

# **S v OKAH**

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CJ CLAASSEN J

2012 OCTOBER 1 – DECEMBER 14; 2013 JANUARY 21

CASE No SS94/2011

## **Order**

The accused is convicted of counts 1–13 as set out in the indictment.

## **CJ Claassen J:**

### **Introduction**

[1] Nigeria is an oil-rich country. The evidence disclosed that the extraction of oil represents 95% of its GDP. The oil is extracted from the southern states of Nigeria known as the Niger Delta area. However, little of this income was re-invested in the upgrading of the infrastructure and other social requirements of the Niger Delta. Hence, a general uprising by the populace of this region occurred against the government of Nigeria. Several militant groups began attacking the large oil companies' pipelines and hijacked their executives demanding ransom in exchange for their release. The ransom was utilised to purchase more armaments to further the armed struggle. These various militant groups joined forces under an umbrella organisation known as 'The Movement for the Emancipation of the Niger Delta' (MEND) The origins and context of

MEND and the armed struggle in the Niger Delta is succinctly described in the admitted documents<sup>1</sup> in the following terms:

‘From the point of view of MEND and its supporters, the people of the Niger Delta have suffered an unprecedented degradation of their environment due to unchecked pollution produced by the oil industry. As a result of this policy of dispossessing people from their lands in favour of foreign oil interest, within a single generation, many now have no ability to fish or farm. People living in the Niger Delta have found themselves in a situation where their government and international oil companies own all the oil under their feet, the revenues of which are rarely seen by the people who are suffering from the consequences of it.

. . . .

Over the last twenty years various political movements and activists have emerged in opposition to the perceived injustices perpetrated upon the people of the Niger Delta by the government and the oil companies. These were usually non-violent; Ken Saro-Wiwa was the most famous activist. Saro-Wiwa was an Ogoni activist who was executed by the Nigerian government in 1995 on what many believe to be deliberately false charges with the aim of silencing his vocal opposition to the oil interests in Nigeria. In Saro-Wiwa’s footsteps came others who, instead of believing in non-violent activism, advocated violence as resistance to the ostensible enslavement of their people. Militants in the delta enjoy widespread support among the region’s approximately 20 million people, most of whom live in poverty despite the enormous wealth generated in the oil-rich region.’

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<sup>1</sup> See exh GG1 p 266 et seq.

[2] The accused, a 46-year-old Nigerian male citizen, espoused the sentiments stated above. He is a permanent resident with his wife and children in the Republic of South Africa. At the time of his arrest on 30 September 2010, he was residing with his family at 19 Dibberic Drive, Bassonia, in the district of Johannesburg. He was arrested for his alleged involvement in the planning and organising of two car bomb attacks in Nigeria wherein several people were killed and many injured.

[3] He was charged with 13 counts in contravention of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004. Counts 1–12 arose from two incidents which occurred respectively on 15 March 2010 in Warri and 1 October 2010 Abuja, Nigeria. In each instance two car bombs exploded killing and injuring several people and causing damage to property. In the process certain internationally protected persons were also threatened by the explosions. It is further alleged that the accused provided the finance and the necessary equipment in order for these bomb explosions to take place. Each of the main counts 1 to 12 carry alternative charges of conspiracy to commit such crimes alternatively to induce and/or incite others to commit such crimes. Counts 1, 3, 5, 7, 9 and 11 relate to the bombings which occurred on 15 March 2010 in Warri. Counts 2, 4, 6, 8, 10 and 12 relate to the bombings which occurred on 1 October 2010 in Abuja, Nigeria.

[4] Count 13 alleges that the accused unlawfully and intentionally threatened certain South African nationals employed in Nigeria with terrorist activities and to disrupt their businesses alternatively to take their employees hostage.

### **Jurisdiction of this court**

[5] One may well ask: Why is the accused being tried in a South African court? South Africa is a member of the United Nations and therefore committed

to executing its obligations in terms of international instruments dealing with terrorism and related activities. South Africa is bound to do so by virtue of the fact that it became a signatory and party to the following United Nations Universal Conventions relevant to this matter namely:

- (1) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomats, adopted by the General Assembly of the United Nations on 14 December 1973.
- (2) The International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
- (3) The International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
- (4) The Convention on the Prevention and Combating of Terrorism, adopted by the Organisation of African Unity, at Algiers on 14 July 1999.
- (5) The International Convention on the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

[6] Inspired by the aforesaid international instruments as well as the destruction of the Twin Towers in New York on 11 September 2001, the Security Council of the United Nations passed Resolution 1373/2001 on 28 September 2001. Resolution 1373/2001 reaffirmed that any act of international terrorism constituted a threat to international peace and security and called upon states to work together to prevent and suppress terrorist acts, through increased cooperation and full implementation of the relevant international conventions relating to terrorism. The relevant provisions of Resolution 1373/2001 are as follows. Clause 1:

*'Decides that all States shall:*

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; . . . .’

