the actions of the appellants constituted high treason, counsel submitted that the State alleged a conspiracy, where various meetings were held, where secession was discussed, and the acquiring of arms from Angola, CLA to be established, UNITA to be approached and that the attendees supported the move to secede the Caprivi Region. Mr Campher pointed out that the court *a quo* applied both the doctrine of common purpose and conspiracy.

[173] On the question of whether Mr Kauta's clients can be convicted of murder and attempted murder, Mr Campher submitted that any act can be an overt act and contended that murder and attempted murder can be stand-alone crimes. He submitted that murder and attempted murder must have been foreseen to result from the attack.

[174] In dealing with Mr Kauta's summarised ground two on misdirection of the court *a quo* in convicting Mr Kauta's clients of murder and attempted murder, Mr Campher referred to paragraph 43 of the judgment and submitted that the trial judge was saying that murder and attempted murder are not overt acts of high treason, but must stand as charges on their own. Mr Kauta in reply to Mr Campher's submissions argued that there was no answer to his submissions on chapter one and that if the court accepts the facts on which the appellants were convicted on amended charges as overt acts, then the conviction of high treason, murder and attempted murder are not sustainable in law. He contended that in respect of appellant no. 27 the particulars alleged against him were not proved and Mwisepe's evidence did not point to any of the amended particulars; that as for appellant no. 29, the court made no finding that fitted into the amended particulars and that as for appellant no. 30, there were no findings that supported the particulars alleged.

[175] Mr Kauta concluded his reply by pointing out that the case for the State against his clients was based on the doctrine of conspiracy, but that on the facts as accepted, the court *a quo* failed to show conspiracy against his clients as the State was required to prove the particulars alleged.



[176] Earlier in this judgment, we have indicated that the court *a quo*, before considering an appropriate sentence, made it clear that the appellants had been convicted of one count of high treason, nine counts of murder and 91 counts of attempted murder on the basis of conspiracy. The conspiracy was to secede the Region of Caprivi from the rest of Namibia by violent means. It did not say that the convictions were on the basis of common purpose. As far as we can ascertain, nowhere in the body of the judgment of the court *a quo* does the court refer to common purpose, save in the beginning of its judgment on conviction where certain legal principles of law are discussed in general. We do not agree with the submission of Mr Campher that the court *a quo* applied both the doctrine of common purpose and conspiracy.

[177] The issue for determination here is whether the State proved beyond reasonable doubt the three appellants' complicity in the commission of one count of high treason, nine counts of murder and 91 counts of attempted murder. Mr Kauta argued that if the court did not agree with his submissions relating to the misdirection on special entry, then his clients cannot be convicted of murder and attempted murder. As explained *supra*, we do not agree with Mr Kauta's submissions on special entry as we have found that the irregularity or defect did not result in an injustice and therefore not fatal to the proceedings. Further we have found that the case against the appellants did not rest solely upon the identification evidence of the witnesses and that *in casu* the verdict has not been tainted by the irregularity.

[178] We have already alluded in this judgment to the common cause facts. Some of these facts, at the expense of repeating ourselves, but for purpose of emphasis, are 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 a group of people from Caprivi Region, in pursuance of a conspiracy scheme to secede the Caprivi Region from the rest of Namibia, formed the CLA in 1989 with stated objectives; that this army killed Victor Falali after he escaped from the camp, the subject of the murder charge in count 5. It was common cause that on 2 August 1999, various government institutions in Caprivi Region were attacked with heavy mortar and artillery. In these attacks, eight police officers were killed, the subject of the murder charges; and that unlawful and intentional attempts were made to kill 91 people, the subject of the attempted murder charges.

[179] The prosecution adduced evidence against the 27<sup>th</sup> appellant from a number of witnesses. Some of the witnesses testified to being related to him in one way or another. Others testified to knowing him as a teacher at some school; while others testified of playing football with him. There were those witnesses who identified or pointed him out in court, but others failed to identify him therein.

[180] Witness Mwisepi, a cousin to the appellant, testified that the appellant discussed the issue of secession everywhere he was; he offered his vehicle Reg No. N. 807 KM to transport Muyongo to Botswana; that Thaddeus Ndala brought food to Sachona Rebel camp using the appellant's motor vehicle. The witness

further testified that he had a conversation regarding the secession of Caprivi Region with the appellant.

[181] Witness Siboli testified that the appellant (pointing him out in court) was one of the mobilizers for the CLA and that he was a teacher during 1992. The witness also testified that the appellant was among those who donated money for the purchase of weapons.

[182] Witness Miti Ndana testified that during October 1998 he was persuaded by one Thaddeus Muzamali to become part of the group of '92'. He had been approached twice. On the second visit he came with a motor vehicle Toyota Hilux registration No. 1313 KM belonging to Oscar Puteho. They left together with others for Ngwezi in Katima Mulilo. From there they drove to Sachona in the bush where they found a group of men. They spent a night. Next morning Ndala brought food to the group using appellant's vehicle. It was at Sachona where the witness learnt of the mission of the group, namely, to secede the Caprivi Region from Namibia as explained by the 'overseer', Samboma. The witness observed a number of firearms. Here they were trained to use firearms. Subsequently, the group moved to Libyu-Libyu. It was at Libyu-Libyu where some members of the group escaped after a buffalo stampede. One of the escapees, Victor Falali, was shot dead.

[183] The witness testified that he knew the appellant as a teacher at Machita and used to play football together. He identified him in court. The group of 92 were members of the CLA under the leadership of Muyongo. In cross-examination the

witness testified that he subsequently remembered the Reg. No. of appellant's vehicle, a white 2.4 Hilux bakkie, No. N 807 KM.

[184] Witness Kanzeka testified of attending two meetings during the year 1998 at the DTA office in Katima Mulilo. The first took place in November, convened and addressed by Geoffrey Mwilima. This was a secret meeting. The topic for discussion was the secession of Caprivi Region by 'way of fighting' and that weapons had to be procured from Angola and those attending this meeting were informed by Geoffrey Mwilima that they had to go to Botswana to undergo training in order to liberate the Caprivi Region. The appellant was among the people who attended this meeting. According to this witness he knew the appellant as a teacher at Kwena and drove a white Toyota Hilux 1800 with registration No N 804 KM. The witness testified further that he attended a second meeting during December 1998. The appellant was among the persons who attended. The topic of discussion at the meeting was the secession of the Caprivi Region from the rest of Namibia. Muyongo addressed the meeting stating that people had to go to Botswana in order to get military training on how to fight in order to liberate the Caprivi Region. The witness identified the appellant in court and other people he mentioned in his evidence. This witness persisted in cross-examination that the registration number of the appellant's vehicle was N 804 KM. He also persisted that appellant taught at Kwena School and not Masida School.

[185] Witness Roger Silangwe Kepa testified that during the year 1999, he was approached by three individuals. The appellant was the first individual to approach him to go to Singalamwe where there were others, already. He testified that he

was threatened by the appellant to the effect that he (i.e Kepa) had gone to Dukwe, and should he refuse to go to Singalamwe, he would be the first one to be killed because he was one of those spreading information that those who were in Dukwe were suffering. This witness also testified that the appellant informed him that the group in the bush at Singalamwe was preparing 'to cut Caprivi' by fighting. In cross-examination, this witness testified that this appellant was his cousin.

[186] Witness Ignatius Buchane Buchane testified that on 27 January 1999, while at his home, he was approached by the appellant who informed him of people fleeing to Botswana. He testified that the appellant encouraged him to go to Botswana for education or to join the army. The witness explained that he knew the appellant as he was his teacher during the year 1995 at Masida. The witness said he refused the request. But on 28 January 1999 appellant returned and repeated the request. He told the appellant that he was still thinking about it. On 1 February 1999 the appellant returned again. This time the witness agreed to go in order to liberate the Caprivi Region. They arranged to leave on 3 February 1999. The appellant transported him (the witness) and his sister to a place called Mwambezi, at a small river and gave them instructions to go to the Khuta at Sadan. The appellant informed them that at Sadan people would take them to Kasane. At Sadan they met a group of 22 individuals from Linyanti. Eventually, they arrived at Dukwe Refugee Camp.

[187] Witness Hendrik Naftali Shamukau testified that during January 1999, he met Bollen Mwilima in a shopping centre in Katima Mulilo. Bollen Mwilima was a teacher at Masida from Masokwotani area. Bollen Mwilima informed him that he should go to Botswana to get employment where others were. He agreed. Bollen

Mwilima took him with others with a Hilux registration N 807 KM to Botswana Border on 4 January 1999. This witness failed to identify the appellant in court.

[188] The appellant testified that prior to his arrest he was employed as a teacher at Machita Combined School from 1995. From 1992 until 1994 he studied at the University of Namibia, Windhoek. He denied that during 1992 he had been a mobilizer and recruiter of persons to join a group to secede Caprivi Region from Namibia by violence. He denied that he donated money during 1992 to be used to acquire weapons. He testified knowing witness Mwisepi as a 'fourth cousin' but denied having discussed with him any issue of secession. He denied ever visiting Dukwe refugee camp but explained that when he returned from a holiday, he passed via Francis Town and Dukwe; that pedestrians crossed the road in front of them and he asked the driver of the motor vehicle, Mr Gabriel Mwilima, to reduce speed, a vehicle of Botswana Police was next to the road. According to the appellant, people flocked to their vehicle when they stopped because from the registration number of their vehicle, the people recognised they originated from Katima Mulilo. A police officer then approached them and asked who gave them permission to speak to the people. The appellant testified that they were then taken by the police for questioning inside what he assumed to be Dukwe refugee camp. After questioning they were taken to a town called Nata where they were released and they returned home.

[189] The appellant testified knowing Kanzeka. He denied attending a meeting addressed by Geoffrey Mwilima during November 1998 at the DTA office in Katima Mulilo. He testified that he was not a member of any political party; that

Geoffrey Mwilima is his uncle; and Muyongo is his father's cousin. He further testified that he came to know Kanzeka as a petrol attendant at Zambezi Shell Services Station. He confirmed owning a motor vehicle, a bakkie, registration number N 807 KM. He denied teaching in Katima Mulilo.

[190] The appellant also denied attending a meeting during December 1998 addressed by Muyongo at the DTA offices. He denied availing his motor vehicle to transport Muyongo to Botswana. He confirmed knowing Ndala, who had a furniture shop in Katima Mulilo and recalled that Ndala once borrowed his vehicle to transport furniture which he (Ndala) had bought.

[191] The appellant denied knowing state witnesses Roger Kepa, Ignatius Buchani and Innocent Maholo. He testified of being arrested on 4 August 1999 in Katima Mulilo by chief Inspector Goraseb in the company of Sergeant Evans Simasiku but was not informed of the reason for his arrest but only informed at a later stage. The appellant further testified that his instruction to his counsel was that he had never given his vehicle to Ndala to take food to Sachona Rebel base. He explained that if there was documentary evidence which showed that he was a member of the UDP, such documents would be 'faked ones'. He testified that he did not know when Muyongo fled to Botswana; that he was never involved in transporting Muyongo to any place; that he did not know why Muyongo left Caprivi Region and when he left.

[192] The appellant was asked during cross-examination for his comment if there is documentary evidence indicating that he was involved when Muyongo left for Botswana, his reply was that there 'is no such documentary . . . '.

[193] At this stage it is appropriate to put these documents in their proper context. These documents are: exhibit 'EGL1', a diary of Moses Limbo Mushwena, accused no. 14, who had during the year 2007 passed away. This diary reflects an inscription on 27 October 1998 to the effect that the previous night Victor Falali was shot and killed at Linyanti; that a Mr Puteho came to inform them about it and that they decided to inform Muyongo that 'time has come we should flee the country.' Bollen Mwilima is mentioned as one of the people in the group of persons who went to Muyongo to convey this information to him. The other document is exhibit 'EFG7', a cashbook of one Overs Ndala, a co-conspirator, that, at p 58, reflects that Bollen Mwilima was a member of the UDP and owner of a white Hilux motor vehicle with registration number N 807 KM and that this vehicle was borrowed from Bollen Mwilima by one Kwala Branson to transport Muyongo and other UDP members as well as members of the CLA to Botswana, Branson Kwala was accused no. 99 in the trial.

[194] During cross-examination, the appellant testified that Branson Kwala was married to his aunt and that Kwala had borrowed his vehicle on 27/28 October 1998. The appellant denied as fact, that his vehicle had been used to transport Muyongo to Botswana, stating that he only became aware that Muyongo had left Namibia when it was announced over the radio that he had left and joined 'the 92' in Botswana.

[195] In his reasoned judgment, the trial judge found that the 27<sup>th</sup> appellant's evidence that before 2 August 1999, he did not know about a movement afoot in Caprivi Region to secede the region from the rest of Namibia was in direct conflict



with the documentary evidence on which he was invited to comment but only said there 'is no such evidence.' The court noted that in exhibit 'EGL1', a diary of accused 14, since deceased, there is an inscription on 27 October to the effect that the previous night Victor Falali was shot and killed at Linyanti; that this information had to be conveyed to Muyongo to warn him to leave the country; that the appellant was one of the group to inform Muyongo and his vehicle was used for this purpose.

[196] The trial court found that the appellant's defence was a bare denial. We agree with this finding. The 27<sup>th</sup> appellant explained that the witnesses who implicated him, whom he mentioned as Mwisepi, Ndana Miti, Kanzeka and Siboli had done so only because he was known to them. We find this to be an unsatisfactory explanation for witnesses who are related to come and implicate a relative in such serious offences on the basis of knowing him, and some on the basis of playing football with him or that he was a teacher at some schools. We find no merit or substance in his explanation.

[197] The learned judge pointed out that he was alive to the basic principles relating to the evidence of accomplice witness. To demonstrate this, he referred to the case of *S v Masuku and another*<sup>30</sup> in which, at p 376, Leon J, set out the ten basic principles which we quote here as cited extensively by the trial judge as follows:

'Caution in dealing with the evidence of an accomplice is imperative . . . (2) an accomplice is a witness with a possible motive to tell lies about an innocent accused; for example, to shield some other person, or to obtain immunity for

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<sup>30</sup> 1969 (2) SA 375 (NPD).

himself. (3) Corroboration, not implicating the accused but merely in regard to details of the crime, not implicating the accused, is not conclusive of the truthfulness of the accomplice. The very fact of his being an accomplice enables him to furnish the court with details of the crime which is apt to give the court the impression that he is in all respects a satisfactory witness, or, as had been described "to convince the unwary that his lies are the truth." (4) Accordingly, to satisfy the cautionary rule, if corroboration is sought it must be corroboration directly implicating the accused in the commission of the offence. (5) Such corroboration may, however, be found in the evidence of an accomplice provided that the latter is a reliable witness. (6) Where there is no such corroboration, there must be some other assurance that the evidence of the accomplice is reliable. (7) That assurance may be found where the accused is a lying witness or where he does not give evidence. (8) The risk of false incrimination will also, I think, be reduced in a proper case where the accomplice is a friend of the accused. (9) In the absence of any of the aforementioned features it is competent for a court to convict on the evidence of an accomplice only where the court understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is only permissible where the merits of the accomplice as a witness, and the demerits of the accused as a witness are beyond question. (10) Where the corroboration of an accomplice is offered by the evidence of another accomplice, the latter remains an accomplice and the court is not relieved of its duty to examine his evidence with caution. He, like the other accomplice still has a possible motive to tell lies. He, like the accomplice, because he is an accomplice, is in a position to furnish the court with details of the crime which is apt to give the court, if unwary, the impression that he is a satisfactory witness in all respects.'

[198] The learned judge was also alive to the fact that the State had provided approximately fifteen allegations in the further particulars on the basis of which the 27<sup>th</sup> appellant was alleged to have committed the crime of high treason. He accepted that there was no evidence supporting some of those further particulars. But, correctly so in our view, posed the question; whether in such an instance (i.e. failure to prove some further particulars) a court should acquit an accused person,

in spite of evidence supporting other further particulars? The court found that one of the further particulars provided was that appellant no 27 was a supporter of the CLA. The court further found that the documentary evidence (exhibits 'EGL' and 'EGF') which constituted executive statements supported the allegation and in turn negatively reflected upon the credibility of the appellant when he denied knowledge of such evidence. The court answered the question posed in the negative. We find no basis to disturb this finding.

[199] The trial judge properly, in our view, rejected appellant no. 27's evidence on the basis of Mwisepi's evidence as corroborated by documentary evidence and in view of the untruthfulness of the evidence of the appellant in respect of the purpose of his visit to Dukwe and his evidence distancing himself from any support given in an effort to secede Caprivi Region from the rest of Namibia.

[200] We note that the court accepted that the 27<sup>th</sup> appellant was not confronted with the exhibits 'EGL' and 'EGF', but we also note that he was referred to documentary evidence containing certain information, thus given the opportunity to respond thereto. However, his response was that such documents would be 'faked ones' as there 'is no such documentary.'

[201] We are satisfied that the State proved beyond reasonable doubt that the crime of high treason based on conspiracy, murder and attempted murder based on *dolus eventualis* were committed. And alternatively, the appellant no. 27, from the common cause facts, had knowledge of the unlawful attack and the secession

of the Caprivi Region from the rest of Namibia by violent means and failed to report to the relevant authorities. The appeal fails.

[202] In respect of the 29<sup>th</sup> appellant, prosecution witness Mwisepi identified the appellant as a 'supporter of the issue' and the appellant as one who used to make phone calls from public phone booths while at Dukwe refugee Camp. The court *a quo* observed that it was not clear from the record on what basis and how the appellant supported the issue. The court, however, noted that the evidence that the appellant was a supporter was not disputed during cross-examination. The court accepted this evidence.

[203] Witness Siboli testified that during 1991 there was a second meeting which involved the committee 'Kopano ya Tau', a DTA special intelligence committee. Appellant no 29 was pointed out by the witness as one of those who attended the meeting where the idea of seceding Caprivi Region was discussed.

[204] Witness 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 29<sup>th</sup> appellant was identified as being one of the attendees.

