Not reportable

CASE NO.: CC 10/2009

IN THE HIGH COURT OF NAMIBIA
In the matter between:

THE STATE

versus

DANIEL JOAO PAULO
JOSUE MANUEL ANTONIO

***CORAM*:**	**PARKER J**
Heard on:	2010 February 1 – 5; 2010 April 19 – 28, May 31, August 2-5, September 23, November 29-30
Delivered on:	2011 January 19

JUDGMENT ON CONVICTION:

PARKER J:

[1] In the course of the trial of the 1st and 2nd accused, counsel for the accused, Mr. McNally, brought an s. 174 (of the Criminal Procedure Act, 1977 (Act 51 of 1977)) ('the CPA') application which was fully argued by him and Mr. Trutter for the State. In a fully-reasoned judgment I delivered on 31 May 2010 ('the s. 174 judgment') I returned a verdict of not guilty of both accused persons in respect of Count 1 and Alternative Count 1 and Count 3 and Alternative Count 3 because I

was of the opinion that there was no evidence that the 1st and 2nd accused committed the offences in those counts; but I dismissed the s. 174 application in respect of Count 2 and Alternative Count 2. That being the case, the trial of the accused proceeded in respect of Count 2 and Alternative Count 2 only. Each accused person testified on his own behalf; and none of them called any witness to testify on his behalf. I should mention that up to the conclusion of the s. 174 application Mr. Trutter represented the State. Thereafter Mr. Sibeya represented the State.

[2] Under the main Count 2 and Alternative Count 2 the accused are facing the following charges:

(1) Main Count 2: Contravening section 2(c), read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part II of the Schedule, of Act 41 of 1971, as amended – dealing in dangerous dependence producing drugs.

(2) Alternative Count 2: Contravening section 2(d), read with sections 1, 2(i) and/or 2(ii), 8, 10, 4 and Part II of the Schedule, of Act 41 of 1971, as amended – possession of dangerous dependence producing drugs.

[3] My present burden in the instant proceedings is, therefore, to determine whether the accused are guilty on Count 2 or Alternative Count 2; that is to say,

whether the State has proved beyond reasonable doubt that the accused are guilty on Count 2 or Alternative Count 2.

[4] I do not propose to rehearse the evidence and the reasoning and conclusions thereanent that led me to hold that there was sufficient evidence that the 1st accused and the 2nd accused, in the language of s. 174 of the CPA, committed the offences under Count 2 or Alternative Count 2. It will not serve any useful purpose to do that. Suffice to set out here the conclusion I arrived at in the s. 174 judgment which is relevant for our present purposes. There, I stated at p. 15 as follows:

> [14] … if a person is in possession of a motor vehicle or other means of conveyance, prima facie possession of the motor vehicle or other means of conveyance leads to the strong inference that he or she is in possession of its contents; that is, whatever is found in or on that motor vehicle and other means of conveyance. For, a person takes over a motor vehicle or other means of conveyance at risk as to its contents being unlawful, if such a person does not immediately examine it. (*R v Lewis (G.E.L.)* (1988) 87 Cr. App. R. 270 (Court of Appeal) at 427) The prima facie assumption is discharged if the person proves or raises a real doubt in the matter that he or she is, for instance, a servant or a bailee who had no reason to suspect that its contents were illicit or that they were prohibited dependence-producing drugs (*R v Lewis (G.E.L)* supra at 427). This proposition is weighty not the least because it finds expression in s. 10 (d) of Act 41 of 1971; and what is more, the conclusion buries any argument put forward by Mr McNally …

[5] Thus, in the present proceedings my single burden is to consider only whether the 1st and 2nd accused have placed sufficient evidence before the Court

capable of dispelling the strong inference that (1) the accused persons dealt in 30.1 kg of cocaine (62 packets) (Count 2) or (2) they possessed the said 30.1 kg of cocaine (62 packets) (Alternative Count 2). The reason is that I have already held in the s. 174 judgment that prima facie both accused persons possessed, and dealt in, the aforementioned cocaine. For this reason I shall take no cognizance of Mr. McNally's spirited submission on his proposition of the law of possession in our criminal justice system which, in any case, is a playback of the submission counsel had made previously in support of the aforementioned s. 174 application. Mr McNally's present submission, therefore, adds not a feather of weight; it has not made me any wiser at all. Accordingly, with respect, I find counsel's effort regarding the issue of possession in the present proceedings to be labour lost.

[6] But that is not the end of the matter. The talisman that Mr. McNally relies on in pursuit of the accused persons' attempt to dispel the aforementioned strong inference is put succinctly in counsel's submission thus *verbatim et literatim*:

> 'Accused one was approached by a certain Guilhermino with a request to take his vehicle to South Africa. Accused 1 did not have a so-called SADC driver's licence and he accordingly, approached accused 2 whom he knew had such a licence. Guilhermino then prepared the documents in respect of the car, they agreed upon a price, and after he gave them money for expenses, they left. They did not know what was concealed underneath the car, and neither of them made any inspection of the undercarriage of the car. The first time they saw the contents of the concealed compartment was when Sergeant Van Wyk opened it at the roadblock outside of Keetmanshoop.'