Clause 2:

‘*Decides also* that all States shall:

. . . .

- (c) Deny safe haven to those who finance, plan, facilitate or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against *other States or their citizens*;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such acts are established as serious criminal offences in domestic laws and regulations and that *punishment* duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating the financing or support of terrorist acts, including in

obtaining evidence in their possession necessary for the proceedings. . . .’ [Emphasis added.]

Clause 3:

‘*Calls up on States to:*

(a) . . .

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters *to prevent the commission of* terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, *to prevent and suppress terrorist attacks and to take action against perpetrators of such acts; . . .*’ [Emphasis added.]

Clause 4, the Security Council:

‘*Notes with concern the close connection between international terrorism and transnational organised crime . . . and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security.*’ [Emphasis added.]

Clause 5, the Security Council:

‘*Declares that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist attacks are*

also contrary to the purposes and principles of the United Nations.’

[Emphasis added.]

[7] The incorporation of these international instruments and Resolution 1373 into our municipal law occurred by virtue of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the Act).

(a) The Act came into force on 20 May 2005 and according to its preamble was enacted:

‘To provide for measures to prevent and combat terrorist and related activities; to provide for an offence of terrorism and other offences associated or connected with terrorist activities; to provide for Convention offences; to give effect to international instruments dealing with terrorist and related activities; to provide for a mechanism to comply with United Nations Security Council Resolutions, which are binding on member States, in respect of terrorist and related activities; to provide for measures to prevent and combat the financing of terrorist and related activities; to provide for investigative measures in respect of terrorist and related activities; and to provide for matters connected therewith.’

(b) The remaining part of the preamble lists all the various international instruments to which South Africa has become bound including the Security Council Resolution 1373/2001 referred to above. This list is repeated in the definition of ‘Instruments dealing with Terrorist and Related Activities’ in the definition section, s 1 of the Act.

(c) The concept of ‘terrorist activity’ is given a very wide definition in s 1 of the Act and means—

‘(a) any act committed in or outside the Republic, which—

(i) involves the systematic, repeated or arbitrary use of violence by any means or method;

(ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to—

(aa) any dangerous, hazardous, radioactive or harmful substance or organism;

(bb) any toxic chemical; or

(cc) any microbial or other biological agent or toxin;

(iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons;

(iv) causes serious risk to the health or safety of the public or any segment of the public;

(v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private;

(vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to—

(aa) a system used for, or by, an electronic system, including an information system;

(bb) a telecommunication service or system;

(cc) a banking or financial service or financial system;



(*dd*) a system used for the delivery of essential government services;

(*ee*) a system used for, or by, an essential public utility or transport provider;

(*ff*) an essential infrastructure facility; or

(*gg*) any essential emergency services, such as police, medical or civil defence services;

(vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or

(viii) creates a serious public emergency situation or a general insurrection in the Republic,

whether the harm contemplated in paragraphs (*a*) (i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (viii) was committed by way of any means or method; and

(*b*) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to—

(i) threaten the unity and territorial integrity of the Republic;

(ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or

(iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international

organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles,

whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and

(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking; . . .’

(d) The concept of ‘terrorist and related activities’ are also defined as meaning—

‘any act or activity related to or associated or connected with the commission of the offence of terrorism, or an offence associated or connected with a terrorist activity, or a Convention offence, or an offence referred to in sections 11 to 14.’

(e) Section 1(3) and (4) exclude from the definition of terrorist activities certain actions which could constitute a defence to any charge on terrorism under the Act. Section 1(4) states:

‘Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or

domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1).’

(f) Section 1(5) excludes as a defence to a charge of terrorism under the Act the following:

‘Notwithstanding any provision in any other law, and subject to subsection (4), a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defense in respect of an offence of which the definition of terrorist activity forms an integral part.’