[205] Witness Richard Mbala testified that he had been employed as a casual worker at Teleshop Katima Mulilo and the appellant had been his supervisor. The witness testified that on 15 March 1999, appellant asked him whether he supported the idea of seceding the Caprivi Region from Namibia. He replied that he did not support the idea. The witness further testified that during June 1999 in

the corridor at Telecom building, the appellant asked him the reasons why the Subia speaking people do not support the secessionist idea.

[206] The witness also testified that the appellant told him that the people of Caprivi must stand together and secede the Caprivi Region from the rest of Namibia and form their own government. He told the appellant that he could not be part of the idea. The witness testified of a second incident during June 1999, this time outside Telecom building, when the appellant asked him whether he was aware of an agreement signed in 1964 in Lusaka between former President Sam Nujoma and Muyongo at a meeting chaired by former President Kaunda of Zambia. He told him that he did not know about such agreement. The witness further testified that he was informed by the appellant that they were going to attack the government in order to secede Caprivi Region from the rest of Namibia. The witness identified appellant in court.

[207] During cross-examination, the witness maintained that he was a contract worker for six months at Telecom; that his late brother Thaddeus Mbala also worked at Telecom. This witness was at the time of his testimony in court employed as a police officer by the Namibian Police Force from 15 February 2001. He explained that after the attack in August 1999, he had a conversation with a police officer concerning the conversation he had had with the appellant.

[208] Witness Regina Sinvula testified being employed at Telecom Katima Mulilo during 1998 to 1999; that she worked with Thaddeus Mbala and the appellant. She confirmed that Richard Mbala worked at Telecom as temporary employee for six months. She further testified that the appellant used to receive a number of visitors

regularly. The court noted that the evidence of Regina Sinvula and exhibit 'EUE2L', a testimonial in respect of witness Mbala corroborated witness Mbala that he had been employed at Teleshop.

[209] The 29<sup>th</sup> Appellant testified in defence that he was employed by Telecom Namibia since 30 March 1991. He denied knowing witness Mbala. He denied that witness Mbala worked at Teleshop. He also denied ever having a conversation with Richard Mbala. He further denied attending any meeting with the purpose of forming the CLA. He denied knowing witness Siboli or Mwisepi. And he denied being in Dukwe as a refugee. The appellant further testified that on 1 August 1999 he had been asked to build a school teacher's house. He was arrested on 4 August 1999 and taken to a room where police officers Patrick Liswani, Aupa and Haupa were. He testified that he was badly assaulted by Patrick Liswani. He was not told why he had been arrested. Liswani never spoke about the issue of secession. The first time he heard that he was facing a charge of high treason was on 21 August 1999. He denied recruiting any one to join the CLA.

[210] During cross-examination the 29<sup>th</sup> appellant testified that Richard Mbala testified against him in order to get a post in the Police Force; that he (appellant) did not know Richard Mbala; that he heard about the Caprivi issue of seceding in 1998 when it was announced over the radio, Namibian Broadcasting Corporation (NBC) and in the newspaper, *New Era*, that 92 people had crossed into Botswana and that they wanted to secede the Caprivi Region. He testified that he was a member of 'Kopano ya tau; that he had known Muyongo as the President of the DTA and that he attended a meeting during 1989 addressed by 'Mr Muyongo and Mr Sam Nujoma. He denied that he at any stage informed anybody of some

'interaction' between Muyongo and former President Nujoma. He also testified that he had a good relationship with Kanzeka and denied that he attended any meeting as testified by Kanzeka. The 29<sup>th</sup> appellant also denied that he had testified that he had attended a meeting addressed by both Muyongo and former President Nujoma. The court noted this as a contradiction. The 29<sup>th</sup> appellant further testified that he only came to know prosecution witness Siboli in court and that he did not know prosecution witness Mwisepi.

[211] The court *a quo* found that the 29<sup>th</sup> appellant was a very evasive witness during cross-examination; that the witness Regina Sinvula was an independent witness and found no reason to disregard her evidence. The trial judge rejected the 29<sup>th</sup> appellant's denial that witness Richard Mbala was employed for the period mentioned on the ground of the appellant's contradictions in his testimony and his evasiveness during cross-examination. The court found as a fact that the appellant had the opportunity to speak to witness Richard Mbala and that he indeed had a conversation with the witness. The court was satisfied that this supported the contention that the appellant actively supported the idea of seceding the Caprivi Region and that the 29<sup>th</sup> appellant had known about an impending attack by the CLA in order to achieve this goal and did not inform the authorities about it. We find no basis to disturb these findings of fact. The appeal is dismissed.

[212] In respect of appellant no. 30, Sasele, witness Siboli testified that the appellant attended a meeting in 1997 at the house of Muyongo where the donation of money and firearms were discussed and that all those present were in favour of obtaining firearms. The witness explained that the CLA and 'Kopano ya Tau' were

one and the same army, a 'hidden private army'. The witness further testified that the 30<sup>th</sup> appellant recruited people to join the CLA. He identified the 30<sup>th</sup> appellant in court as being a member of the CLA and that he himself, the witness, also joined the CLA.

[213] Witness Kanzeka testified that the 30<sup>th</sup> appellant attended a meeting during November 1998 addressed by Geoffrey Mwilima in which the secession of the Caprivi Region by violent means was discussed. He also testified that the 30<sup>th</sup> appellant and Geoffrey Mwilima said at this meeting that those individuals who had transport should assist to transport people to Botswana. The witness identified 30<sup>th</sup> appellant in court.

[214] Witness Mwisepi testified that the 30<sup>th</sup> appellant used to receive persons who had returned from Botswana and that he supported the idea of seceding the Caprivi Region and offered to transport people to Botswana. The court noted that the evidence of reception of persons from Botswana appeared to be based on 'rumours' and held the evidence inadmissible. The witness identified the appellant in court.

[215] The evidence of witness Innocent Falali Maholo related to the appellants presence at the inauguration of the New Chief of the Mafwe Tribe and that appellant was part of the group who had opposed the inauguration.

[216] The 30<sup>th</sup> appellant testified that he was arrested on 5 August 1999 at his house; that at that stage he was unemployed; that he was discharged from the Police Force on 8 April 1999; he was previously employed at Katima Mulilo Police Station since 1990 and prior to this he had been employed by SWATF. He further



testified that he did not know Mwisepi; did not promise to transport persons to Botswana; was suspended on 28 August 1999 before he was discharged; knows Kanzeka as a petrol attendant at Zambezi Shell Filling Station and Geoffrey Mwilima as a distant cousin; that he did not attend a meeting at DTA during November 1998 addressed by Geoffrey Mwilima and that he knows Innocent Maholo since they live in the same area. In cross-examination, the 30<sup>th</sup> appellant testified that he could not dispute that meetings of 'Kopano ya Tau' were held; that he came to know of the secession movement during 1998 when 92 persons went to Botswana; that he did not belong to any political party or supported the DTA but stopped when he joined the Police Force in 1990. When the appellant was asked in cross-examination why witness Siboli and Mwisepi would implicate him in the crime of high treason, he simply replied 'Fabrications'. He further testified that he is not in support of seceding the Caprivi Region.

[217] The learned judge found that the evidence of witnesses Mwisepi, Siboli and Kanzeka in respect of the involvement of the 30<sup>th</sup> appellant in the secession movement was never challenged or disputed during cross-examination and that the cross-examination focussed on efforts to discredit the witnesses. The trial Judge noted that even though the evidence of state witnesses was not above criticism, the evidence of these witnesses in respect of the appellant's involvement in the secession movement stood uncontroverted.

[218] This means, subject to the courts observation, the evidence of these witnesses was accepted by the trial court. The learned judge found the 30<sup>th</sup> appellant to have been an untruthful witness and tried unsuccessfully to present

himself as an apolitical police officer, and a person who was not in the least interested or involved in local politics. The court did not accept the appellant's denial of his involvement as reasonably possibly true in view of the uncontested evidence to the contrary and was accordingly rejected. We find no basis to disturb these findings. The appeal fails.

Kachaka's clients (Rodwell Sihela Mwanabwe, Albert Sekena Mangilazi and Fabian Thomas Simiyasa)

[219] Appellants 5<sup>th</sup>, 10<sup>th</sup> and 19<sup>th</sup> (Rodwell Sihela Mwanabwe, Albert Sekena Mangilazi and Fabian Thomas Simiyasa, respectively,) are represented by Mr *Kachaka*. He filed their grounds of appeal on 1 June 2016 against conviction only in relation to the conviction for high treason, murder and attempted murder. He was to have represented the 21<sup>st</sup> appellant, Kester Silemu Kambunga as well, but 21<sup>st</sup> appellant passed on before this appeal could be heard. *Mr Kachaka* advised the court that he was abandoning 21<sup>st</sup> appellant's appeal. Accordingly, that appeal is not before this court.

[220] In his written submissions on appeal dated 21 June 2021, Mr *Kachaka* set out four grounds of appeal, which he submitted were general to all his clients, contending that the judge *a quo* erred:

- (a) in convicting the appellants of high treason, murder and attempted murder without taking into account the effect of a special entry that the judge entered in terms of s 317 of the CPA 'concerning the prosecution's use of a photo album to aid the State witnesses identify the accused persons' and 'in

stating in his final judgment that the effect of the special entry would be decided by the Supreme Court . . . [when] the effect of the special entry was to be decided by the trial court;'

- (b) in failing to appreciate that the 'evidence led in the trial relating to the nine counts of murder did not satisfy the requirements by law for one to be found guilty of murder on a separate count of murder . . . what were led were simply overt acts of the charge of high treason';
- (c) in failing to recognise that 'the count involving the death of Victor Falali [count 5] should have been tried as a separate murder trial because evidence shows that there was no conspiracy to murder Victor Falali but was an independent incidence to the conspiracy';
- (d) in that 'the trial that led to the appellants herein being convicted was not fair [but] contrary to Article 12 of the Constitution of Namibia which provides for a fair trial especially Articles 12(b), (d), (e) and (f) of the Namibian Constitution.'

[221] In the notice and grounds of appeal filed in 2016 and in reference to ground of appeal (d) above, several issues that did not really amount to grounds of appeal were raised. They were again raised in the heads of argument on appeal.<sup>31</sup>The appellants complained that they were charged with 279 counts in relation to which the State intended to call about 1000 witnesses. With that number of charges and

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<sup>31</sup> Para 4(i) – (v) of 2016 notice of appeal; pp 3-5 of heads of argument.

witnesses, there was simply no hope of completing the trial within a reasonable time and, in the end, the State called only 379 witnesses over a period of 12 years and abandoned the majority of the charges and witnesses. The State routinely failed to disclose witness statements until, in many cases, 3 days before a witness testified, which adversely affected the defence's ability to deal adequately with the appellants' defences and properly prepare for cross-examination of state witnesses. When the State finally agreed to disclose the witness statements, about 1000 of them, it continued to refuse to advise defence counsel in advance which witnesses would be called next, thus again inhibiting proper preparation of cross-examination. Through the Directorate of Legal Aid ('DLA'), the State refused to appoint *pro deo* legal practitioners for the accused persons for a period of about 2 years until the courts ordered that legal aid be provided. The State thereby occasioned a delay to the commencement of the trial by that length of time. After arrest, 5<sup>th</sup> appellant was subjected to torture and other inhuman and degrading treatment in contravention of his fundamental rights under the Constitution. These issues were raised as part of the contention that the trial was unfair.

[222] *Mr Kachaka* must have realised that these issues, raised in order to show that the trial was generally unfairly conducted contrary to the appellants' interest, did not constitute sustainable grounds of appeal, hence he did not focus on them at the hearing. We note that some of the issues were resolved or compromises reached in regard to them during the course of the trial e.g., an understanding was reached on disclosure of witness statements. This compromise was reached, according to *Mr Campher*, in order to protect witnesses during the course of this charged trial. The decision not to prosecute other offences or call certain

witnesses was a matter within the discretion of the prosecuting authorities. The provision of legal aid was resolved through the courts. The violation of accused persons' rights was canvassed during the trial and decisions taken thereon and in the final judgment. It is on record for example, that 5<sup>th</sup> appellant was compensated for the assault upon him in civil proceedings that resulted in an out of court settlement. In any event, nothing about the effect, if any, on the appellant's evidence was said in the High Court or on appeal to indicate how his defence may have been adversely impacted by the treatment he received at the hands of State agents. In regard to these issues, therefore, it is understandable that *Mr Kachaka* did not pursue them and was content to identify with submissions, if any, made by other counsel. He specifically stated before us that, if no other counsel addressed them, 'the outstanding grounds will stand abandoned.' Without his own specific submissions on the issues, we are unable, nor are we inclined, to consider them in so far as they relate specifically to the appellants he represents. We consider them in some detail in relation to Ms Agenbach's clients because she raised the issues more directly and made submissions thereon. Our conclusions thereon apply equally to Mr Kachaka's clients.

[223] Elsewhere in this judgment<sup>32</sup>, we have addressed, to the extent necessary and disposed of the impact and effect of the special entry on the convictions and propriety of the convictions for murder and attempted murder and shown that they are not as contended by *Mr Kachaka*, duplications of the conviction for high treason or that those convictions should be viewed as either overt acts of high treason or only as aggravating factors on the high treason sentence. It is not

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<sup>32</sup> See paras 16 -36.

necessary again to deal with them separately in relation to Mr *Kachaka*'s clients. Only where appropriate, and for the sake of clarity and completeness, do we do so.

[224] We have noted that *Mr Kachaka* raised four grounds of appeal as applicable generally to all his clients. In dealing with each of the appellants, he relied on other grounds germane to each of them. We examine them accordingly.

[225] At the hearing of the appeal and in his heads of argument, *Mr Kachaka* focussed on only a few of the grounds of appeal, viz: material contradictions in the evidence of Sizuka and Libuku; material contradictions in the evidence of Libuku viewed on its own; failure by the judge to treat the witnesses as accomplice witnesses and to exercise caution or to warn himself about the danger of convicting on their evidence when, properly assessed, they were accomplice witnesses; failure to exclude the danger of jointly fabricated evidence, and the insufficiency of the evidence identifying the Tata truck allegedly driven by 19<sup>th</sup> appellant, Simiyasa, on the day of the attack. Counsel devoted an inordinate length of time and argument to the appeal of 5<sup>th</sup> appellant and disproportionately less time and argument to that of 10<sup>th</sup> and 19<sup>th</sup> appellants. We understand why he took that approach.

*19<sup>th</sup> Appellant: Fabian Thomas Simiyasa*

[226] The 19<sup>th</sup> appellant, was found by the court *a quo* to have been active in transporting food to rebel camps and the rebels themselves to their targets of attack, in a white government-owned Tata truck, in particular during the evening

and night of the attack, on 1 and 2 August 1999 and generally that he was in charge of logistics 'in the struggle.'

[227] The 19<sup>th</sup> appellant's appeal is based on the following challenges to the findings of the court:

(i) The court *a quo* misdirected itself by making findings not supported by evidence. The finding that [there] were two white Tata trucks is not supported by evidence in that the record shows two white one ton Tata trucks but more than two white Tata trucks and the material question was how many white one ton Tata trucks were [there] and not how many one ton Tata trucks since witnesses testified to only seeing a white Tata truck. To conclude that the [19<sup>th</sup>] appellant was the driver of the white Tata truck was a misdirection and an error in law and fact.

(ii) The learned judge erred in law or fact by admitting hearsay evidence. What witness Oscar Mwisepi said about the [19<sup>th</sup>] appellant was all hearsay and the learned judge admitted it.

(iii) The learned trial judge erred in law and fact by admitting a material contradiction after overlooking a material piece of evidence Witness Kapulo Kapulo's evidence against the [19<sup>th</sup>] appellant centred on one event in which he contradicted himself by saying the [19<sup>th</sup>] appellant was alone when he brought food to Kalumba but on oath in Botswana mentioned it was Danbar Mushwena. The witness explained the contradiction by saying the [19<sup>th</sup>] was with Danbar Mushwena and the learned judge accepted the explanation, and this was an error in law and fact for the learned trial judge did not take into account that the witness stated that the [19<sup>th</sup>] appellant was alone.

(iv) The material witnesses, namely, Oscar Mwisepi and Kapulo Kapulo are both affected by the special entry mentioned above.'

[228] In summarising the grounds of appeal, *Mr Kachaka* stated, in his heads of argument, that the court misdirected itself 'by making findings not supported by evidence; . . . by admitting hearsay evidence [and] . . . by admitting a material contradiction after overlooking a material piece of evidence.'

[229] He submitted that the evidence does not support the finding of the court that 19<sup>th</sup> appellant drove the truck that ferried food and people before the attack. To the contrary, he submitted, the evidence shows that there were two white one-tonne Tata trucks and more than two bigger tonnage white Tata trucks in the Caprivi Region at the material time. The material question was how many white Tata trucks were there, and not how many white one-tonne Tata trucks. State witnesses testified only that there was a white Tata truck that was active on the day in question, without specifying if it was a one tonner or a five or seven tonner. The defence's contention was that there were more than two white Tata trucks of different tonnage in the Caprivi Region and anyone could have been driving the Tata truck that was seen ferrying food and rebels.

[230] The learned judge noted that *Mr Kauta*, who spoke for all the appellants during the application for a discharge in terms of s 174 of the CPA in September 2012 and set out common cause facts, which the judge accepted, stated:



‘... 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.’<sup>33</sup>

[231] *Mr Kachaka* also submitted that in terms of the court’s findings ‘a lot of witnesses’ talked about a white Tata truck moving around. It seems to us that the main issue for decision is whether the 19<sup>th</sup> appellant was the person driving the white Tata truck that was seen by many people delivering food and rebels on the day in question.

[232] A number of facts are established by the evidence. First, the 19<sup>th</sup> appellant was employed by a government ministry responsible for rural water supply as a senior handyman from 1995. His job involved driving government owned motor vehicles around the area to fix broken down water installations. It is not in dispute that on the material date he drove a one tonne white Tata truck in the course of performing his duties. There is no evidence that anyone else drove that vehicle or a similar vehicle on that date. The court found, as a fact based on the evidence of witness Mountain Efferson Chiyeye (Chiyeye), 19<sup>th</sup> appellant’s supervisor at work, that there were two white TATA trucks in the Caprivi Region at the relevant time. One was out of order and parked in a government garage or workshop, the other was driven by 19<sup>th</sup> appellant in the course of his work on 1 and 2 August 1999. According to the 19<sup>th</sup> appellant, who admits driving a white Tata truck at the material time in the course of his duties, he parked the one tonne Tata truck that he had been using on 1 August 1999 at 9:00 pm. According to an independent

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<sup>33</sup> See para 44, p 29 of judgment.

witness, Vincent Simwanza Mayumbelo, a new security guard at the government garage or workshop, 19<sup>th</sup> appellant parked the truck at 2:00 am on 2 August 1999. The 19<sup>th</sup> appellant therefore agreed that he drove a white one tonne TATA truck on that day but denied that it was the same that was seen moving around and delivering food and rebel personnel before the attack and further denied that he parked it at 2:00 am.

[233] The evidence of Chiyeye discloses that about that time, 1 and 2 August 1999, 19<sup>th</sup> appellant was assigned to repair some water installations and to transport one of his co-workers, Gilbert Chikanda, to his work-station but none of that was done. The excuses given by 19<sup>th</sup> appellant included that he had taken leave of absence from work, which was unknown to his supervisor, and that he did not find the co-worker when he was due to take him to his works-station, which the supervisor contested. The court analysed this evidence and came to the conclusion that 19<sup>th</sup> appellant used the government vehicle allocated to him to transport food and personnel in support of the secessionists on 1 and 2 August 1999.

[234] There was other evidence that implicated the 19<sup>th</sup> appellant in the secessionist movement. His association with the movement appears to have become apparent from 1998. The evidence, especially that of Alfred Kapulo Kapulo ('Kapulo'), a member of CLA, shows that 19<sup>th</sup> appellant was supplying food and water to secessionist at Kalumba as early October 1998. The 19<sup>th</sup> appellant tried in vain to set up an alibi in respect of the time that he is alleged to have done so but that *alibi* was properly and soundly rejected by the court.

[235] *Mr Campher* submitted that the evidence against the 19<sup>th</sup> appellant was overwhelming. With that we agree. The learned judge *a quo* dealt with the evidence against him at great length.<sup>34</sup> His analysis was extensive and incisive. We wholly accept it. He concluded his analysis of the evidence by stating:

'I have discussed (supra) the consequences of raising a false alibi and I have referred to the relevant authorities and need not repeat same. The testimony of the accused was that he was not the driver of a GRN TATA truck on 1 August 1999 when rebels were transported to Makanga in preparation of the attack and from Makanga to pre-determined targets earmarked for attack by the rebels, and in particular Katonyana base, is rejected as false. I am satisfied that the accused supplied the rebels (ie., members of the CLA) food at Kalumba, and by transporting rebels on 1<sup>st</sup> and 2<sup>nd</sup> August for armed attacks in Katima Mulilo, that his conduct amounted to overt acts, and that he had the required hostile intent.'<sup>35</sup>

[236] The learned judge's analysis of the evidence was so thorough that *Mr Kachaka's* submission in relation to the evidence *Mwisepi* [that it] was all but hearsay evidence' and of *Kapulo* that the 19<sup>th</sup> appellant delivered food items to the rebels at Kalumba in 1998 was contradictory, cannot be sustained. The alleged contradiction that in one breath he said it was he that delivered the food and in another breath, under oath in proceedings in Botswana, that it was one, *Danbar Mushwena*, was sufficiently explained away when he said that he was with *Danbar Mushwena* when they delivered the food. *Mr Kachaka's* submission that the judge erred in accepting that explanation without resolving the 'glaring' contradiction in *Kapulo's* evidence, holds no water. At the hearing of the appeal *Mr Kachaka* did not press home the significance of the evidence of *Mwisepi* and *Kapulo*, obviously

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<sup>34</sup> Pp 243 to 260 paras [698] to [737] of judgment.

<sup>35</sup> Para [737] of judgment.

because he appreciated that 19<sup>th</sup> appellant's appeal centred around the issue whether he drove the white Tata truck around on the day in question.

[237] Having regard to the thorough analysis of the judge *a quo* of the evidence implicating the 19<sup>th</sup> appellant we have no basis at all for interfering with the decision of the High Court. His appeal must be dismissed.

*10<sup>th</sup> Appellant: Albert Sakena Mangilazi*

[238] The grounds of appeal specific to the 10<sup>th</sup> appellant as they appear both in the notice of 2016 and counsel's written submissions are only two, namely, that judge failed, to the prejudice of the appellant's acquittal, to consider the effect of the special entry made in terms of s 317 of the CPA because 'almost all witnesses' who identified and implicated the appellant, are affected by the special entry; and secondly, that the judge failed to recognize, and therefore did not exclude, 'the danger of jointly fabricated stories of the accomplice witnesses that testified against the [10<sup>th</sup>] appellant'.

[239] We have dealt with the special entry earlier in this judgment and came to the conclusion that the irregularity did not result in a failure of justice. We maintain the same in respect of this appellant. *Mr Kachaka* submitted that if the contentions on the special entry are dismissed, then everything else fails. We however think that for completeness of the picture we should consider the other evidence implicating the 10<sup>th</sup> appellant.

[240] The judge *a quo* dealt with the evidence relating to 10<sup>th</sup> appellant<sup>36</sup> given by Mwisepi, Oscar Luwake Simbulu ('Simbulu'), Michael Maswabi Nuwe ('Nuwe'), Richard Kafunde Mutanale ('Mutanale'), Kapulo and police officer Theophilus Kamati. Except for the police officer, the evidence of the witnesses detailed how each of them knew or met 10<sup>th</sup> appellant at several places and rebel camps – at his village at Liselo, rebel camps at Kalumba, Sachona where they trained in the use of bombs, mortars and AK rifles; Linyanti and then to Libyu Libyu; travelled with him together with Samboma to Angola to source arms; crossed over to Botswana as some in the group of 92 after the death of Victor Falali, got detained in Mahalapye in Botswana and kept at Dukwe refugee camp; his roles at different times as a chef in a camp and group leader at Sibinda and Kalumba.

[241] Police officer Kamati testified about 10<sup>th</sup> appellant's arrest on 18 July 2002 after he returned in April 2001 and recovery from him and two of his co-conspirators of military equipment and clothing. From him was recovered a black AK 47 magazine with 30 live rounds of ammunition, a brown AK 47 magazine with 30 live rounds of ammunition, a water container with a yellow cap, a blanket and medicinal tablets. His evidence is not impacted by the special entry. Mutanale also testified long after the special entry was made. He identified 10<sup>th</sup> appellant. Kapulo said he knew 10<sup>th</sup> appellant as the appellant was married to his father's sister<sup>37</sup>. Nuwe said he knew him because they were together in the army.

[242] Counsel submitted that all witnesses against 10<sup>th</sup> appellant were impacted by the special entry hence submitted that if the special entry is dismissed, then

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<sup>36</sup> At pp 260 to 270 (paras [738] to [765]) of judgment.

<sup>37</sup> At para 749 of judgment.

everything else fails. Counsel submitted that it is dangerous to allow accomplice's evidence without seeking corroboration as it is likely to be fabricated stories but did not address us on what corroboration was required and why the cumulative evidence of the witnesses could not be viewed as mutually corroborative.

[243] The 10<sup>th</sup> appellant's defence was a bare denial, as found by the judge. He said he did not know any of the witnesses, denied baldly that he went to any of the camps and to any foreign country in connection with the secessionist movement, though he admitted that he was in Botswana after he left the country because of harassment by security service personnel. He left Dukwe in July 2001 because he was homesick and without advising the authorities there. He entered the country through an undesignated entry point hence he was initially arrested for violating immigration laws. He literally admitted nothing of what was said about him by all the material witnesses.

[244] The judge *a quo* noted that the cross-examination by appellant's counsel was not thorough and did not rebut material evidence of the witnesses that implicated him. His approach to the evidence was beyond reproach:

[762] This court must approach the evidence of the witnesses who had identified the accused with caution since all of them were accomplices or co-perpetrators, as correctly submitted by counsel. This does however not mean that their testimonies must be disregarded. The response by the accused to their testimonies is that those testimonies were fabrications and denied any involvement in the events as testified by the witnesses. I am aware that the accused has no onus to prove his innocence. I have however referred to evidence which I regard as uncontested by the accused during cross examination, in particular the evidence of Kapulo that the

accused was part of the group of 92 men who crossed the Chobe with weapons of war. The accused was evasive during cross examination<sup>38</sup>, he contradicted himself and did not deny during his evidence-in-chief that two AK 47 magazines with 60 rounds of live ammunition were found in his bag.

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[765] I am of the view, having considered all the evidence presented that the testimony of the accused is not reasonably possibly true in the circumstances. I am further satisfied that the evidence presented by the State [is] beyond reasonable doubt [true] and I am satisfied that the only reasonable inference to be drawn is that the accused had the required hostile intent.'

[245] In our opinion Mr Kachaka's generalised submissions that the learned judge did not handle accomplice evidence properly or that he did not exclude the danger of falsely fabricated evidence has no foundation and must be rejected, going by the learned judge's assessment. We must note that Counsel did not, either in his heads of argument or in oral submissions, refer to any legal authority in support of his submissions in respect of the 10<sup>th</sup> appellant or any of the other two appellants that he represented. He must have appreciated that his clients' convictions depended largely on factual findings made by the court. The judge's analysis of the evidence and his findings of fact and law are beyond criticism. The 10<sup>th</sup> appellant was properly convicted of the offences of high treason, murder and attempted murder as determined by the judge *a quo*. His appeal has to be dismissed.

*5<sup>th</sup> Appellant: Rodwell Sihela Mwanabwe*

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<sup>38</sup> In this connection the judge referred, as an example, to p 37936 – 37937 of record.

[246] The grounds of appeal specific to the 5<sup>th</sup> appellant as they appear in the notice of appeal of 2016, and in *Mr Kachaka's* heads of argument, are that the judge *a quo* erred in that:

- (a) he overlooked material contradictions in the evidence of Sizuka and Libuku who testified against the 5<sup>th</sup> appellant;
- (b) he was adversely affected, in relation to 5<sup>th</sup> appellant, by the conduct Chika Adour Mutalife (24<sup>th</sup> appellant) 'such that it affected and clouded his findings on [him]';
- (c) he failed to warn himself in regard to the accomplice evidence against the 5<sup>th</sup> appellant given by Sizuka, Libuku and their uncle, Crispin Mandiole Mandiole ('Mandiole') 'simply because they were not warned as accomplices, yet their evidence showed otherwise', that in fact they were accomplices;
- (d) he failed to consider the effect of torture and other inhuman treatment to which witnesses and, in some cases their parents, were subjected to at the time of arrest of 5<sup>th</sup> appellant; and
- (e) he 'did not exclude the danger of jointly fabricated stories.'

[247] Counsel submitted that these witnesses were in fact accomplices because Mandiole admitted that he recruited them to go to Botswana and participated in the



scheme to secede the Caprivi Region. The judge should therefore have treated them as such. In this regard *Mr Kachaka* was not consistent. In one breath he submitted that Libuku, Sizuki and 5<sup>th</sup> appellant, each went to Botswana for a reason that each 'identified', and in another, he submitted that they must all be treated as accomplices because, according to Mandiole and one or other of them, they went for military training. We are satisfied that the evidence as a whole, shows that they all went for military training and any other reason given was just a ruse.

[248] The judge *a quo* dealt with the evidence against the 5<sup>th</sup> appellant extensively and incisively.<sup>39</sup>*Mr Kachaka* submitted that although six witnesses were called to testify against the 5<sup>th</sup> appellant, the evidence of only four of them was considered by the court. Counsel correctly observed that the general approach of the judge during the trial was that, if a witness failed to identify an accused person, his evidence was largely, if not entirely, disregarded. That then became the basis of exclusion of the evidence of the other witnesses.

[249] The 5<sup>th</sup> appellant was arrested on 10 August 1999 after the attack on 2 August 1999.

[250] It is common cause that Mandiole, Sizuka, Libuku and 5<sup>th</sup> appellant are closely related. Mandiole is an uncle of the three. As such the three are cousins as between themselves. The evidence establishes that Sizuka, Libuku and 5<sup>th</sup> appellant went to Botswana in November 1998 at the instigation of Mandiole. The

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<sup>39</sup> At pp 224 – 233 of judgment, paras [646] – [670].

reason, though not definitively established by the court *a quo* in relation to all the three cousins of Mandiole, was to further their education, which we have rejected as a ruse. But it is to be noted that *Mr Kachaka* understood that the evidence shows that they all went for military training, hence his argument that they should have been treated as accomplice witnesses. Not so for Mandiole. His unchallenged evidence is that he went to Botswana to get military training in pursuance of the secessionist agenda. Thus, uncle and cousins all ended-up as refugees at Dukwe Refugee camp in Botswana, where many other Namibians, who had similarly left the country, were kept by the Botswana authorities. It should be recalled that the State case is broadly that some, if not most or all, of those at Dukwe became involved in the secessionist movement and that they continued to pursue that conspiracy from that camp and on their return to Namibia.

[251] It is significant that when Mandiole testified, he was not cross-examined by the defence. The court accepted his evidence as wholly unchallenged<sup>40</sup>. The story about how and why 5<sup>th</sup> appellant left the country for Botswana is told not only by Mandiole but by the appellant's cousins, Libuku and Sizuka. The story about him

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<sup>40</sup> At p 232 para of judgment where the judge says:

'[668] Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness's evidence. The testimony of Mandiole stands uncontroverted. In addition to his narration of their journey to Botswana this witness also testified about an incident on 2 August 1999 when he asked the accused why he was running and the accused informed him about gunshots and other people who were also running. The defence of the accused, just like the defence of accused no. 9, is an alibi. His testimony was that on the day of the attack he was at his village – 40-45 km from Katima Mulilo and that he did not participate in the attack. The accused never gave a plea explanation, his defence was never put to the witnesses during cross-examination (in particular to Crispin Mandiole), and he first raised his defence during his evidence-in-chief.

[669] I must accept the evidence of Mandiole (in the absence of any challenge thereto) that the accused replied to a question that he was running because of gunshots. The accused conceded that one would not be able to hear gunshots in his village if gunshots were fired in Katima Mulilo. The evidence of the accused that he was at his village on 2 August 1999 must be rejected as false....'

being seen on the morning of 2 August 1999 in Katima Mulilo is also told by the three – Mandiole, Sizuka and Libuku. In addition to testifying that he went to Botswana for military training, without as much saying the same about each of his cousins, Mandiole's evidence established his closeness to 5<sup>th</sup> appellant, Libuku and Sizuka, and implicated the 5<sup>th</sup> appellant in the offences charged. The close relationship was confirmed by the three cousins.

[252] Mandiole's evidence that he met 5<sup>th</sup> appellant who was running around 6:00 am on 2 August 1999 and 'looked like someone in fear', like others also running helter-skelter because of the shooting that was taking place, was confirmed by Sizuka. *Mr Kachaka* submitted that the judge misconstrued the running as an indication that 5<sup>th</sup> appellant was running, not for the same reason several other persons were running, but because he had been involved in the attack. Mandiole's response to 5<sup>th</sup> appellant after the latter said he was running to his (Mandiole's) house is telling. He said- 'If that's the situation or if that is the case, go to your elder sister, Ida.' He was clearly trying to dissociate himself from 5<sup>th</sup> appellant and whatever activity he had been involved in. The learned judge's conclusion cannot be faulted.

[253] Libuku gave a detailed account of how they left for Botswana starting from Shell Service station in Katima Mulilo. *Mr Kachaka* tried unsuccessfully to raise the issue whether they left from that service station or from Engen service station in order to show some inconsistency in Libuku's testimony but the evidence clearly establishes that they left from Shell service station, and that was accepted by the trial judge. Libuku's detailed narration of the journey to Botswana, according to

counsel, clearly establishes that he was in the secession conspiracy and should have been treated as an accomplice witness and corroboration for his evidence ought to have been clear. *Mr Kachaka* submitted that a contradiction was apparent in the evidence of Libuku and Sizuka when they both met 5<sup>th</sup> appellant and Adour Chika, Libuku said they were invited to join the military preparations, whereas Sizuka said they were invited to go town to look for piece work. He however admitted that Sizuka was not cross-examined on this aspect of his evidence and so an opportunity was lost to reconcile his evidence with that of Libuku.

[254] Counsel also highlighted Libuku's evidence concerning 2 August 1999. Libuku said that he had taken his siblings to school when he saw 5<sup>th</sup> appellant running away from the shooting that was taking place and when 5<sup>th</sup> appellant told him that he had been involved in the attack. Counsel submitted that the evidence of Libuku as to what 5<sup>th</sup> appellant told him on 2 August 1999 is what nailed him, and that if that evidence is rejected because Libuku was an accomplice and had to be corroborated, then 5<sup>th</sup> appellant should walk free. He also highlighted two statements made to the police by Libuku - the first being that he heard 5<sup>th</sup> appellant telling the police that he had been involved in the attack and the second, in which he said he was not close enough to where the police were interrogating 5<sup>th</sup> appellant to have heard him making a confession. We do not consider that the alleged contradictions in the evidence of Libuku and Sizuku, as contended by counsel, are of such a serious nature as to off-set the effect of their evidence and that of Mandiole, taken together.

[255] Counsel's main contentions were that in light of what he saw as contradictions in the evidence of the witnesses Libuku and Sizuka, the umbrage that the judge took at Adour Chika's attempts to disguise himself, the fact that Mandiole, Sizuka and Libuku were accomplice witnesses and the possibility that they fabricated evidence against appellant, and the ill-treatment or torture to which appellant was subjected, the 5<sup>th</sup> appellant should have been acquitted. We cannot agree.

[256] *Mr Campher* submitted that Mandiole, Sizuka and Libuku were not accomplice witnesses because they did not participate in the attack and their evidence was not controverted, in particular that of Mandiole. The 5<sup>th</sup> appellant denied that he was in Katima Mulilo on 2 August 1999 whilst *Mr Kachaka* submitted that if he was seen running, then he was running like any other persons who was running because of the shooting. This cannot help him. It can only be one or the other. The judge considered his alibi, *to wit*, that he was at his village on 2 August 1999, and rejected it. *Mr Campher* rounded up his submissions by stating that if the 5<sup>th</sup>, 10<sup>th</sup> and 19<sup>th</sup> appellants fail on the high treason charge, as he contended they should, then they 'must take responsibility for the murders and the attempted murders'.