(g) Section 2 of the Act establishes the offence of terrorism in the following terms: ‘Any person who engages in a terrorist activity is guilty of the offence of terrorism.’

(h) Section 3 of the Act creates as offences certain actions which are regarded as associated or connected with terrorist activities. In particular, it is stated that the provision of a skill or expertise or training or instruction to engage in any terrorist activity will be regarded as an offence associated with a terrorist activity.

(i) Section 4 creates the use of property associated with any terrorist activity as offences.

(j) Section 5 creates offences relating to explosive or other lethal devices and reads as follows:

‘Any person who intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transport facility, a public transportation system, or an infrastructure facility, with the purpose, amongst others, of causing—

(a) death or serious bodily injury; or

(b) extensive damage to, or destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss,

is guilty of an offence relating to explosive or other lethal devices.’

(k) Section 8 provides for the creation of offences relating to causing harm to internationally protected persons. Who is regarded as an internationally protected person is defined in section 1 as including, inter alia, any Head of State, a head of government or a minister of foreign affairs or a representative or official of a State or other agent of any international organisation or intergovernmental organisation.

(l) Section 14 deals with threats, attempts, conspiracy and inducement of other persons to commit offences and reads as follows:

‘Any person who—

(a) threatens;

(b) attempts;  
 (c) conspires with any other person; or  
 (d) aids, abets, induces, incites, instigates, instructs or commands, counsels or procures another person,  
 to commit an offence in terms of this Chapter, is guilty of an offence.’

(m) Section 15 grants express jurisdiction to courts in the republic to try and hear ‘specified offences’ as defined in section 1, which reads as follows:

“‘specified offence”, with reference to section 4, 14 (in so far as it relates to section 4), and 23, means—

- (a) the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 13 or 14 (in so far as it relates to the aforementioned sections); or  
 (b) any activity outside the Republic which constitutes an offence under the law of another state and which would have constituted an offence referred to in paragraph (a), had that activity taken place in the Republic. . . .’

(n) In terms of s 15(1)(a), courts in the Republic of South Africa are granted extraterritorial jurisdiction in respect of terrorist offences if: ‘(1)(a) the accused was arrested in the territory of the Republic, . . .’ It is common cause that the accused in the present matter was arrested at his residence in Bassonia in Johannesburg.

(o) Jurisdiction is further granted in terms of s 15(2) which reads as follows:

‘Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that—

- (a) act affects or is intended to affect a public body, any person or business in the Republic;
- (b) person is found to be in the Republic; and
- (c) person is for one or other reason not extradited by the Republic or if there is no application to extradite that person.’

It is common cause that the accused in the present matter was not extradited to Nigeria.

- (p) Jurisdiction is further qualified in s 15(3) which states the following:

‘Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed—

- (a) at the place where the accused is ordinarily resident; or
- (b) at the accused person's principal place of business..’

- (q) Section 16(1) prohibits any prosecution under ch 2 of the Act without written authority of the National Director of Public Prosecutions as appointed in terms of s 179(1) of the Constitution. In terms of exh A such authorisation was granted. The purpose of the section is to ensure that a charge under the

Terrorism Act is taken by the highest official after a proper consideration of all relevant facts.<sup>2\*</sup>

[8] By virtue of the above, I am of the view that the state has succeeded in establishing the jurisdiction of this court to hear this matter. However, counsel for the accused sought to rely on the provisions of s 1(4) to oust the jurisdiction of this court to try the accused. Such reliance is misplaced. Section 1(4) excludes from the ambit of the Act any armed struggle in the exercise of a people's legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces in accordance with the principles of international law. As stated earlier, it is common cause that a militant campaign was waged against the Nigerian government by its own civilians living in the southern states of Nigeria in protest to the alleged wrongful application of funds derived from oil extraction occurring within the jurisdiction of those southern states. Subsequent to the grant of amnesty by the Government of Nigeria to its civilians who had been engaged in such armed struggle, and subsequent to the accused accepting the terms of such amnesty for himself, no further armed struggle was legitimate. In any event, at no stage prior to amnesty was the struggle directed at the occupation by foreign forces or for the purpose of national liberation or self-determination and independence against colonialism. No basis in fact or in law was placed before this court by the accused to bring himself within the four corners of s 1(4). Counsel's argument in this regard is therefore rejected.