[257] The main evidence accepted by the court implicating 5<sup>th</sup> appellant was his admitted going to, purpose and sojourn in Botswana, his meeting Mandiole on the morning of the attack, his meeting with Sizuka and Libuku in July of 1999 before the attack and on the day of the attack is all very strong evidence against 5<sup>th</sup> appellant. Additionally, the failure to cross-examine the witnesses and put to them

his defence, as observed by the judge *a quo* adds considerable weight to the propriety of his conviction. We are unable to find fault with the judge's analysis of the evidence and his conclusions. To be noted also is that, to the contention that the three witnesses may have colluded to implicate 5<sup>th</sup> appellant, there is no acceptable explanation by the appellant as to why they might have done so. In fact, he said that they had a very good relationship. The only possibility, as far as 5<sup>th</sup> appellant was concerned, is that they were put up to it by the police. The death of Falali occurred in 1998 and the evidence supports the fact that 5<sup>th</sup> appellant was already associated with the secession and the conspiracy to dismember the Caprivi Region from the rest of Namibia. We do not find any substance in the contentions made on behalf of 5<sup>th</sup> appellant. His appeal against conviction on all the charges on which he was convicted and sentenced must fail. We find accordingly.

Ms Agenbach's Clients (Chris Puisano Ntaba, Postrick Mowa Mwinga, Ndala Saviour Tatalife, John Panse Lubilo, Thaddeus Siyoka Ndala and Martin Siano Tubandule)

[258] Ms Agenbach represented 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> appellants at the trial but from a much later point in time in 2013. She represents them in this appeal as well. The appellants are, respectively, Chris Puisano Ntaba, Postrick Mowa Mwinga, Ndala Saviour Tatalife, John Panse Lubilo, Thaddeus Siyoka Ndala and Martin Siano Tubaundule. They were convicted of high treason, nine counts of murder and 91 counts of attempted murder and sentenced as detailed below. They are appealing against both conviction and sentence.

[259] The six appellants along with other appellants were, by order of the High Court, dated 28 April 2016, granted leave to appeal against conviction on all the counts. Together with five other appellants, they were also granted leave to appeal against sentence.

[260] The State was, by the same order, granted leave to cross-appeal against sentence. For some reason the court *a quo* stated, as part of the order granting leave, that the State 'will oppose the appeal against the convictions by the applicants, taking into account the evidence ruled inadmissible during the trial.' At the hearing of the appeal *Mr Campher* did not pursue the appeal against conviction. He was unable to satisfy us as to what practical purpose would be served by any submissions on the evidence ruled inadmissible if it was 'to merely strengthen the conviction' only, as he put it.

#### Grounds of appeal

[261] On 1 June 2016, Ms Agenbach filed a 150-page long document being the appellants' notice and grounds of appeal. In respect of the conviction, she raised the following grounds of appeal-

- (a) that the Republic of Namibia has no sovereignty or *majestas* or legislative authority over the Eastern Caprivi Zipfel (ECZ), now the Zambezi Province, because historically it was not part of German South-West Africa, but a separate territory administered separately by successive foreign governments before the independence of Namibia. Accordingly, the High Court had no jurisdiction over her clients or the jurisdiction to entertain the

offences charged against them. The learned judge *a quo* rejected this contention.<sup>41</sup> Ms Agenbach did not pursue this ground of appeal before us. Had she done so, thereby persisting in error, we would undoubtedly have reached the same conclusion as the judge *a quo*. Also not pursued is the sub-ground of appeal that ‘the common law definition and elements of high treason are repugnant to and/or non-compliant with NC (National Constitution) and/or Public International Law.’ The argument was closely related to the argument on the issue of jurisdiction.

- (b) that the judge *a quo* erred by not giving sufficient weight to the fact that the appellants were denied legal representation and that ‘their legal representation was ineffective’, both of which resulted in the infringement of the appellants’ fundamental rights and freedoms entrenched by Chapter 3 of the Constitution and ‘affected the fairness and purpose of the entire proceedings and/or constitutes a failure of justice *per se* and entitles appellants to a setting aside of their conviction’.
- (c) that the judge *a quo* erred by not giving sufficient weight to ‘acts of lawlessness and/or arbitrariness and/or failure to comply with procedural rules of litigation by agencies of the State [and thereby] abolished and/or

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<sup>41</sup> He had this to say about it at para 1018 of judgment:

‘The submission that the Eastern Caprivi Zipfel is not specifically mentioned in the Constitution becomes in view of the aforesaid, superficial (sic). Mr Phil Ya Nangolo, an International Human Rights practitioner, admitted that he is not an expert on international law and not an expert on the interpretation of international instruments. This court has therefore no reason not to accept the evidence of Dr Akweenda that there was never two mandates in respect of two different authorities and that the territory known as the Eastern Caprivi Zipfel was part of the territory of Namibia prior to its attainment of independence in March 1990. It follows that all accused persons are subjects of the Namibian State to whom they owe an allegiance since the foundation of the Namibian State.’



abridged and/or infringed on the appellants' cluster of fundamental rights and freedoms entrenched in Chapter 3 of the Constitution... which actions and/or inactions adversely affected the fairness and purpose of the entire proceedings and/or adversely tainted the admissibility and/or credibility of all the evidence produced in the trial and/or constitutes a failure of justice *per se* and entitles the appellants to a setting aside of their conviction.'

(d) that in respect of sentence, the judge *a quo* erred –

- (i) by giving no or insufficient weight to irregularities that occurred during the trial resulting in a failure of justice which entitles the appellants to have their sentences set aside, among them, that 'the appellants were *refouler* all of whom effectively hold the status of refugees and asylum seekers; they were exposed to torture and other forms of cruel and inhuman treatment; they were indigent and denied legal representation and were absent from the trial from 2007 to 2013;
- (ii) by contradicting himself 'to such an extent that the court *a quo*'s decision is vitiated, which renders the incarceration of the appellants wholly inappropriate... and entitles them to have their sentences set aside.

[262] It is apparent from reading the 150 pages of the combined submissions and grounds of appeal that it is not easy to fully understand the appellants' contentions. Sometimes issues pertaining to sentence are mixed up with issues

relating to conviction. There is however some clarity in Ms Agenbach's heads of argument filed on 16 August 2021 and the submissions she made in court. We focus on those heads and submissions since, necessarily, they sum up the appellants' case on appeal.

[263] Ms Agenbach's approach in her heads of argument was to set out, for half their length, the background to appellants' conviction in detail, including what she conceived to be common cause facts and, thereafter, from p 30 to 44 to deal specifically with the issues pertaining to each of the appellants. What she referred to as common cause facts are not entirely so because some of the facts were contested by the State. Those that we find not contested by the State are the following.

[264] Government institutions and other places were attacked by groups of armed men on 2 August 1999. Soon after the attack a state of emergency was declared in the Caprivi Region. Ms Agenbach describes the declaration of a state of emergency as an 'exterminatory' exercise which opened the way for 'a wholesale commission of absolutely prohibited acts of torture, cruel, inhuman or degrading treatment or punishment and other large scale and gross human rights abuses to extract information, statements and/or confessions and/or admissions...'. This characterisation is not shared by the State or the representatives of other appellants and is therefore not common cause. She continued: the security services personnel acted in an arbitrary fashion, as is evident from their testimonies. She gives as examples the testimony of several police and other

investigation personnel.<sup>42</sup> No identification parades were held and dock identification was permitted; evidence tainted by the fact that those subjected to inhuman treatment testified 'resulted in numerous trials within a trial and more than 50 judgments and rulings wherein the court *a quo* rejected the evidence';<sup>43</sup> the appellants were without legal representation during the pre-trial stages until the courts ordered, in *The Government of the Republic of Namibia & others v Mwilima & others*<sup>44</sup> that *pro deo* legal representation be provided; when the trial commenced in February/March 2004, all the appellants were legally represented but the legal practitioners withdrew their services from her clients and about seven other accused persons because of a conflict of interest that arose when the accused persons concerned required the legal representatives to argue the issue of jurisdiction to the effect that the Caprivi Region was not a part of Namibia and the High Court accordingly had no jurisdiction. Her clients remained in court until 2007 when they decided to absent themselves from the trial on the grounds that they had no legal representation. During the time they appeared in court and evidence was given against them, they were not in a position to cross-examine witnesses thereby rendering their trial unfair. They returned to court in 2013 after the State closed its case and an application for a discharge at the close of the prosecution case, in which they did not participate, had been determined. At that stage the courts had again ordered that her clients be provided with legal aid and be represented by lawyers of their own choice, albeit paid by the State. That is when she became their counsel. An application was made to court to recall witnesses that had testified when the appellants were not legally represented and

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<sup>42</sup> See footnote 3 to the heads of argument from p3 to 7 in small print.

<sup>43</sup> Para 12 of heads of argument.

<sup>44</sup> 2002 NR 235 (SC).

when they had absented themselves from the proceedings. The court permitted the recall of only those witnesses that had testified during the absence from court of the appellants. Most, if not all, of those that testified against the appellants had done so during the period before the appellants absented themselves from the trial.<sup>45</sup>

[265] It must be apparent that the grounds of appeal are aimed at showing that the whole trial was unfair and that the conviction should be set aside. This argument was not supported by all other counsel.

#### Lack of jurisdiction in relation to 15<sup>th</sup> and 16<sup>th</sup> appellants

[266] The circumstances of the 15<sup>th</sup> and 16<sup>th</sup> appellants are otherwise similar to those of others of Ms Agenbach's clients except that, in respect of the two, counsel raised the court's lack of jurisdiction to try them arising from the fact, as submitted, that they –

'were part of the so-called first group – named the "Mamili group" ... detained as illegal immigrants in Zambia since 25 June 1999. After the attack ... [they were] arrested in Zambia. It is common cause that the Namibian Police represented by Inspector Theron and Inspector Shishanda proceeded to Sesheke in Zambia, arrested the group in Zambia, removed them to Namibia and handed them to the Namibian Army. No request was directed to the Zambian authorities to deport or extradite this group from the 15<sup>th</sup> of June 1999, when admittedly, the Namibian Police knew about their detention at Mongu in Zambia, until the attack in Katima Mulilo on the 2<sup>nd</sup> of August 1999.'

[267] The 15<sup>th</sup> and 16<sup>th</sup> appellants mounted an application in the High Court together with 11 others contesting the jurisdiction of the court. The application was

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<sup>45</sup> See *Kamwi v The State* CC32/2001-2013 NAHCD 286 (16 October 2013).

based on s 106 (1)(f) of the CPA, which provides that when an accused pleads to a charge he may plead that the court has no jurisdiction to try the offence. No submission was made before us that in pleading lack of jurisdiction s 106(3) was strictly complied with.<sup>46</sup> We assume it was, hence the court *a quo* dealt with that plea. The High Court found in favour of the applicants on 23 February 2004, and ordered their release. They had already been in custody for 4 years. They were however not released. The reasons therefore are not clear from the record of proceedings. The State appealed against the High Court judgment. The appeal was upheld in *S v Mushwena & others*.<sup>47</sup> Before us counsel submitted that 15<sup>th</sup> and 16<sup>th</sup> appellants 'reserved their right and continued to hold until the end of the trial that this honourable court lacks jurisdiction to try them.' It was submitted that they held strongly to the view that the court had no jurisdiction and this was the reason why, when they were required to plead to the charges at the start of the trial, the 13 of them refused to do so and court entered a not guilty plea on their behalf. Thus, after *Mushwena* judgment, they continued to hold that view and now raise it again in this appeal.

[268] In resuscitating the objection to jurisdiction, counsel submitted before us that *Mushwena* (on appeal) was wrongly decided as subsequently confirmed by decisions of this Court in *S v Munuma*<sup>48</sup> and *S v Likanyi*<sup>49</sup>. She submitted that the

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<sup>46</sup> S106(3) provides as follows-

'An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the grounds on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.'

<sup>47</sup> 2004 NR 276 (SC).

<sup>48</sup> 2017 (3) NR 771 (SC).

<sup>49</sup> 2016 (4) NR 954 (SC).

facts in those two cases were similar to those of 15<sup>th</sup> and 16<sup>th</sup> appellants. She accordingly argued:

‘Consequently it is submitted that the court *a quo* also in the instance of the 15<sup>th</sup> and 16<sup>th</sup> appellants had no jurisdiction to try them and therefore that the outcome of their appeal in *Mushwena* Judgment similarly be reversed, that their conviction and sentence should similarly be set aside, that they should similarly be released from detention with immediate effect.’

[269] The point raised by Ms Agenbach requires some consideration by us in order to answer two critical questions. Are the appellants not improperly and un-procedurally sneaking into this appeal a review or reconsideration of a decision of this Court? And, was *Mushwena*, in any event, reversed by two subsequent decisions of this Court in so far as it relates to 15<sup>th</sup> and 16<sup>th</sup> appellants? If it was, then we have no option but to follow the subsequent decisions. We undertake this inquiry in full realisation that this Court is otherwise *functus officio* in respect of the point raised and that *Mushwena* finally determined the appellant’s fate. The point raised by counsel is, in fact, a disguised additional ground of appeal. It is raised in this appeal because the appellants could not have raised it again during the trial in the High Court after the Supreme Court decision in *Mushwena*, *Munuma* and *Likanyi* were delivered in August 2016 and August 2017, respectively. As such the jurisdictional issue could only be resuscitated, if it could be and if justified, after these two decisions came on stream.

[270] We give short shrift to counsel’s argument on this point because of two decisive issues emerging from *Munuma* and *Likanyi*, in particular the latter.

[271] The first is the procedure by which the issue was sprung upon us in this appeal. In *Likanyi* this Court laid down the procedure for seeking a review or reversal of an earlier decision of this Court. Damaseb DCJ said:

[58] I cannot stress too strongly that the Supreme Court will, as a general rule, not entertain any attempt (relying on Art. 81 [of the Constitution]) to reopen a case previously adjudicated and determined just because subsequently we think it may have been wrongly decided. In addition, no litigant may as of right come to this court to reopen its prior decision in terms of Art. 81. The Chief Justice will, upon a representation made, consider the matter and only if satisfied that exceptional circumstances exist having regard to all the circumstances – including the imperative to safeguard finality to litigation – afford leave for the matter to be argued and give directions as to how it will be heard. It is unnecessary to set out what constitutes exceptional circumstances as the jurisprudence in that respect should be developed over time. Each case will be considered on its own facts and circumstances and the power will be invoked only exceptionally.

[59] Until a procedure is authoritatively determined by the Chief Justice under s 37 of the Supreme Court Act, the procedure to be adopted will be the following. A party seeking to invoke the exceptional jurisdiction under Art. 81 may make representations to the Chief Justice, clearly setting out the factual and legal bases for the grievance. If the Chief Justice is satisfied that a good basis exists to invoke the jurisdiction, he will give directions as to how the matter should proceed with due regard to the rights of all the parties.’

[272] The above procedure was not followed in the present case. We appreciate that the point raised by Ms Agenbach is a point of law which this Court ordinarily may entertain. In this case however, the appellants should have made representations to the Chief Justice for directions to be given by him on how to proceed.<sup>50</sup> The necessity for this procedure is obvious. Without it, this Court will be

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<sup>50</sup> See also Frank AJA's judgment in *Likanyi* at para [90] where he says:

inundated with all sorts of applications requesting it to review or reverse its decisions in disregard of the important doctrines of *stare decisis* and *res judicata* as dealt with extensively in *Likanyi*. Mr *Campher* submitted that the appellants had not complied with the procedure for bringing such an issue to this Court. We agree with him. On this basis alone this Court cannot entertain the issue and, to borrow and adapt the words of Frank AJA in *Likanyi* – ‘In these circumstances it is [not] incumbent on this court to consider the matter’. This answers the first question that we posed.

[273] The second consideration is that the facts as to how 15<sup>th</sup> and 16<sup>th</sup> appellants were brought back to Namibia from Zambia are entirely different from those of in *Munuma* in relation to Boster Mubuyaeta Samuele, 7<sup>th</sup> appellant in that case, and in *Likanyi*. In *Likanyi*, the Court confirmed the factual findings in *Mushwena*, in which the 15<sup>th</sup> and 16<sup>th</sup> appellants were parties. It said:

[68] It was common cause that the group deported from Zambia were surrendered to the Namibian authorities on Namibian territory whereas Messrs *Likanyi*, *Mubuyaeta* and another were handed over to Namibian law enforcement agents on Botswana territory.

[69] It is clear from the evidence of Mr *Goraseb* that Mr *Likanyi* was taken into custody by agents of Namibia on Botswana territory. It was the Namibian agents who transported him to Namibia from Botswana. It is also clear that Mr *Likanyi*'s liberty was restricted and that he was under the coercive power of Namibian

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‘The original application in this matter was premised on section 16 of the Supreme Court Act, 15 of 1990. As pointed out in the majority judgment this section is not applicable in the current circumstances. I agree with the reasoning of the majority’s judgment on this score and have nothing to add thereto. Counsel for the respondent took issue with the manner the application was brought before this court. However, per the letter dated 26 October 2016 from the Chief Justice the applicant was informed that the intended review had been set down for hearing and gave directions to the parties as to the filing of heads of argument. In these circumstances it is incumbent on this court to consider the matter.’



agents, negating any voluntary surrender to the Namibian authorities. That was sufficient to constitute the performance by Namibian authorities in Botswana of a sovereign act of arrest in violation of international law: *Munuma* - appeal para 36.'

[274] In this connection, it should be noted that *Munuma* and *Likanyi* did not disapprove of the reasoning in *Mushwena* and the court's conclusion in relation to the 15<sup>th</sup> and 16<sup>th</sup> appellants, who were brought in from Zambia. The facts were different: in *Munuma* and *Likanyi* the appellants were arrested in Botswana and in *Mushwena* 15<sup>th</sup> and 16<sup>th</sup> appellants were brought into Namibia and then arrested in Namibia by Namibian authorities. On the merits, *Mushwena* decision stands as correct in relation to 15<sup>th</sup> and 16<sup>th</sup> appellants. And, as we have stated above if it had to be revisited, it would have had to be in terms of the procedure in place for bringing up such an issue. This therefore disposes of counsel's submissions in respect of the jurisdiction issue raised in relation to 15<sup>th</sup> and 16<sup>th</sup> appellants and answers the second question we posed.

[275] Having disposed of the jurisdictional issue, we now deal in some further detail with the substantive appeal grounds in relation to all appellants first, and then in relation to each of the appellants.

#### Grounds of appeal common to Ms Agenbach's clients

[276] Ms Agenbach filed grounds of appeal which are common to all her clients and others specific to each one of them. Of the common grounds, which are subsumed under the rubric of denial of a fair trial, and which she pursued on appeal are the following. First, all of the appellants did not testify in their defence and the trial judge erred in finding against them arising from that failure. Second,

they did not have legal representation during the pre-trial stages from 1999 to 2004 and were prejudiced thereby. When they were granted legal aid in 2004 and 2005 they still suffered prejudice because in Ms Agenbach's words 'their legal representation was ineffective'. The trial judge erred in not giving sufficient weight to the lack of representation or poor representation. Third, some of the witnesses who testified against them did so from 2005 to 2007 when the appellants' legal representatives had been withdrawn. They were prejudiced by the lack of legal representation and a failure on their part to cross-examine state witnesses. The trial judge erred in not paying sufficient regard thereto. Fourth, the DLA was, for the period from 2005 to 2013 not prepared to provide the appellants with legal representation on a *pro deo* basis, much to their prejudice and yet the trial judge did not take this into account. Fifth, the appellants absented themselves from the trial from 2007 until 2013 but the trial judge did not consider this to be a significant factor in the fairness or lack thereof, of the trial.

[277] The other category of common grounds of appeal are those that Ms Agenbach set out under the rubric - failure to 'keep the streams of justice pure.' Under this rubric counsel contended that there was a lack of credibility and objectivity on the part of the prosecution and its witnesses in that 'the investigation and prosecution were not objective, nor credible and so fraught with irregularities that one unfortunately cannot do otherwise but to submit that the appellants were the object of a persecution by the authorities, including the police and the prosecution itself.'<sup>51</sup> This, counsel submitted, the trial judge ignored. She raised other issues as well - the special entry made by the court, the treatment by the trial

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<sup>51</sup> Para 104 of appellants' written submissions.

judge of single witness evidence and accomplice evidence, the failure by the appellants to cross-examine state witnesses, the application of inferential reasoning to the failure of the appellants to testify, the erroneous acceptance by the court of 'so-called facts not in dispute' set out by Mr Kauta when 'Mr Kauta had no mandate on behalf of the appellants to make any concession on their behalf'; the incorrect and unconstitutional application by the trial judge of the doctrine of common purpose and convicting the appellants on that basis.

[278] We have stated elsewhere in this judgment that grounds of appeal should be set out clearly and submissions made in support of each of them. We note that Ms Agenbach was on a lonely trajectory especially in relation to the contention that whole trial was unfair and conducted in contravention of Chapter 3 rights of the appellants. If this were so we have no doubt that counsel representing other appellants would have taken up the issue together with her. We understand why Ms Agenbach and her clients pre-occupied themselves with an attack on the conduct of the trial as a whole. Her clients refused to testify in their defence. They did not cross-examine state witness who testified in their presence. This left them high and dry unless this court were able to say that their refusal to testify was in some way justified and that the trial judge erred in arriving at his decision in regard thereto. The withdrawal of their counsel in January 2005 was not without some blemish on the part of the appellants. They insisted that the main issue on jurisdiction, i.e., that the Caprivi Region was not a part of Namibia and therefore the High Court did not have jurisdiction to try them, had to be pursued. Some counsel were unwilling to pursue that line of defence, others represented other accused persons who did not agree that there was need to raise that jurisdictional

issue, thus coming up against a conflict of interest, and yet others were of the view that the jurisdictional issue could be raised at a later stage and were prepared to proceed with the trial on that understanding. The decision in 2007 to absent themselves from the trial until 2013 was entirely their own. The failure, refusal or neglect to cross-examine state witnesses during the period that they were in attendance without legal representation is partly to be blamed on them even if it were to be said, as it is now submitted, that they did not know how to go about it or had no capacity to do so or they did so in protest against what they perceived to be a generally unfair trial. There is evidence of a general refusal by the appellants to cooperate during the trial to which we have already alluded. It is well-known that unrepresented accused persons defend themselves in many criminal trials. Where they are granted legal representation by the State they often accept proffered assistance in handling their defences. In this case, what ultimately tilts the balance of the scales in favour of, or against, the appellants is the evidence led against them individually.

[279] In considering the appellants' contentions with respect to the alleged denial of fair trial rights contrary to Article 12 of the Constitution, or that the entire process of trial must be tested against the standard of fair trial as provided by the said Article and Articles 5, 8 and 25 of the Constitution, we have to bear in mind the observations in the preceding paragraph. It is on record that the courts, on at least two occasions, ruled in favour of the provision of legal aid to the appellants – before the trial commenced and in 2013. We have no reason to doubt that trial judge, as any presiding judicial officer would do, explained to the appellants the importance and procedure of cross-examination. It seems clear from the

subsequent refusal by the appellants to testify that the appellants had made up their minds not only that they would not cross-examine state witnesses but also that they would not themselves testify in their defence. Hoffman and Zeffert<sup>52</sup> restate the trite law that if a party wishes to lead evidence to contradict an opposing witness, which *in casu* the appellants did not wish to do, he should first cross-examine him upon the facts which he intends to prove in contradiction so as to give the witness an opportunity for explanation. See *Small v Smith*<sup>53</sup>, to which counsel also referred.

[280] The learned authors state, at p 456, that a failure to allow cross-examination is a serious irregularity. At p 461 they also state that while there is no absolute rule that a failure by a party to cross-examine precludes him from disputing the truth of the witness's testimony, such a failure may often be decisive in determining the accused's guilt. That unfortunately was the sequel to the failure to cross-examine witnesses in this matter. The situation that unfolded in this case is that after about two years without legal representation and without cross-examining state witnesses, the appellants absented themselves from the trial without leave of the court in terms of s 159(2)(b) of the CPA.<sup>54</sup> The consequences thereof and the procedure to be followed are set out in s 159(3) and s 160 of the CPA. It is on record, and not disputed, that the learned trial judge advised the appellants that the trial would proceed in their absence. He explained to them the consequences of the decision to absent themselves. It is important to note that,

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<sup>52</sup> *The South African Law of Evidence*, 4 ed at pp 461-462.

<sup>53</sup> 1954 (3) SA 434 (SWA) at 438.

<sup>54</sup> S 159(2)(b) provides that if two or more accused appear jointly at criminal proceedings and any accused is absent without leave of the court, the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may direct that the proceedings be proceeded with in the absence of the accused concerned.

had the appellants cross-examined the witnesses that testified against them and later refused to testify in their defence, as they did, there would still have been no evidence before the court for a proper evaluation of their defences. Smalberger JA, in the Court of Appeal of the Kingdom of Lesotho in *R v Motsamai*<sup>55</sup>, said that the mere fact that that a person has cross-examined a witness is not of much significance in relation to the weight to be attached to whatever he elicits from that witness in cross-examination if that person does not himself testify. He said:

‘A further feature of the trial Judge’s judgment is that she appears to equate the accused’s version of events as put to the Crown witnesses under cross examination to evidence of the accused. There is a significant difference in the legal effect of what is put under cross examination in that respect, as opposed to evidence actually given under oath. Only when the accused has given evidence, and has been subjected to cross examination, can his evidence properly be evaluated and weighed up against that of PW1[witness].’

[281] The submissions by counsel that the appellants were prejudiced by absence of legal representation at pre-trial stages, by their inability or lack of capacity to cross-examine the witnesses after counsel withdrew and their failure to cross-examine witnesses during the time that they were in attendance, in our view and on the authority that we have cited, do not assist their case: the failure to cross-examine would have added little, if anything, to their defence so long as the appellants did not testify on oath. There would still have been no evidence to properly evaluate and weigh up against that of the state witnesses. The failure to cross-examine and to testify, inevitably, became tools at the disposal of the trial judge in assessing the evidence and in coming to a decision or verdict thereon.

The lack of legal representation from 2005 to 2007 in the circumstances existing at

<sup>55</sup> (C of a (CRI) No 21/09) [2010] LSCA 32 (22 October 2010) 464 at para 11.

the time does not, in our view, constitute so serious a factor of prejudice or an irregularity as would justify the setting aside of the conviction. Some appellants represented by other counsel in this appeal withdrew their appeal against conviction for high treason after realising the futility of pursuing it. That is some indication that the condemnation of the whole trial as unfair is not a sustainable argument. The enormity of the consequences of a decision that the whole trial was unfair and warrants the setting aside of the conviction, is self-evident. This was a case involving vital interests of the State and criminal charges of the highest order of seriousness. The contention to have the conviction set aside needed not only to have been jointly shared with all the other appellants but also to have been argued with focused thoroughness based on incisive research and argument and not on generalised submissions as did Ms Agenbach. Counsel relied on *S v Monday*<sup>56</sup>, *The Government of the Republic of Namibia & others v Mwilima & others*<sup>57</sup>, *S v Khanyile & another*<sup>58</sup>, and *S v Luboya*<sup>59</sup> to support the contention that the whole trial was a humongous failure of justice. In our view she did not, more importantly seek to show how the principles of law in those cases apply to the facts of each of her clients' cases and to critically analyse the reasoning of the trial judge, but took an omnibus and generalised approach, couched in hyperbolic terms as evidenced by such statements in the written submission, as –

'99. It therefore cannot be gainsaid that the context of the trial in the court *a quo*, the irregularities surrounding legal representation described hereinbefore, wrecked and totally destroyed the appellants' right to a fair trial. The lack of essentially and consequently proper legal representation was of such significant and material

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<sup>56</sup> 2002 NR 167 (HC).

<sup>57</sup> 2002 NR 235 (SC).

<sup>58</sup> 1988 (3) SA 795 at 798G-799C.

<sup>59</sup> 2007 (1) NR 96 (SC).

proportions that it did not only constitute an impermissible and unlawful infringement with the appellants' right to a fair trial, but in effect destroyed appellants' right to same.

100. It is therefore respectfully submitted that in the instance of the appellants, a material irregularity in the conduct of the trial has occurred and that the proceedings in the trial court were fundamentally irregular resulting in a gross miscarriage of justice which entitles them to the setting aside of their convictions and sentences following this Honourable Court's judgments in *Monday, Mwilima and Luboya*.'

[282] Counsel employed similar language in relation to the court's decision on the special entry. She submitted that the infringement of constitutional rights was 'aggravated by the failure of the court *a quo* to reject the evidence of all witnesses who testified before the special entry which amounts to an irregularity and/or a misdirection particularly in view thereof that the Court relied on this evidence to convict the appellants.'

[283] We have already dealt with the effect of the special entry and came to the conclusion that the irregularity associated with it did not result in a miscarriage of justice. Ms Agenbach did not assist us to come to any different conclusion by at least focusing attention on any faulty reasoning by the trial judge, and on how the evidence implicating the appellants should have been treated. As we shall show below, there was sufficient evidence from the State that proved, as found by the trial judge, that the appellants were involved in the conspiracy to overthrow the Government in the Caprivi Region. There is simply no cogent submission or reasoning by counsel that would persuade us to reject that evidence and acquit the appellants.



[284] We now proceed to deal with the appeal of each of Ms Agenbach's clients. It is in this context that we examine counsel's submissions based on the complaints relating to the treatment by the court *a quo* of the evidence of single and accomplice witnesses. In general, counsel's approach was this. The grounds of appeal of each appellant are set out in the notice of appeal filed in June 2016. Therein she indicates where, in her opinion, the judge erred in his assessment of each witness's evidence. Instead of making a single point in relation to such evidence where it relates to more than one witnesses, she repeats the same point over and over again from witness to witness. As an example, in relation to 15<sup>th</sup> appellant she submitted that the trial judge gave no or insufficient weight to the fact that Kapulo was an accomplice witness, that Kapulo did not identify the appellant with ease, that appellant had a right to seek asylum in another country without interference from Namibian authorities and that Kapulo's credibility was seriously dented during cross-examination by other defence counsel. She repeated the same issues and submissions in similar, if not the same, wording in respect of other state witness, in the fashion of a cut and paste job. This made the reading of her submissions quite tedious.<sup>60</sup> Then, when it came to the heads of argument on the basis of which she made oral submissions, she quoted extensively or summarised what the trial judge said without commenting as to whether, or in what respect, she disagreed with the judge's reasoning<sup>61</sup>. It was difficult to tell whether she had abandoned some of the grounds of appeal in the notice or which of them she sought to rely on in argument before us.

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<sup>60</sup> See paras 40 -51, p 96 – 103 of the notice of June 2016 .

<sup>61</sup> See paras 46.5 – 46.5.9, p40-43 of heads of argument filed on 16 August 2021.

*15<sup>th</sup> appellant - Thaddeus Siyoka Ndala*

[285] Four state witnesses testified against 15<sup>th</sup> appellant – Christopher Lifasi Siboli ('Siboli'), Kapulo, Olver Muyandi Mbulunga ('Mbulunga') and William Miti Ndana ('Ndana'). They all knew or came to know 15<sup>th</sup> appellant well. They all identified the appellant in court. The judge noted that the identification of 15<sup>th</sup> appellant by Mbulunga and Ndana 'was not challenged during cross-examination by counsel who appeared on behalf of the accused.'<sup>62</sup>

[286] Siboli said that 15<sup>th</sup> appellant was actively involved in the secessionist movement. He attended a committee meeting at the DTA offices in Katima Mulilo in 1998 at which Muyongo and Geoffrey Mwilima talked about secession of the Caprivi Region by violent means and the appellant supported the idea. The appellant was present when the CLA was formed in 1989 and recruited persons to join the armed wing. At a meeting chaired by Muyongo in 1992, the appellant agreed to go to Angola to acquire weapons and donated money for the purpose. In 1997 appellant attended various meetings at DTA office, at Muyongo's old homestead, at Liselo village and at Masokotwani, where secession was discussed. The judge *a quo* rejected Siboli's evidence about the formation of CLA in 1989 and the appellant's presence thereat. He found that other evidence shows that the CLA was formed at a much later stage and, in any event, in 1989 'there was as yet no Government in an independent Namibia hence also no reason for the existence of such an organisation.'<sup>63</sup> No issue was taken by counsel with Siboli's evidence.

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<sup>62</sup> At paras [1021] and [1022] of judgment.

<sup>63</sup> At para [1026] of judgment.

[287] Kapulo was himself involved in the secessionist conspiracy. He testified that when he was at Sachona with other secessionists, 15<sup>th</sup> appellant in the company of Kenneth Sitali brought food to the camp. The group, now consisting of 100 secessionists, had to leave Sachona for Linyanti because their presence at Sachona had become known. They were transported in two motor vehicles, one in which he was, was driven by 15<sup>th</sup> appellant. Ms Agenbach's criticism of the judge is that this witness was warned in terms of s 204 of the CPA and testified in the presence of the appellants but before the special entry: his evidence should not have been used to support the conviction. He was able to identify the appellant on a second attempt and his 'credibility was severely dented by cross-examination by other defence counsel.' The judge accepted Kapulo's evidence but in doing so he was fully cognisant of the fact that it was affected by the special entry. He nonetheless took it into account together with the evidence of other witnesses. As for his evidence being dented in cross-examination, counsel did not do more than making that bald submission and did not show in what respects the evidence was so dented. There is no substance to the criticism of the judge's findings.

[288] Mbulunga related two instances when he came into contact with 15<sup>th</sup> appellant. The first was when the appellant sent one Osbert Likanyi to inform the witness about a meeting at the DTA office. The second was when, led by Samboma, the witness went to a UNITA camp in Angola and on their return, whilst on Zambian territory 15<sup>th</sup> appellant and Steven Mamili brought some food for the group. Mbulunga's evidence was criticised for the same reasons as that of Kapulo: he was warned in terms of s 204 as an accomplice witness; he testified in appellant's presence and before the special entry was made, his evidence was dented by cross-examination by other defence counsel; he was subjected to

inhuman and degrading treatment. His evidence should not have been accepted. Counsel added another dimension to her criticism of the acceptance of his evidence – ‘that even if the testimony is admissible and/or credible, which it is not, the witness testified about events in 1998 which does not constitute a crime and/or is irrelevant and/or insignificant and/or inconsequential to the attack of 2 August 1999.’ This last submission is typical of submissions by counsel. It is just a bald submission that does not take into account the evidence tending to show that the conspiracy to secede started as far back as 1998. How then are the events of 1998 to be viewed as irrelevant or inconsequential to the attacks in August 1999. For the same reasons that we find no fault with the judge’s assessment of Kapulo’ testimony, we also find none with respect to this witness’s evidence.

[289] Ndana testified that he became a member of ‘the group of 92’ and was at Sachona when 15<sup>th</sup> appellant brought food to the camp. He said that he had known 15<sup>th</sup> appellant from Katima Mulilo. It was in connection with the evidence of this witness that the judge *a quo* adverted to exhibit ‘EGF(8)’ at p 14 in which the history of the CLA is referred to. Exhibit ‘EGF(8)’ records:

‘Wednesday the 28<sup>th</sup> October 1998 at 18h15 Mr Mishake Muyongo the president of UDP – led a group of four men out of Katima Mulilo. Their names are as follows:

- (a) Ndala Thaddeus Siyoka
- (b) Sitali Kenneth
- (c) Mushakwa Charles Mafenyeho
- (d) Muhinda Mubuyaeta.

We were five in number. Branson Kwala borrowed the Hilux single vehicle registration no. N 807 KM and drove to Mphundu via Muchifa Road.’