### **Plea procedure**

[9] The accused pleaded not guilty to all counts as well as the alternative counts thereto. No plea explanation was offered and the accused elected to remain silent. At all times he was represented by Mr *MI Maunatlala*.

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<sup>2</sup> See *S v Bogaards* (864/10) [2011] ZASCA 196 (21 November 2011) at paras 52–54.

\* Now reported at [2012] 1 All SA 376 (SCA) ([2011] ZASCA 196)–Eds.

[10] At the time of the pleading stage, the minutes of two pre-trial conferences were handed in as exhs I and J, respectively. The correctness thereof was confirmed by the signatures of both state counsel and the accused's legal representatives. It appeared from these documents that the accused was not willing to make any admissions other than those listed in paras 3.3.1–3.6.4 in exh J. Subsequently and during the trial the accused made a substantial amount of admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 as listed in exhs GG and GG1.

[11] The state was represented by Mr *S Abrahams*. The state tendered viva voce evidence of 32 witnesses one of which was recalled. It would not be necessary to refer to the evidence of all the witnesses for purposes of this judgment for the reasons set out in the next para.

[12] On behalf of the defence only two witnesses were called namely Col NG Zeeman, the investigating officer in this matter and Mr Ayodeji Majekodumni, an information technology expert. The defence closed its case without calling the accused to testify. Hence, much of the defence case which was put to the state witnesses during cross-examination never materialised. The defence was therefore obliged to argue its case largely on the State evidence.

### **The common cause facts**

[13] As indicated earlier in the judgment, the accused made a number of admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 which are contained in exh GG pp 1–276 and in exh GG1 pp 1–398. Not all of the admissions regarding the documentation in these two exhs are relevant for the purposes of this judgment. However, I will refer to those that are material for this judgment.



[14]–[38] [Omitted as not relevant to the headnote–Eds.]

[39] In summary, these admissions boil down to the following:

- (a) The accused was at all relevant times a supplier of arms and military equipment and hardware to inter alia MEND.
- (b) At the relevant times during 2010 the accused was the leader of MEND.
- (c) The only reasonable inference to be drawn from the admitted documents is that the accused was the same person as Jomo Gbomo and that he used the latter as a pseudonym in emails and notifications to the media.
- (d) The accused was in Port Harcourt in the Novotel on 14 March 2010, the day before the bombing in Warri after having entered Nigeria unlawfully from Benin.
- (e) The bomb blasts at Warri and Abuja were caused by motorcars laden with dynamite. In Warri two car bombs were used one of which was a Mercedes Benz. In Abuja the two cars used were a Honda and Mazda 626.
- (f) The bombings at Warri and Abuja comply with the definition of terrorism and terrorist activities in the Act.
- (g) The bombings caused mayhem to buildings and cars and killed and injured several people as set out in the indictment. Timing devices were found on site, which were used to set off the bombs at different times. The delay in the second bomb exploding was designed to attract people to the location of the first bombing and thereby to cause maximum injury and death to those attracted during the explosion of the second bombing.
- (h) It is also common cause that MEND accepted responsibility for both terrorism acts in Warri and Abuja.
- (i) The people who attended the gatherings at Warri and Abuja fall within the definition of ‘internationally protected person’ as defined in s 1 of the Act.

The buildings damaged during the bombings fall within the definition of ‘state or governmental facility’ as defined in s 1 of the Act.

### **Information technology evidence**

[40] The state tendered the evidence of an Information Technology Expert on two occasions, namely Capt Charles Maree of the South African Police Services attached to the Cyber Crimes Support unit of Crime Intelligence. The bulk of his evidence related to the scientific analysis of hundreds of e-mails allegedly sent by Jomo Gbomo in order to establish that the IP addresses point to the sender being the accused. In response the defence called an IT specialist, Mr Ayodeji Majekodumni to counter this evidence. During the course of the evidence of these two witnesses, countless exhibits and documents were handed in. I am of the view that it is not necessary to traverse this complicated and somewhat convoluted evidential dispute for the purpose of this judgment. There is, in my view, more than adequate evidence to come to a definitive finding without reference to such evidence.

### **The state’s case**

[41] A convenient summary of the state’s case has been set out in the document prepared by Mr *Abrahams* in terms of s 144(3)(a) of the Criminal Procedure Act attached to the indictment. I shall therefore refer to it liberally in setting out an overview of the state’s case.

### **Historical background**

[42] The accused, a Nigerian national, was a leader of a rebel militant organisation from the oil-rich Niger Delta region, in the southern parts of the Federal Republic of Nigeria. It was an umbrella organisation (‘entity’ as described in s 1 of the Act) of various militant groups known as the ‘Movement for the Emancipation of the Niger Delta’ (MEND).

[43] MEND was dissatisfied with what it believed to be the Nigerian Federal Government's unequal and discriminatory sharing of oil revenues, which in its view, had adversely affected the Niger Delta region and the Nigerian Federal Government's non-cooperation in having the land of the people of the Niger Delta restored to the people of that region which MEND believed had been unlawfully taken from them. As a result MEND had been constant conflict with the Nigerian Federal Government since 2005.

[44] The nature of the conflict included armed attacks on the oil industry such as blowing up the oil pipes and hijacking the executives of oil companies, claiming ransom for their return. These attacks adversely affected the economy of the Federal Republic of Nigeria as it was proved that approximately 95 % of the gross national product of Nigeria emanated from the oil extracted from the southern region.

[45] The militants conducted their guerrilla attacks on the oil industry from various bases in the Delta region from where they conducted their armed attacks on motorised riverboats. The area where these bases were established was known as 'the creeks'. The militants were well armed and properly clad in camouflage uniforms, MEND badges, army boots etc.

[46] Dr Goodluck Jonathan originated from the southern regions of Nigeria. He became first vice-president and thereafter president of Nigeria. In a bid to end attacks on the oil industry his predecessor President Umaru Yar'Adua initiated an amnesty program in 2009 which inter alia included the voluntary surrender of arms and ammunition by armed MEND militants and other rebel factions associated with the conflict in the Niger Delta. One of the conditions in negotiating the amnesty with the militants was that the accused as leader of

MEND who was in custody at the time on charges of treason and gun-running, should be released.

[47] During July 2009 the accused accepted an offer of amnesty extended to him by the Nigerian Federal Government for his involvement in MEND's previous criminal activities. In so doing the accused also offered to work with the Nigerian Federal Government towards the restoration of peace in the Niger Delta region.

[48] The accused returned to South Africa during August 2009, after previously, during 2005 having made the Republic of South Africa his principal place of residence. It would appear that the accused became increasingly dissatisfied with subsequent post-amnesty conditions in the oil-rich regions of southern Nigeria.

**The Warri bombing on 15 March 2010 (counts 1, 3, 5, 7, 9 and 11)**

[49] During February 2010 the accused left South Africa and travelled to Nigeria. In Nigeria he gave NGN 1 200 000 (Naira, the Nigerian currency) to Obi Nwabueze (Obi), a Nigerian national and instructed him to purchase two vehicles. Obi purchased a Toyota and a Honda Ballade and took the vehicles to the residence of Mr Y, also a Nigerian national living in Port Harcourt.

[50] The accused requested another Nigerian national, Bassey Umoren, to construct hidden compartments in the two vehicles for which he paid Umoren N50 000. The accused gave Umoren an additional NGN 20 000 to purchase materials to be used in the construction of the hidden compartments. The construction consisted of welding a metal plate between the boot and the backseat. Umoren performed this work at the residence of Mr Y after which the accused paid Umoren another N50 000 for his services.

[51] The accused gave NGN 750 000 to Chima Orlu, also a Nigerian national, to purchase dynamite and detonators. The accused, Mr Y, Obi, Raphael Damfebo (also a Nigerian national) and Chima Orlu met at Mr Y's residence where the dynamite, detonators and timing devices were fitted into the hidden compartments of the two vehicles. The timing devices were supplied by the accused in the form of clocks and/or mobile phones. The accused taught his accomplices how to place a detonator in a dynamite stick and then connect the detonator to a clock or mobile phone and the latter to a battery and the battery again to the detonator. As such, the clock or mobile phone broke the electrical circuit, but as soon as the clock or telephone rang, the electrical circuit was complete and the detonator was set off exploding the first dynamite stick which thereafter ignited all the other dynamite sticks in the secret compartments. Normally between 30 and 60 dynamite sticks were packed into the secret compartments of the motor vehicles.

[52] On 15 March 2010 and on the instruction of the accused, Tiemkemfa Francis Oswo (alias General Gbokos) and a person unknown to the state, attempted to park two vehicles (one a Mercedes Benz) in the demarcated parking area of Government House Annex, Warri, Nigeria where the Vanguard Newspaper was due to hold a Post Amnesty Dialogue meeting. However, due to the visible presence of state security officials they parked the vehicles in the public road in front of Government House Annex.