[290] The learned judge also referred to exhibit 'EGF(2)' on 'Required Equipment' which was found in 15<sup>th</sup> appellant's possession and in which it is stated that Mr Muyongo and four men crossed into Botswana on 29 October 1998 after the group of 92 had crossed on 27 October 1998 and that the formation of CLA was a collective decision. He also referred to 15<sup>th</sup> appellant's evidence during a bail application on 31 July 2000 when he admitted that he was a member of SWATF and UDP. Again he referred to exhibit 'ETC' which shows that 15<sup>th</sup> appellant was one of the UDP members who attended a meeting in Botswana on 1 January 1999, the minutes of which, according to the judge, amount to an executive statement.

[291] Counsel submitted that the judge erred, as with the evidence of Kapulo and Mbulunga, in giving insufficient weight to the fact that Ndana was an accomplice witness warned in terms of s 204, that he testified in the presence of the appellant before the special entry was made, and that he 'testified about an incident in 1998 which does not constitute a crime' and was irrelevant to the attack in August 1999. The judge further erred in relying on exhibits 'EGF(8)', 'EGF(2)' and 'ETC' in that he gave insufficient weight to the following: the police came into possession of exhibits 'EGF(8)', 'EGF(2)' and 'ETC' unlawfully, as is suggested by the evidence of several witnesses; there was no conclusive proof that EGF(2) was written by the appellant; 'EGF(2)'; 'ETC' was authored by Stephen Mamili who passed away in the early stages of the proceedings and that he wrote the document could not be conclusively verified. Finally, counsel submitted that 15<sup>th</sup> appellant should not have been convicted because there is no evidence that he was present at any of the places which were attacked or that he made common cause or shared a

common purpose with those who actually perpetrated the attack or that he had the requisite *mens rea*.

[292] Having considered the evidence against 15<sup>th</sup> appellant as given by the four witnesses and the submissions of counsel, the learned judge *a quo* concluded:

‘The accused elected not to testify in the face of the evidence which requires an answer from him. I am accordingly satisfied that the evidence presented by the State at the conclusion of the trial constitutes proof beyond a reasonable doubt that the accused committed overt acts with the required hostile intent and that the accused committed the offences set out here under.’<sup>64</sup>

[293] Mr Campher supported the findings and conclusion of the trial judge. There is not much by way of submissions that added anything new. The decision of the learned judge *a quo*, arrived at after considering damning evidence from four state witness to which 15<sup>th</sup> appellant gave no counter-veiling evidence is beyond reproach. There is some lack of appreciation on the part of counsel that the State case and the conviction were premised on a conspiracy which began in 1998, hence the submission such as that 15<sup>th</sup> appellant was not present at the places of the attack or did not share a common purpose with the actual attackers. We are satisfied that the 15<sup>th</sup> appellant was properly convicted of high treason, nine counts of murder and 91 counts of attempted murder. Although he was himself not a participant in the actual attacks on 2 August 1999, he was clearly a co-conspirator to secede the Caprivi Region from the rest of Namibia by violent means with knowledge that the use of violence, in all probability, would result in the killing or attempted killings of people. His appeal cannot succeed. It is accordingly dismissed.

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<sup>64</sup> At para 1027 of judgment.

[294] We have examined the grounds of appeal in respect of 15<sup>th</sup> appellant in detail. We do not intend to do the same in respect of each of the remaining appellants represented by Ms Agenbach. As we earlier observed most of the grounds of appeal are repeated for each of her clients. Accordingly, we now restrict ourselves to a consideration of the trial judge's conclusions and any outstanding submissions by counsel that may call for separate consideration.

*16<sup>th</sup> appellant – Martin Siano Tubaundule*

[295] A number of witnesses testified against 16<sup>th</sup> appellant but the judge disregarded the evidence of those of them that failed to identify the appellant. He relied on the evidence of only four witnesses – Russens Luslizi Kumana ('Kumana'), Hamlet Kachibolewa Muzwaki ('Muzwaki'), Simeon Nghinomenwa Kaipiti ('Kaipiti') and Eimo Dumeni Popyeinawa ('Popyeinawa').

[296] Kumana testified that he was recruited to go to Botswana by his cousin, Francis Mubita. They started off from Zambezi filling station for Liselo in a convoy of three motor vehicles, one of which, 'a dark blue Hilux bakkie with registration no. N 408 KM, was driven by 16<sup>th</sup> appellant. He identified 16<sup>th</sup> appellant in court. His evidence was not challenged by the appellant.

[297] Muzwaki testified that he attended a meeting on a day in October or November 1998 addressed by Mishake Muyongo after his resignation from Parliament. The topic of discussion was secession of the Caprivi Region. The 16<sup>th</sup> appellant was in attendance.

[298] Kaipiti was an officer in the Prison service and received 16<sup>th</sup> appellant into custody at Grootfontein Prison on 10 August 1999 together with six others including 15<sup>th</sup> appellant. On receiving them he took possession of their properties, diaries and letters found in their possession and entered the property into the admission register. The property was later handed over to Inspector Haingumbi.

[299] Popyeinawa, as investigating officer, received a document, exhibit 'EGJ(1)' identified as belonging to 16<sup>th</sup> appellant, which, among other things, stated:

'16/12/98, this date I left the Caprivi to join the armed struggle for the Caprivi Liberation Army. To fight for independence is not mere verbal talk. Then to take the struggle ... to take it all means, not leaving unturned stones. The key for the armed struggle is armed struggle. We have to take some risks.'

[300] A handwriting expert examined the above extract from exhibit 'EGJ(1)' and concluded that the handwriting was 'highly probable' that of 16<sup>th</sup> appellant. Exhibit 'ETC', earlier referred to in relation to 15<sup>th</sup> appellant, shows that 16<sup>th</sup> appellant attended the meeting held in Botswana on 1 January 1999.

[301] The learned judge *a quo* accepted the evidence against the 16<sup>th</sup> appellant despite Ms Agenback's submissions that the evidence of the handwriting expert was not conclusive and that Muzwaki, in three successive statements to the police, did not mention 16<sup>th</sup> appellant's attendance of the meeting in 1998 at which secession was discussed and only remembered 8 years later that such meeting was held. In rejecting the latter submission, the judge observed –



[1032] ... I agree that one could legitimately question the ability of the witness to remember such an incident after such a long time, but it is not uncommon for witnesses to testify about events not mentioned in their witness statements.

[1033]... Nevertheless in spite of the criticism raised by Ms Agenback, I am of the view that the cumulative effect of the evidence presented by the State was of such a nature that it required an answer from the accused.'

[302] The learned judge then concluded:

'The accused elected not to testify. I am satisfied that the evidence presented by the State, in the absence of a reply by the accused person, proves the commission of the offences mentioned hereunder beyond reasonable doubt.'

[303] The 16<sup>th</sup> appellant was in the same position as the 15<sup>th</sup> appellant in that he was not a participant in the attacks on 2 August 1999 and was brought into Namibia in the circumstances already discussed. Like the 15<sup>th</sup> appellant, he was a party to conspiracy to overthrow the Government in the Caprivi Region by violent means, with all the potential, as it turned out, that people would be killed or maimed in the process. We are not persuaded that a basis has been laid for his acquittal. To the contrary we find that he was a party to the conspiracy to commit high treason and the other offences of which he was found guilty. His appeal against conviction for high treason, nine counts of murder and 91 counts of attempted murder therefore stands to be dismissed. We find accordingly.

*2<sup>nd</sup> appellant -Chris Puisano Ntaba*

[304] The 2<sup>nd</sup> appellant was convicted of high treason, nine counts of murder and 91 counts of attempted murder on the evidence of five main witnesses - Walter

Mwezi Sikochi (Sikochi), Johnny Shapaka (Shapaka), Lemmy Haifiku (Haifiku), Ben Shikesho (Shikesho) and Daniel Mouton ('Mouton'). Their evidence implicated them in the events immediately preceding the attacks on 2 August 1999 and the attacks themselves.

[305] Sikochi testified that 2<sup>nd</sup> appellant was at Makanga on 1 August 1999 where the final preparations were made for the attacks on 2 August 1999. Shapaka testified that four rebels were captured at Mpacha military base around 04h00 and another eight at between 07h00 and 08h00 in the morning of 2 August 1999. Haifiku testified that he handed over the captured rebels to the police at 10h30 that morning. Shikesho and Mouton testified with respect to photographs in exhibit 'Q'. Shisheko's evidence does not seem to have been of much use in that it lacked clarity about whether 2<sup>nd</sup> appellant was still at Mpacha military base when the witness went there to ask for the names of the captured rebels. Mouton's evidence was that he was at Mpacha military base around 14h00 on 2 August 1999 and, in the line of his business as a police photographer, he took photographs of the rebels which appear in exhibit 'Q' as nos. 31, 32 and 33, in which 16<sup>th</sup> appellant is shown as one of the captured rebels.

[306] The learned judge *a quo* summarised the evidence against 16<sup>th</sup> appellant and found that the appellant was captured inside Mpacha military base on the morning of 2 August 1999. There was no evidence that he could have been captured elsewhere and brought to the military base as Mr Kachaka, during cross-examination, surmised. The judge stated that with this evidence against him, the 16<sup>th</sup> appellant-

'Nevertheless ... elected not to testify. I am satisfied that the prima facie evidence presented by the State proved the presence of the accused on the premises of Mpacha military base on the morning of 2<sup>nd</sup> August 1999. This constituted an overt act. In my view the only reasonable inference to be drawn in these circumstances is that the accused had the required hostile intent. I am satisfied that the evidence presented by the State, in the absence of any evidence by the accused person, proves beyond a reasonable doubt the commission of the offences referred to hereunder.'<sup>65</sup>

[307] The evidence against 2<sup>nd</sup> appellant places him at the scene where an attack took place. It proves he was one of those involved in the conspiracy to secede the Caprivi Region from Namibia using violence with its concomitant consequence that persons would be killed and maimed in the process. His refusal to testify, like did others in his group, did not help his defence at all. The finding of the court cannot be faulted. We confirm his conviction on all the counts and dismiss his appeal.

*3<sup>rd</sup> appellant- Postrick Mowa Mwinga*

[308] Seven witnesses testified against 3<sup>rd</sup> appellant. Their testimony was considered by the court below. The witnesses were Mwisepi, Rennety Koyi Mukushwani (Rennety), Shailock Sinfwa Sitali (Sitali), Oliver Simasiku Chunga (Chunga), Nuwe, Kapulo and Willem Eiman.

[309] Mwisepi testified on two issues concerning 3<sup>rd</sup> appellant. First, that the appellant was at Dukwe refugee camp in Botswana. Second, that after the attack on 2 August 1999, the appellant came out on NBC radio station (Silozi section) and announced to fellow rebels that they should surrender. Rennety, 3<sup>rd</sup> appellant's wife, confirmed hearing the appellant over the radio in September

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<sup>65</sup> Para [1056] of judgment.

1999, announcing the same message. She testified after she was advised of the provisions of s 198 and s 199 of the CPA relating to privilege arising out of marital state and non-compulsion to answer questions which a spouse may decline to answer. Simasiku also testified that he heard the appellant announcing over the radio that 'the people in the bush must come and hand themselves over.'

[310] Sitali testified that the appellant attended a meeting at the DTA office in 1998 at which Mishake Muyongo said that the UDP had parted ways with the DTA and that the Caprivi Region would be seceded from Namibia. Ms Agenbach submitted at the end of the trial that it was not possible that Muyongo would make the latter announcement because the meeting was public and the police were in attendance. It does not seem that the learned judge *a quo* made any specific finding as to whether or not Muyongo made the statement attributed to him at that meeting. We do not see why he may not have made such statement. At that stage there was nothing particularly criminal about expressing the political opinion that the Caprivi Region would secede as that could be done through negotiations. As a politician Muyongo could very well have said it.

[311] Nuwe identified 3<sup>rd</sup> appellant as one of the persons who left in a convoy of motor vehicles at night from the DTA offices for Angola. Kapulo identified the 3<sup>rd</sup> appellant in court and testified about 3<sup>rd</sup> appellant being the firearms instructor at Sachona and Lyibulibu camps and that he was also in prison with the others, including the witness, in Mahalapye Prison in Botswana. At Dukwe refugee camp 3<sup>rd</sup> appellant was also there as a group leader giving theoretical training about the use of firearms. Despite cross-examination from defence counsel Mr Samukange

on the issues about which he testified, Kapulo maintained that his evidence was the truth.

[312] Mouton, a member of the Namibian police service, testified about the pointing-out made by the appellant of 'various places, including Makanga base where the attack was launched and Katounyana Police Camp, also attacked on 2<sup>nd</sup> August 1999. He was not cross-examined on this evidence. The judge however expressed reservations about the admissibility of the evidence of pointing out captured on camera and on photographs in exhibit 'EHJ'. He stated that although it could not be denied that another police officer accompanying the witness, Inspector Francis, explained to the appellant about his rights in relation to the pointing out, as testified by the witness, there was no evidence that the appellant had been advised of his right to legal representation during that exercise.

[313] Having considered the evidence implicating 3<sup>rd</sup> appellant in the conspiracy to commit high treason, the learned judge *a quo* concluded:

'[1071] The accused did not testify. I am of the view that, even were Exhibit EHJ to be excluded, the evidence presented by the State required an answer from the accused person. The reference to the cross-examination by Ms Agenbach of witness Kapulo cannot assist the accused person. The version of the accused was put to the witness as counsel was bound to do, but that does not elevate such instructions put to the witness as evidence. The evidence of Kapulo stands uncontroverted. The evidence of Kapulo referred to earlier was that the group of people was the group of 92 who, after the death of Victor Falali, fled to Botswana.

[1072] I am satisfied that the evidence presented by the State, in the absence of any testimony by the accused person, proves beyond a reasonable doubt the commission of an overt act with the required hostile intent and that the accused stands to be convicted of the crimes referred to hereunder.'

[314] It is readily apparent that the judge *a quo* was correct in his treatment of the cross-examination of Kapulo by counsel. He correctly set out the legal position as in the *Motsamai* case (*supra*). We are of the view that the learned judge's analysis of the evidence and his conclusions were correct. There was enough evidence against 3<sup>rd</sup> appellant, which if not rebutted by appellant's own evidence, legitimately stood as proof beyond a reasonable doubt of the commission of the offence charged. The 3<sup>rd</sup> appellant was a self-confessed participant in the conspiracy to overthrow the Government of Namibia in the Caprivi Region by force of arms, with the real potential that in the process murders and attempted murders would be committed, as it turned out. His appeal against the one count of high treason, nine counts of murder and 91 counts of attempted murder, fails.

*4<sup>th</sup> appellant – Ndala Saviour Tatalife*

[315] The evidence incriminating 4<sup>th</sup> appellant was given by his brother and sister, Harrison Mufungulwa Sikumba (Sikumba) and Jennifer Nando Tatalife. They both testified that 4<sup>th</sup> appellant went missing from their village in 1998 and returned after the attacks in Katima Mulilo on 2 August 1999. The brother said that when they met at their village after the attacks on 2 August 1999, 4<sup>th</sup> appellant told him that he had been forced to join CLA and that 'he was at Katounyana where 'shootings' took place' and that he managed to escape from there. Both brother and sister said that 4<sup>th</sup> appellant asked them to go with him to their father so that the father could report his return to the chief. That was done whereupon the chief reported the matter to the police and the appellant was arrested. The brother also testified about the recovery, after 4<sup>th</sup> appellant's arrest of an AK rifle, a magazine a

camouflage trouser, a brown cloth and another piece of property described in the judgment as 'a rung'<sup>66</sup> after the appellant had written a letter from prison indicating where these items could be found.

[316] The learned judge *a quo* stated that Sikumba 'was not cross examined and his evidence must be accepted as uncontroverted.' To the contention by Ms Agenbach that Sikumba's evidence about what 4<sup>th</sup> appellant told him was hearsay, the judge recanted:

'I disagree. What was said by the accused were admissions to his brother about his involvement in the attack on Katima Mulilo on 2<sup>nd</sup> August 1999. I must accept that what was said by the accused was said freely and voluntarily. The fact that the accused elected not to testify does not convert what he said into inadmissible hearsay. It remains incriminating evidence against him. It is significant that counsel does not deny that the accused said to his brother what his brother had testified to in his evidence in chief.'<sup>67</sup>

[317] Despite a submission by counsel that it was 'highly unlikely' that 4<sup>th</sup> appellant wrote the letter indicating where the recovered items, AK rifle *et al*, were to be found, because letters from prison are censored, the learned judge found that counsel did not go so far as to deny that those items were in fact recovered as testified.

[318] The evidence of police officer Jacobus Hendrick Karstens about the pointing out by 4<sup>th</sup> appellant of Makanga rebel base, where various items indicating that the base had been used as such were observed, was rejected by the court. He did so because no evidence had been given 'about the process followed prior

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<sup>66</sup> Para [1073] of judgment.

<sup>67</sup> Para [1074] of judgment.

to the pointing outs. There is accordingly no evidence that the accused had been informed of his right to legal representation and what his response was and therefore no proof that the pointing out was done freely and voluntarily or that his rights in the circumstances had been explained to him.'

[319] The conclusion that the learned judge *a quo* arrived at on the evidence before him is similar to that he reached in relation to others of Ms Agenbach's clients:

'The accused person elected not to give evidence. I am satisfied that the State has in the absence of any evidence from the accused proved an overt act by the accused with the required hostile intent, beyond reasonable doubt and that the accused stands to be convicted of the offences mentioned hereunder.'<sup>68</sup>

[320] We have no difficulty at all in confirming the findings and conclusions of the judge *a quo*. The 4<sup>th</sup> appellant was nailed by the evidence of his own brother and sister about his absence from the village and his return immediately after the attacks on 2 August 1999, his confession to them about where he had been and his participation in the attack at Katounyana. That evidence, which he did not at all contest and given by his own brother and sister is, in circumstances where he did not testify, sufficient proof that he was party to the conspiracy to overthrow the Government of Namibia in the Caprivi Region by military force with the real possibility that in the process other persons would be killed or maimed. He was properly convicted on the one count of high treason, nine counts of murder and 91 counts of attempted murder. His appeal is accordingly dismissed.

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<sup>68</sup> Para [1079] of judgment.



*8<sup>th</sup> appellant – John Panse Lubilo*

[321] Three witnesses, Hobby Habaini Lisilo (Lusilo), and police officers Sem Mbinga (Mbinga) and Jacobus Hendrick Karstens (Karstens), testified against 8<sup>th</sup> appellant. Lusilo, it seems to us, is the same person that is referred to in the judgment as Sinyabata or as Hobbi Sinyabata.

[322] The main evidence linking 8<sup>th</sup> appellant to the attacks on 2 August 1999 is an injury on his big toe which he sustained from a bullet strike from enemy fire at the time of the attack. That was the evidence of Lusilo and Karstens. Lusilo was unable to identify 8<sup>th</sup> appellant in court because, according to him, the appellant's face had changed over time. The witness, however, was instrumental in the identification of 8<sup>th</sup> appellant when the police went to apprehend him. He said that on 2 August 1999 he and his brother-in-law, Richard Masupa Mukungulike, went to 8<sup>th</sup> appellant's village, Sikelenge and there saw the 8<sup>th</sup> appellant and the injury to his big toe. He said that the appellant told them that he had been shot at Mpacha military base.

[323] Mbinga testified that he and other police officers, accompanied by one Hobby Sinyabata, went to Kaenda village on 30 August 1999 and the said Sinyabata pointed out two persons, Richard Masupa Mukungulike and Joseph Kubuyana, who helped them identify 8<sup>th</sup> appellant's homestead. The 8<sup>th</sup> appellant was not at home but his wife was. She led the officers to a nearby village, Nyanga Nyanga and there pointed out her husband to them.

[324] Karstens testified that he saw an injury on the left toe of 8<sup>th</sup> appellant 'which appeared to have been caused by a bullet' although the appellant did not admit the cause thereof: he explained to the police officer that he had been injured whilst running back to his village and 'stepped into a stick that caused the injury'. Karstens also testified about the pointing out that was done by 8<sup>th</sup> appellant on 1 September 1999 after his arrest. This pointing out led to the recovery from a hole in the bush, of a white plastic bag inside which was a G3 rifle and a magazine. The learned judge *a quo* rejected this evidence because he was not 'satisfied that the pre-conditions to have such a pointing out to be admitted as evidence against the accused person were met by the State.'<sup>69</sup>

[325] The learned judge *a quo* assessed the evidence against 8<sup>th</sup> appellant as follows:

[1091] The evidence against the accused is that Hobbi Sinyabata testified that he observed a wound on the big toe of John Panse Lubilo, who told him that he was wounded at Mpacha. Sinyabata failed to identify the accused in court but identified the courtyard of John Lubilo who he knew was an induna. Subsequently the wife of the accused identified him. The evidence of Sinyabata was not disputed neither was the evidence of Sem Mbinga. The evidence of Inspector Karstens was that he observed an injury on the big toe of the accused person. Karstens in my view could not express an opinion of what could have caused such an injury, but it is not denied that the accused was injured on his big toe. The accused himself gave an innocent explanation as to how he sustained such injury according to Karstens. The accused through the testimony of Sinyabata placed himself at Mpacha military base. This is an admission by the accused.

[1092] I am of the view that in the face of such evidence an answer was due by the accused. I am satisfied that the evidence presented by the State proved the

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<sup>69</sup> Para [1090] of judgment.

commission of an overt act by the accused and the only reasonable inference in the circumstances is that the accused had the required hostile intent at the relevant time. I am satisfied that the State has proved beyond reasonable doubt that the accused committed the offences mentioned hereunder.'

[326] The evidence before the court *a quo* laid a firm basis that if it was not contradicted by other evidence by 8<sup>th</sup> appellant or anyone else in his defence, it would become itself proof beyond a reasonable doubt that the appellant committed the offences charged. The 8<sup>th</sup> appellant, just like his other colleagues represented by Ms Agenbach, refused to testify in his defence. This meant that there was no evidence to rebut, to any extent at all, the evidence of prosecution witness. There is no reason for us to upset the findings and conclusions of the judge *a quo*. The 8<sup>th</sup> appellant was one of the those who conspired to secede the Caprivi Region from Namibia with the use of firepower and in the knowledge that killings and attempted killings of persons would occur, as they sure did. He was therefore properly convicted on one count of high treason, nine counts of murder and 91 counts of attempted murder. His appeal is dismissed.

#### General comment on Ms Agenbach's clients' appeal

[327] One of the bases for finding Ms Agenbach's clients guilty of the offences charged is their refusal to testify. The learned trial judge highlighted this when, in respect of each appellant, he stated that he did not testify when the evidence against him required an answer from him, the absence of which entitled the court to infer guilty of each of them. The application of the standard of proof in criminal cases is easiest when an accused has given evidence in his defence. In that case

the words of *Greenberg J in R v Difford*,<sup>70</sup> and Lord Denning in *Miller v Minister of Pensions*,<sup>71</sup> are often quoted: in *R v Difford* –

‘... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.’

And in *Miller v Minister of Pensions*:

‘It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it’s possible but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’

[328] Both passages show the importance of there being some evidence by an accused person which the court will assess as to its degree of probability. And if there is some such evidence, the statement by Hoffman and Zeffert,<sup>72</sup> becomes apposite:

‘Unless a judge or a magistrate has probably misdirected himself as to the appropriate standard, a court of appeal will be less concerned with the precise words he has used than with whether his actual assessment of the evidence shows the caution required by the criminal standard.’

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<sup>70</sup> 1937 AD 370 at 373.

<sup>71</sup> [1947] 2 All ER 372 at 373.

<sup>72</sup> Op.cit. at p 526.

[329] The trial judge in this case considered all the evidence against the appellants, which no doubt was strong against them, most of it given by persons well known or related to them and placing the appellants at meetings where secession was discussed and planned, the places which were attacked and their roles in the secessionist movement. The trial judge was even handed in his assessment of the evidence and rejected some of it, where appropriate. To that evidence there was no response or answer by the appellants. He was fully entitled to draw the inference of guilt. We are satisfied he was correct in doing so.

#### Conclusion on convictions

[330] From the foregoing it is clear that the appeals against the convictions have been set aside. We are satisfied that all appellants in this appeal were correctly convicted on all the counts charged. We now proceed to deal with the appeal against sentence.

#### Ad Sentence

[331] On 28 April 2016 the court *a quo* granted leave to appeal against sentence to Raphael L Lifumbela, Chris P Ntaba, Postrick M Mwinga, Charles Mushakwa, Ndala S Tatalife, John P Lubilo, John S Samboma, Bennet Mutuso, Thaddeus S Ndala, Martin S Tubaundule, and Geoffrey K Mwilima, respectively being appellants numbers 1, 2, 3, 4, 8, 9, 14, 15, 16, 17, 26. The state was also granted leave to cross-appeal the sentences imposed, in the words of the trial judge ‘... leave to cross – appeal against sentence of the above applicants’.

[332] Most, if not all, of the grounds of appeal against sentence are common to all the appellants in the exception of a few, namely:

- (a) that the court misdirected itself and/or erred in law and /or fact by imposing an effective term of imprisonment of 18 years or 15 years, in that such sentence is too high and as such induces a sense of shock considering that the appellants have been in detention awaiting trial for a period of more than 15 years;
- (b) that there is no evidence that links each appellant to the crime of murder and attempted murder, as there is no evidence, as to who shot any of the deceased or injured persons;
- (c) in respect of appellant 17, Mushakwa, that he alleges that his moral blameworthiness is low and that his state of health should have been taken into consideration; and
- (d) in respect of appellant 9, Samboma, he alleges that he is suffering from diabetes and was assaulted by the police during their investigation.

[333] The State on the other hand raised as its grounds of cross- appeal against sentence, the following:

- (a) that the learned judge misdirected himself and /or erred in law and /or in fact, when he ordered that the whole of the unsuspended periods of imprisonment of the sentences on the murder and attempted murder counts

should run concurrently with the unsuspended period of imprisonment imposed in respect of high treason.

(b) that the whole or at least part of the unsuspended periods of imprisonment should have been ordered to run consecutively, with the period of imprisonment imposed in respect of the count of high treason.

(c) that the offence of which the appellants were convicted of are the most serious offences one can be convicted of, namely murder and high treason.

(d) that a lot more innocent people could have been killed, it was very fortunate for the persons attacked that not more were killed because the aim of the secessionists was to kill all the people found at the places they attacked.

[334] What follows is a general discussion on sentence taking into account all the grounds of appeal against sentence. We need to remind ourselves that the objectives of punishment are aimed at retribution, deterrence, and rehabilitation, the emphasis in modern times being, generally on the latter objective. Any punishment or term of imprisonment which takes away from the offender all hope of release should be viewed as being contrary to the values and aspirations of the Constitution and more specifically the inherent right to dignity afforded to such incarcerated offender. During the hearing on sentence the Attorney General was not invited to intervene or make submissions, by virtue of his functions under Article 87 of the Constitution so as to place evidence before the court concerning the application of the Correctional Services Act 9 of 2012 on the question of parole

applicable to offenders. This Act makes provision for prisoners to be released prior to serving their full sentence. We shall not comment on whether the appellants are entitled to be released on parole or probation as that falls squarely within the powers of the correctional services department, and more so that no submissions were made before us in this regard.

[335] No evidence in mitigation was placed before the court at sentencing stage by the appellants, except for four of them. In respect of some of them, respective counsel placed before the court certain personal factors which they asked the court to consider in mitigation of sentence. It was therefore largely left to the discretion of the trial court what sentence to pass, relying on what the State placed before it in aggravating circumstances.

[336] It is well known that sentencing is the most difficult part of a trial. In considering an appropriate sentence, the court must, *inter alia*, take into account the triad factors,<sup>73</sup> which consists of the seriousness of the crime, the interest of society and the personal circumstances of the accused person. The court *a quo* as well as this Court took into account that 'punishment should fit the criminal as well as the crime, be fair to society and blended with the measure of mercy according to the circumstances.'<sup>74</sup>

[337] The appellants were convicted of high treason, murder and attempted murder, which are undoubtedly serious offences. So serious that the whole community was affected, to the extent that it was necessary to declare a state of

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<sup>73</sup> See *S v Zinn* 1969 (2) SA 537 (A) at 540G, *S v Tjiho* 1991 NR 361 (HC) at 365B-C.

<sup>74</sup> As stated in *S v Rabie* 1975 (4) SA 855 at 861D - 862 and applied in *S v Strauss* 1990 NR 71 (HC).



emergency. As stated by Milton in *South African Criminal Law and Procedure*<sup>75</sup>, the purpose of the crime of high treason in a modern state is threefold - to protect the people who make up the society that is in the State from violent attack by foreign invaders or internal revolutionaries; to protect formal institutions such as the legislative, executive and judicial branches of government from violence and coercion; and to protect the democratic character of the state and its constitution from destruction - hence it has been said high treason is the first among public crimes in order of origin and gravity. Milton also says:

‘What the crime punishes is the destruction of these interests in certain specific ways. It is treason to encourage or facilitate invasion of the country by external enemies. It is treason to bring about internal rebellion. It is treason to apply violent or coercive pressure upon the government and its personnel by insurrection. It is treason to seek to overthrow the established democratic order by unconstitutional means.’<sup>76</sup>

[338] The seriousness of the offences committed by the appellants is self-evident. Inevitably, this rung of the triad significantly affects the punishment to be imposed. In *S v Stoney Raymond Naidel & 2 others*<sup>77</sup> Damaseb JP, discussed the need for a judge to blend his sentence with mercy but pointed out that ‘in certain cases that may well not be possible in view of the seriousness of the offence and the interests of society which required deterrent treatment of the offender.’

[339] What happened in this case can be gleaned from the main judgment on conviction, which clearly shows that it was a political act directed at the government. There are various methods to raise a discontentment with the government except by violent means. People can negotiate and/or protest

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<sup>75</sup> JRL Milton *South African Criminal Law and Procedure*, Vol 11 3 ed., p 2-3.

<sup>76</sup> Milton *op. cit.* at p 3.

<sup>77</sup> Case No. CC 21/2006 High Court of Namibia, delivered 21 November 2011 (unreported).

peacefully and/ or register their discontentment through their representatives in the various levels of the administration. The sentence imposed by the High Court was intended, no doubt, to reflect the interests we have set out above.

[340] The High Court sentenced the appellants as follows:

[185] I am of the view that the following sentences are appropriate sentences regarding the respective accused persons with regard to their roles and the circumstances of this particular case: In respect of (the leaders): Benet Kacenge Matuso (accused no. 69), Geoffrey Kapuzo Mwilima (accused no. 68), John Sikundeko Samboma (accused no. 54), Alfred Tawana Matengu (accused no. 79), and Thaddeus Siyoka Ndala (accused no. 70) for their conviction in respect of the crime of high treason each accused is sentenced to a period of 35 years imprisonment of which 17 years imprisonment is suspended for 5 years on condition the accused is not convicted of the crime of high treason committed during the period of suspension.

[186] In respect of each count of murder, each accused is sentenced to 30 years imprisonment of which a period of 12 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of murder committed during the period of suspension. In respect of each of the counts attempted murder each accused is sentenced to 10 years imprisonment.

[187] The court ordered that the unsuspended periods of imprisonment imposed in respect of the murder counts and the periods of imprisonment imposed in respect of attempted murder counts should run concurrently with the unsuspended period of imprisonment in respect of the count of high treason.

[188] In respect of: (the attackers/soldiers)

Aggrey Kayabu Makendano

Moses Chicho Kayoka

Richard Libano Misuha

Charles Mafenyeko Mushakwa

Chika Adour Mutalife  
Kingsley Mwiya Musheba  
Osbert Mwenyi Likanyi  
Rodwell Sihela Mwanabwe  
Albert Sekeni Mangalazi  
Rafael Lyazwila Lifumbela  
Postrick Mowa Mwinga  
John Panse Lubilo  
Chris Puisano Ntamba  
Saviour Ndala Tatalife

and in respect of the conviction of high treason each accused is sentenced to 35 years imprisonment of which a period of 20 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of high treason committed during the period of suspension.

[189] In respect of each of the count of murder each accused is sentenced to 30 years imprisonment of which a period of 15 years imprisonment is suspended for 5 years on condition that the accused is not convicted of the crime of murder committed during the period of suspension.

[190] In respect of each attempted murder each accused is sentenced to 10 years imprisonment.

[191] This court orders that the unsuspended periods of imprisonment imposed in respect of the counts of murder and the periods of imprisonment imposed in respect of the attempted murder counts should run concurrently with the unsuspended period of imprisonment imposed in respect of the count of high treason.

[192] In respect of: (the supporters)

Bollen Mwilima Mwilima  
Charles Nyambe Mainga  
Mathews Muyandulwa Sasele  
Fabian Thomas Simiyasa

Kester Silemu Kabunga  
Mathews Mundi Pangula  
Bernard Maungolo Jojo  
Richard Simataa Mundia  
Martin Siano Tubaundule

[193] Chika Adour Mutalife (attacker/soldier) was described by this Court as an attacker or soldier on 2 August 1999 however this Court in the exercise of its discretion has decided to deal with him under this section due to his youthfulness at the time of his arrest. In respect of the conviction of high treason each accused is sentenced to 30 years imprisonment of which a period of 20 years imprisonment are suspended for a period of 5 years on condition that the accused is not convicted of the crime of high treason committed during the period of suspension.

[194] In respect of the counts of murder each accused is sentenced to 25 years of which a period of 15 years imprisonment is suspended for a period of 5 years on condition the accused is not convicted of the crime of murder committed during the period of suspension.

[195] In respect of the counts of the attempted murder each accused is sentenced to 8 years imprisonment.

[196] This Court orders that the unsuspended periods of imprisonment imposed in respect of the counts of murder and the periods of imprisonment imposed in respect of the crimes of attempted murder should run concurrently with the unsuspended period of imprisonment imposed in respect of the count of high treason.

[197] In respect of: (the light-lipped/taciturn)

Victor Masiye Matengu  
Alfred Lupalezwi Siyata; and  
Bernard Maungolo Jojo (supporter)

[198] Bernard Maungolo Jojo (supporter) was found by this Court to be a supporter in the attempt to secede the Caprivi Region. However I have in the

exercise of my discretion decided to deal with him under this category due to his advance age in years.

[199] In respect of the conviction of high treason each accused person is sentenced to 20 years imprisonment of which a period of 17 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of high treason committed during the period of suspension.

[200] In respect of the counts of murder each accused is sentenced to 20 years imprisonment of which a period of 17 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of murder committed during the period of suspension.

[201] In respect of the counts of attempted murder each accused is sentenced to 8 years imprisonment of which a period of 5 years imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of attempted murder committed during the period of suspension.

[202] This Court order that the unsuspended periods of imprisonment imposed in respect of the counts of murder and attempted murder should run concurrently with the unsuspended period of imprisonment imposed in respect of the count of high treason.

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[341] As earlier stated, appellants 9, 14, 15, 18 and 26 were classified as leaders. Appellants 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 17, 23 and 25 as attackers/soldiers. Of the leaders and attackers 11 of them were granted leave to appeal against sentence, namely appellants 1, 2, 3, 4, 8, 9, 14, 15, 16, 17 and 26. Although appellant 24 was classified as an attacker/soldier, the court *a quo* exercised its discretion by treating him under the rubric of supporters due to his youthfulness. Those classified as supporters, including appellant 24 are ten in number - appellants 12, 16, 19, 21, 22, 27, 29 and 30. Appellant 20, though classified as a supporter, was

sentenced as one of the 'light-lipped/taciturn' because of his advanced age together with appellants 13 and 28.

[342] It is significant to note that on the nine counts of murder and 91 counts of attempted murder, the court specified the sentence on each count, which literally interpreted means the number of years imposed on murder and attempted murder must be multiplied by nine and by 91, respectively. This means, for example, each of the leaders was sentenced to 35 years on the high treason count, a total of 270 years on the nine counts of murder and a total of 910 years on the 91 counts of attempted murder. Accordingly, after the suspension of portions of the sentences but before ordering that the sentences run concurrently, the effective sentence for high treason was 18 years, for nine murder counts was 162 years and for 91 attempted murder counts remained at 910 years. In imposing the sentences, the trial judge was fully aware of what he wanted to achieve. He stated:

'Although a court may be entitled to take various counts together for the purpose of sentence in certain circumstances and impose one sentence or a globular sentence, I personally have a preference, and for the reasons mentioned in *Visagie* and *Tjikotoke*, to shy away from the globular sentences, but shall impose a punishment in respect of each crime committed by an accused person.'