[53] The Minister of the Niger Delta, the Delta State Governor, the Imo State Governor, the Edo State Governor and other representatives and/or state officials of the Federal Republic of Nigeria were in attendance along with many other dignitaries and guests.

[54] During the course of the morning an Internet warning was sent by Jomo Gbomo on behalf of MEND that a bomb would explode in the vicinity of Government House Annex. The motor vehicles exploded where they were parked on either side of the road in front of Government House Annex.

[55] One person, Alex Igbi, a 45-year-old adult male, a Nigerian national, died from injuries sustained as a result of the explosion. The persons listed in annexure A attached to the indictment sustained serious bodily injuries as a result of the explosion. The vehicles in the immediate vicinity as well as the buildings, Government House Annex and the International Unity School, were also damaged as a result of the explosion.

[56] Thereafter MEND publically on internet took responsibility for the aforementioned bombings.

**The Abuja bombings on 1 October 2010 (counts 2, 4, 6, 8, 10 and 12)**

[57] During September 2010 the accused and his brother, Charles Okah, gave Obi NGN 2 000 000 to purchase four vehicles. The accused also gave Chima Orlu N1 640 000 to purchase dynamite and detonators. At the request of Obi, Bassey Umoren again constructed hidden compartments in the four vehicles at the residence of Charles Okah in Lagos, Nigeria. Charles paid Obi an amount of N50 000 for the aforesaid services.

[58] Dynamite and detonators were fitted in constructed hidden compartments of two of the vehicles namely a Honda and a Mazda 626. The accused supplied four timer devices (clocks) that were used in assembling the two vehicle-borne improvised explosive devices.

[59] On 1 October 2010 MEND gave an advance warning of its intention to cause an explosion at the Eagle Square.<sup>3</sup> On the instructions of the accused, there was an unsuccessful attempt to park the vehicles within the Eagle Square precinct in Abuja where the Nigerian president, Dr Goodluck Jonathan, foreign dignitaries and other representatives and/or state officials of the Federal Republic of Nigeria were celebrating the Nigerian Federal Republic's 50th Independence Anniversary. Due to the visible presence of state security officials, the vehicles were parked on the main public road in proximity to Eagle Square where public vehicles were parked and persons using public transport were being dropped off to attend the celebrations.

[60] During the morning of 1 October 2010 the two motor vehicles exploded. The persons listed in annexure B attached to the indictment died as a result of the injuries sustained during the explosion and the persons listed in annexure C attached to the indictment sustained serious bodily injuries as a direct result of the explosion. MEND once again publically took responsibility for the aforementioned bombings.

[61] In the indictment the state alleged that the accused at all relevant times conspired with and/or induced and/or incited and/or instigated and/or instructed and/or commanded and/or procured Chima Orlu and/or Obi Nwabueze and/or Charles Okah and/or Tiemkemfa Francis and/or Segun Ilori and/or Edmund Ebuwari and/or Bassy Umoren and/or Emmanuel Alison and/or Raphael Damfebo and/or persons unknown to the state in the commission of and/or to commit the aforesaid acts and/or acted with a common purpose.<sup>4</sup>

### **Terrorist threats (count 13)**

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<sup>3</sup> See exhs OO and OO1.

<sup>4</sup> See the alternative charges to counts 1–12.

[62] On 27 January 2012, one Peter Timi, ostensibly the European representative of MEND, forwarded a communiqué to various persons and entities, including the South African Nigeria Chamber of Commerce in which MEND threatened the South African Government to facilitate the release of the accused from lawful detention, failing which MEND would disrupt the business activities of South African entities in the Federal Republic of Nigeria and would take South African nationals employed by such entities, hostage.

[63] On 30 January 2012 whilst in the presence of the investigating officer the accused directed similar threats as those communicated by Peter Timi and/or MEND. In this regard the accused, Peter Timi and/or MEND and/or persons unknown to the State at all relevant times acted with a common purpose to threaten the entities and individuals referred to above.

### **The defence case**

[64] The nature of the defence case amounted to a denial by the accused of being involved in any of the terrorist activities alleged by the state. A further defence was postulated in cross-examination of the state witnesses to the effect that the Government of Nigeria in a corrupt fashion embarked upon a giant conspiracy against the accused in alleging his involvement in the terrorist activities. Such a conspiracy was denied by all state witnesses to whom the proposition was put in cross-examination. Mr Maunatlala valiantly attempted on behalf of the accused to argue the existence of such a conspiracy by a process of deduction. In my view, there is no basis for any inferences of a conspiracy to be drawn from the proven facts as disclosed by the evidence. In addition, no facts were placed before this court by the defence which constituted any iota of evidence pointing to the existence of such a conspiracy against the accused. On the contrary, many of the state witnesses were the accused's former accomplices who were intimately involved with the actions of the accused in planning and



executing the bombings in Warri and Abuja. At no stage did the evidence disclose any agreement or opportunities to enter into an agreement amongst them to testify collectively against the accused in a false manner. The opposite is rather more apparent from their testimony as there seems to be minor differences between their respective factual recollections of the actions of the accused.

### **The evidence**

[65]–[141] [Omitted as not relevant to the headnote–Eds.]

### ***Evaluation***

[142] The evidence of these three witnesses for the state is, in my view, conclusive of the accused's guilt on charges 1–12. The evidence of the two main accomplices is congruent and corroborates one another. There are no contradictions or discrepancies which may negatively affect their testimony. It is trite law that an accused may be found guilty on the evidence of accomplices.

[143] The evidence of these witnesses overwhelmingly established that the accused was the planner, funder, supplier, instructor, expert and leader in the execution of the bombings in Warri and Abuja. Although he was not present at the moment the car bombs exploded, it cannot be gainsaid that they exploded at his instance and direction. To my mind that makes him guilty beyond all reasonable doubt of the charges in counts 1–12 as the main perpetrator.

[144] I shall deal with the remaining witnesses in a rather cursory manner because they mostly confirm the evidence of the two main witnesses and only add minor details.

[145]–[300] [Omitted as not relevant to the headnote–Eds.]

## Conspiracy

[301] A conspiracy is an agreement between two or more persons to commit, or to aid or procure the commission of the crime.<sup>5</sup> When two or more persons are engaged in a common enterprise, the acts and/or declarations of one of them in pursuance of that common enterprise are admissible against the other.<sup>6</sup>

[302] When considering the liability of the respective conspirators, it should be borne in mind that everything done by any one of the conspirators in furtherance of the conspiracy—

‘is evidence against each and all of the parties concerned, whether they are present or absent or whether or not they were individually aware of what was taking place...and that such acts and declarations of other conspirators before any particular conspirator joined the association, are only receivable against the latter to prove the origin, character and object of the conspiracy...’<sup>7</sup>

[303] In *S v Du Toit en Andere (3)* 2004 (1) SACR 66 (T) at 76g–h the court held there did not have to be an agreement in a conspiracy as to the specific acts to achieve the greater goal. The court further held where there was a conspiracy and plan that that acts of violence and unrest would be committed, the specific acts and means were irrelevant in determining the guilt of the principal planner.

[304] In *S v Libazi and Another* 2010 (2) SACR 233 (SCA) (2010 JOL 25611 (SCA)) at 19 the court explained its interpretation of conspiracy as follows:

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<sup>5</sup> See Burchell J *Principles of Criminal Law* 3 ed at 653.

<sup>6</sup> See *R v Miller and Another* 1939 AD 106 at 115–18; *S v Cooper and Others* 1976 (2) SA 875 (T) at 879A–880G.

<sup>7</sup> See *R v Leibbrandt and Others* 1944 AD 253 at 276; *R v Mayet* 1957 (1) SA 492 (AD) at 494.

‘It appears that for a conviction on a charge of conspiracy to be achieved, the commission of an offence must be the focal point of the agreement between the perpetrators. It is, however, not a requisite for a conviction on a charge of conspiracy for the actual offence to have been committed. Once the planned offence is committed it appears that it is preferable to rather convict of that offence than the conspiracy, or both.’

[305] To the extent that it may be held that I am wrong in having found the accused guilty on the main charges, I am of the view that the evidence in any event clearly discloses that the accused conspired with some or all of the individuals mentioned in the indictment to commit the various charges 1–12.

### **Conclusion**

[306] For the reasons set out above, I have come to the conclusion that the state proved beyond a reasonable doubt the guilt of the accused on the main charges of counts 1–13 as set out in the indictment.