[343] We believe that the court *a quo* realised that the total effective sentences for murder and attempted murder amounted to 'Methuselah' sentences, which punishment would be in violation of Article 8 of the Constitution, and therefore unconstitutional because it extinguishes or eliminates any hope of ever being released on parole during the accused's life time. A 'Methuselah' sentence has

been characterised as unconstitutional by this Court. This includes a sentence that does not offer any hope of release on parole. In *Gaingob (supra)*<sup>78</sup> the appellants were sentenced to 67 and 64 years for two counts of murder, one count of housebreaking with intent to rob and robbery and two counts of housebreaking with intent to steal and theft. On appeal, this court was called upon to answer the question whether inordinately long fixed terms of imprisonment which could extend beyond the life expectancy of an offender, constitute cruel, inhumane or degrading treatment or punishment in conflict with Article 8 of the Constitution which entrenches the right to human dignity. It discussed in detail the purpose of imprisonment and the unlawfulness of sentences that deny an offender any hope of release during his lifetime. The State argued against a life sentence because that would in practice entitle the appellants to parole after 25 years imprisonment. It contended for 'a three-digits' determinate sentence that would ensure that the appellants served more than 25 years.<sup>79</sup> Cognisant of the unconstitutionality of a 'Methuselah' spoken to by Farlam JA in *S v Nkosi & others*<sup>80</sup> he adjusted it by ordering that the unsuspended periods of imprisonment on the murder and attempted murder counts should run concurrently with the sentence on the high treason count, thereby imposing an effective sentence of 18 years on the leaders and 15 years on the attackers.

[344] The important principle from *Gaingob* and other cases discussed therein, such as *S v Tcoelib*<sup>81</sup> and *S v Nkosi and others*<sup>82</sup> is that a sentence that effectively

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<sup>78</sup> Op cit. footnote 23.

<sup>79</sup> See paras 17 to 22 of judgment on sentence.

<sup>80</sup> 2003 (1) SACR 91 (SCA) at p 95c-e.

<sup>81</sup> 1999 NR 24 (SC).

<sup>82</sup> 2003 (1) SACR 91 (SCA).

removes from a person sentenced to imprisonment of any realistic hope of release during his life time through parole, amounts to cruel, degrading and inhuman or degrading treatment or punishment and infringes his right to human dignity enshrined in Article 8 of the Constitution. In our view, this principle extends to the sentencing of a person of advanced age, who also must be given a realistic hope of release during his life time. We therefore consider the sentences imposed on the appellants from the perspective laid down in *Gaingob*.

[345] The sentence imposed by the trial judge for high treason and each count of murder and attempted murder on the leaders, for example, was premised on a number of factors, all legitimate in the circumstances. These include the planning or premeditation that was involved<sup>83</sup>; the failure of the majority of the appellants to give evidence in mitigation<sup>84</sup>; the fact that the convicted persons opted to use violence without at all trying to negotiate with government about the grievances they may have had<sup>85</sup>; the absence of contrition<sup>86</sup>, the primacy in the circumstances of deterrence and retribution with personal circumstances receding to the background<sup>87</sup> and the roles and moral blameworthiness of each of them<sup>88</sup>. This explains why the sentence for murder is on the upper end of the range of sentences for that offence, which is ordinarily between 20 years and 30 years imprisonment.

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<sup>83</sup> Para 178 of sentence judgment.

<sup>84</sup> Para 38 of sentence judgment.

<sup>85</sup> Paras 34, 35, 168 and 170 of sentence judgment.

<sup>86</sup> Par 155 of sentence judgment.

<sup>87</sup> Para 152 and 172 of sentence judgment.

<sup>88</sup> Para 161 of sentence judgment.



[346] The trial judgment considered the period spent in custody pending completion of trial and correctly observed:

‘Another mitigating factor is that the majority of the accused persons have been in detention for the past 16 years (others for 13 years). I am not aware of any criminal trial in the recent history of this, or in neighbouring jurisdictions, where accused persons had been in custody for such a long time awaiting the conclusion of their trial. It is unprecedented.’

[347] Relying on *Karirao v S*<sup>89</sup> and *S v Radebe and another*<sup>90</sup> he also observed that the period spent in pre-trial detention must be considered together with other factors in arriving at an appropriate sentence. The reasons for the prolonged trial also come into the equation. The trial judge did not, unfortunately, demonstrate how exactly he took that period into account. The appellants were in pre-trial detention from 1999 until conviction and sentence in 2016. Some of the delay was attributable to the appellants. There is evidence of their refusal to cooperate and disruption of the proceedings in one way or another. We are of the view that the court *a quo* should have demonstrably discounted the sentence by the period spent in custody before sentence. That discounting must take into account the appellants’ contribution to the prolonged delay in completing the trial. Instead of deducting the whole period of 16 years we think that a lesser period of between 11 and 14 years should be deducted from the period of imprisonment.

[348] The trial judge considered whether the offences of which the appellants were convicted of are political or relative political offences, a matter raised by M’s Agenbach before us. The judge stated, following the reasoning of Tebbut JP in the

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<sup>89</sup> (SA 70-2011) [2013] NASC 7 (15 July 2013) para 23, p 14.

<sup>90</sup> 2013 (2) SACR 165 (SCA).

Botswana Court of Appeal in *Republic of Namibia v Alfred & others*<sup>91</sup> that high treason, committed in the case before us, is a purely political offence and that the murders and attempted murders are relative political offences. He however fell short of showing how this classification of the offences impact on the sentence. Ms Agenbach submitted that the political nature of the offences calls for a light or very light sentence. We do not agree. We have already shown that high treason is the most serious offence against the State and that killings and injury caused to innocent citizens in the course of committing high treason are all very serious offences. Deterrence must play a very significant part in sentencing convicted persons in this case.

[349] We however think that the fact that the appellants were convicted of murder and attempted murder on the basis of *dolus eventualis*, and that the direct intention to kill was absent, should have mitigated the sentence to some extent, a principle of law accepted in *S v Gariseb & others*.<sup>92</sup> The trial judge was alive to this as well: these two offences were committed in the course of committing high treason and as part of one criminal transaction.

[350] It must now be apparent that we endorse the trial judge's general approach to sentencing. We however think that he misdirected himself on two fronts, which entitle us to depart from the sentence that he imposed. First, we agree with State counsel that the suspended periods are far too long and unprecedented. We intend to reduce those periods the result of which is an increase in the effective sentences. Second, we think that he should have taken into account the period of incarceration prior to sentence. That will translate into an overall reduction of the

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<sup>91</sup> [2004] 2 BLR 101 (CA).

<sup>92</sup> 2016 (3) NR 613 para 9.

sentences on murder. We endorse the running concurrently of sentences for murder and attempted murder with the sentence on high treason in recognition of the fact that these latter offences were committed in the course of committing high treason.

[351] One of the general principles of sentencing is that persons who are convicted of the same offence should receive similar sentences. Unwarranted disparities between sentences of co-accused should generally be avoided if the court is to maintain the systemic objectives of consistency and equality before the law- the treatment of like cases alike and different cases differently<sup>93</sup>. This however is not a rule of law, we appreciate. We are of the view that each offence must be punished individually and, if there is a need to suspend any portion of the sentence, it must not be more than half of the sentence imposed. It is trite that each case must be considered on its merits.

[352] We note that the learned judge *a quo* distinguished between classes of convicted persons – ‘the leaders, the attackers/soldiers, the supporters and the light-lipped/ taciturn’. He imposed different sentences according to this classification. There does not seem to us to have been any cogent reason for the classification especially in relation to the conviction for high treason, which was premised on a conspiracy to commit that offence. We derive some guidance in this regard from the elements of the crime of conspiracy at statutory law. The crime of conspiracy requires that the accused persons must have agreed with one another to commit a crime, in this case high treason, and the act consists in entering into

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<sup>93</sup> See *Green v The Queen; Quinn v The Green* [2011] HCA 49; 244 CLR 462 at [28].

the agreement, that is to say, there must be a meeting of minds.<sup>94</sup> We may not have distinguished between the appellants on the basis of that classification in respect of the high treason count, but we accept as correct the trial judge's statement that –

'It must be stated that where a trial judge imposes a sentence it exercises a judicial discretion in accordance with judicial principles and it has been held that '... it would be unrealistic to overlook the fact that determination of a specific imprisonment term cannot be achieved according to an exact, objectively applicable yardstick and that there can often be an area of uncertainty within which opinions as to the appropriate prison term could validly differ'.<sup>95</sup>

[353] We also believe that it is trite that mercy is an element of justice, and the period awaiting trial is one of the factors to be taken into account when considering an appropriate sentence. Unfortunately, counsel were unable to draw our attention to any case in this jurisdiction in which the sentence was backdated to take into account the period spent in pre-trial custody. One of them referred to *Gaingob* as an example of backdating a sentence in the sense of taking into account time spent in custody pending completion of trial. But *Gaingob* is not to that effect. This Court set aside the sentence of the court below and substituted it with another. The wording of paragraph (b) of its order is what counsel interpreted wrongly to mean that it was a backdating of sentence. The words 'and is backdated to the date of sentencing, namely 8 February 2002' were as unnecessary as they were liable to cause confusion. Where a sentence is set aside and substituted with another, the substituted sentence is the actual sentence and takes effect *ex tunc*.

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<sup>94</sup> CR Snyman, *Criminal Law*, 5 ed, p 295.

<sup>95</sup> See para 28 of sentence judgment.

[354] Another consideration that we find relevant in this case is the advanced age of the appellants. Nineteen of them are above 60 years of age, seven above 50 years and three above 40 but below, or just below 50 years of age as at the date of finalising this appeal.

[355] The offences we are concerned with in this appeal were committed nine years into the new dawn that is, into the new freedom and democracy the people fought for. It is to be expected and understood that some of the people might have been perhaps disgruntled. The advanced age of the appellants is a relevant factor to be considered. Therefore, we believe that this court should play a role and facilitate reconciliation amongst the people of this country by fashioning a sentence that advances this interest without ignoring the critical opprobrium that was generated by dismembering the country as an objective.

[356] As earlier stated, it is a salutary principle of sentencing to take into account the period spent in custody pending trial. We have decided to consider a period of between 11 and 14 years awaiting trial as an appropriate and equitable one to be deducted from the sentence. We reiterate that from the evidence given in the trial court, it is clear that to some extent, the appellants were also responsible for the delay of the whole trial. This is the basis on which we arrive at 11 or 14 years instead of 16 years for reduction from the overall sentence. We do not agree, as argued by some of the counsel, that a court must consider the period awaiting trial before imposing an appropriate punishment. The court must first determine an

appropriate sentence and then deduct therefrom, in exercise of its discretion, the period of incarceration pending completion of the trial.

[357] The appellants were sentenced on 8 December 2015. As of 8 December 2021, each of them had served six years of the sentence. The leaders have twelve more years to serve; the attackers/soldiers have nine more years to serve; the supporters have four more years to serve; and the 'light-lipped/taciturn' have all served their terms of three years effective and are now out of prison. The situation we are faced with, arising from the delay in the finalisation of this appeal, is that, if we accede to the contention by the State and increase the sentences, then the appellants who have served the sentence imposed by the High Court, i.e., 'the light-lipped/taciturn', depending on the magnitude of the increase, may have to be re-arrested or, on their own, report to prison, so as to serve the increased sentence, a rather undesirable outcome. The sentences we propose would not in any case require that those that have been released should be brought back into prison.

[358] The 'light-lipped/taciturn, appellants 13, 20 and 28 were each sentenced for high treason to 20 years imprisonment of which 17 years was conditionally suspended for 5 years; for 'the counts of murder' to 20 years imprisonment of which 17 years was conditionally suspended for 5 years, and for 'the counts of attempted murder' to 8 years imprisonment of which five years was conditionally suspended for 5 years. The effective sentences on murder and attempted murder were ordered to run concurrently with the effective sentence on high treason. The judge a quo treated all the murder counts as one for purposes of sentence and all

the attempted murder charges also as one for purposes of sentence. The effective sentence that this category of appellants was to serve is three years. By the time that this appeal was heard in August/September 2021, they had served their sentences and discharged. We would not have found it necessary to consider the matter of sentence in regard to them but for the fact that we have interfered with the sentences of their co-appellants and in effect reduced them after taking into account the period spent in pre-trial custody. Applying more or less the same formula, their effective sentence of 3 years remains the same but we have, as with other appellants, deducted a portion of the period spent in custody before completion of the trial.

[359] We have noted that the court *a quo* placed more emphasis on reducing the sentences by suspending large portions. We view this as a misdirection and therefore we are at large to interfere with the sentence in terms of s 322(6) of the CPA. In our view, the approach by the court *a quo* diminished the gravitas of the offences convicted on. Having considered the triad and all other necessary factors, including mitigating and aggravating factors and submissions by State counsel, we accordingly set aside the sentence by the High Court and substitute it with the sentence in the order below.

[360] In the result, the following orders are made:

- (a) The appeal against convictions is dismissed.

(b) The appeal against sentence and cross-appeal is partly allowed and the sentences of the High Court are set aside and substituted with the following:

'Leaders

- (i) High Treason - (Leaders) are each sentenced to 35 years imprisonment of which 10 years imprisonment is suspended for a period of 5 years on condition that the appellants are not convicted of high treason during the period of suspension.
- (ii) Murder - all counts taken as one for purposes of sentence, each appellant is sentenced to 30 years imprisonment of which 12 years imprisonment is suspended for a period of 5 years on condition that the appellants are not convicted of murder during the period of suspension. Of the effective sentence of 18 years, 14 years shall run concurrently with the period of imprisonment imposed in respect of high treason.
- (iii) Attempted Murder - all counts taken as one for purposes of sentence, each appellant is sentenced to 10 years imprisonment which shall run concurrently with the period of imprisonment imposed in respect of high treason.
- (iv) From the effective sentence of 29 years, a period of 14 years that appellants spent in custody awaiting trial is deducted.



Attackers/Soldiers

- (v) High Treason - (Attackers/Soldiers) except Chika A Mutalife, are each sentenced to 35 years imprisonment of which 12 years imprisonment is suspended for a period of 5 years on condition that the appellant is not convicted on the crime of high treason committed during the period of suspension.
  
- (vi) Murder - all counts taken as one for purposes of sentence, each appellant is sentenced to 25 years' imprisonment of which 10 years' imprisonment is suspended for a period of 5 years on condition that the appellant is not convicted of murder during the period of suspension. Of the effective sentence of 15 years, 12 years shall run concurrently with the period of imprisonment imposed in respect of high treason.
  
- (vii) Attempted Murder – all counts taken as one for purposes of sentence, each appellant is sentenced to 10 years imprisonment which shall run concurrently with the period of imprisonment imposed in respect of high treason.
  
- (viii) From the effective sentence of 26 years, a period of 14 years that appellants spent in custody awaiting trial is deducted.

Supporters

- (ix) High Treason - (Supporters), including Chika A Mutalife – are each sentenced to 25 years imprisonment of which 5 years imprisonment is suspended for a period of 5 years on condition that the appellant is not convicted of high treason during the period of suspension.
- (x) Murder - all counts taken as one for purposes of sentence, each appellant is sentenced to 20 years imprisonment of which 10 years imprisonment is suspended for a period of 5 years on condition that he is not convicted of murder during the period of suspension. Of the effective sentence of 10 years, 9 years shall run concurrently with the period of imprisonment imposed in respect of high treason.
- (xi) Attempted Murder - all counts taken as one for purposes of sentence, each appellant is sentenced to 8 years imprisonment which shall run concurrently with the period of imprisonment imposed in respect of high treason.
- (xii) From the effective sentence of 21 years, a period of 14 years that the appellants spent in custody awaiting trial is deducted.'

Light-Lipped/Taciturn

- (xiii) High Treason – (Light-Lipped/Taciturn) are each sentenced to 20 years imprisonment of which 7 years imprisonment is

suspended for a period of 5 years on condition that the appellant is not convicted of high treason during the period of suspension.

- (xiv) Murder – all counts taken as one for purposes of sentence, each appellant is sentenced to 20 years imprisonment of which 10 years is suspended for a period of 5 years on condition that he is not convicted of murder during the period of suspension. Of the effective sentence of 10 years, 6 years shall run concurrently with the period of imprisonment imposed in respect of high treason.
- (xv) Attempted Murder - all counts taken as one for purposes of sentence, each appellant is sentenced to 8 years which shall run concurrently with the period of imprisonment imposed in respect of high treason.
- (xvi) From the effective sentence of 17 years, a period of 14 years that each appellant spent in custody awaiting trial is deducted.'

**SHONGWE AJA**

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**CHINHENGO AJA**

## APPEARANCES

1 <sup>ST</sup> , 9 <sup>TH</sup> , 14 <sup>TH</sup> & 17 <sup>TH</sup> APPELLANTS:	P S Muluti
2 <sup>ND</sup> , 3 <sup>RD</sup> , 4 <sup>TH</sup> , 8 <sup>TH</sup> , 15 <sup>TH</sup> & 16 <sup>TH</sup> APPELLANTS:	I Agenbach
5 <sup>TH</sup> , 10 <sup>TH</sup> & 19 <sup>TH</sup> APPELLANT:	V C Kachaka
12 <sup>TH</sup> , 13 <sup>TH</sup> , 18 <sup>TH</sup> , 20 <sup>TH</sup> & 22 <sup>TH</sup> APPELLANTS:	P McNally
23 <sup>RD</sup> APPELLANT:	C Kavendjii
6 <sup>TH</sup> , 7 <sup>TH</sup> , 24 <sup>TH</sup> & 25 APPELLANTS:	J M B Neves
26 <sup>TH</sup> APPELLANT:	G Nyoni
27 <sup>TH</sup> , 28 <sup>TH</sup> , 29 <sup>TH</sup> & 30 <sup>TH</sup> APPELLANTS:	P U Kauta
Instructed by:	Legal Aid
RESPONDENT	L Campher
Instructed by:	Prosecutor-General