[7] I shall now proceed to examine the evidence on the documents, which, according to Mr. McNally, a Mr. Guilhermino prepared and which, from the evidence, permitted the accused persons to take possession of the motor vehicle from the said mysterious Mr. Guilhermino in Luanda (the capital of Angola), drive the vehicle through the Angolan border post of Santa Clara, which, significantly, is inside Angolan territory, and from there to the border between Angola and Namibia at Oshikango, and from there, southwards, through the northern part of Namibia, and through Windhoek until the motor vehicle, with its two occupants (i.e. the accused persons), was stopped by Namibia Police personnel at the roadblock near Keetmanshoop. The distance between Oshikango and the locus of the said roadblock is about 1,200 km. From the *Oxford Map of Africa* it appears that the distance between Luanda, where, according to the accused, the accused took possession of the motor vehicle from a certain Mr. Guilhermino (as aforesaid), and Oshikango is considerable, almost like the distance between Oshikango and Keetmanshoop.

[8] As I see it, the further evidence before the Court that is relevant is as follows. According to the 'Property Title Registration' certificate issued by the Ministry of Justice of Angola, the property in the motor vehicle is registered in the name of Guilhermina Beatriz Peyavali Vieira Clemente Lubamba (hereinafter, 'Lubamba' for short) (Exh 'U1'/ 'TI'). According to the 1st accused, a Mr. Guilhermino gave the motor vehicle to him for the sole purpose of driving it to Upington, South Africa, for and on behalf of the said mysterious Mr. Guilhermino. Mr. Guilhermino had explained to the 1st accused that he, Guilhermino, was at a

later date going to spend the Christmas holidays in South Africa and he did not want to go though the tedium of driving the motor vehicle through the southern parts of Angola due to the bad state of the roads in the southern part of Angola; that is, north of Oshikango.

[9] The 1st accused then solicited the assistance of his acquaintance, the 2nd accused, who he knew possessed a 'SADC drivers licence' (which enables the holder thereof to drive through SADC member States (including Namibia and South Africa)) to drive the motor vehicle to South Africa. The 1st and 2nd accused persons testified further that they did not know what was concealed in a compartment that was attached to the undercarriage of the motor vehicle. The accused testified further that the first time they saw the contents of the said compartment was when the aforementioned Sgt Van Wyk (a state witness) opened the said compartment at the aforementioned roadblock.

[10] I have no doubt in my mind in finding that the version of the 1st accused and the 2nd accused cannot possibly be true. It is, therefore, with firm confidence that I reject their explanation meant to dispel the strong inference that, on the high authority of the English Criminal Court of Appeal in *R v Lewis (G.E.L.)* supra, since I have already found that the 1st accused and the 2nd accused were in possession of the motor vehicle, they were in possession of the contents of the motor vehicle, viz. the 62 packets of cocaine (Alternative Count 2) and dealt in the said amount of cocaine (Count 2) (see the s. 174 judgment). And I do so find for the following irrefragable reasons. (1) The motor vehicle is not the property of

some invisible character, Mr. Guilhermino. (2) There is no evidence before this Court, explaining how this mysterious Mr. Guilhermino gave the motor vehicle, which is not his property, to the 1st accused for the 1st accused to drive it all the way to South Africa for and on behalf of the said mysterious Mr. Guilhermino; and this is *a fortiori*. (3) The evidence gets better for the State and worse for the accused persons as follows: In the first place, any lingering doubt as to whose property the motor vehicle is is put beyond the shadow of doubt by the 'Vehicle Temporary Exit Pass No. 07/EXT/011231', issued by the National Directorate of Customs, Ministry of Finance, Angola (Exh 'Y1'). The following relevant and telltale particulars appear in the said Exit Pass:

> '(a) SANTA CLARA BORDER POST
> To proceed from Santa Clara (in Angola), with destination to Namibia OSHIKANGO.
> (b) Vehicle Toyota (the motor vehicle)
> (c) KEA-88-61
> DRIVER'S DETAILS
> Name: Josue M. Antonio (the 2nd accused)
> Bearer of Driver's Licence No.: NB-13402
> Resident of: Lubango
> Owner ('Proprietor')
> Name: Guilhermina Beatriz'

In the second place, there is a 'Declaration' made by Lubamba (Exh. 'Z1') in which she declares as follows:

'I, the undersigned, Guilhermina Beatriz Peyavali Vieira Clemente Lubamba, daughter of Venceslan Clemente and Rosalia Ndemba, native of Ombadja, Province of Cunene, born on 19 August 1974, and resident of Pioneiro Zeca neighbourhoods, Ombadja, Cunene; hereby declare that Josue Manuel Antonio, is authorized to drive a car of the make of TOYOTA LAND CRUISER, of Dark Gray colour, licence Registration number KEA-88-61, for private use.'

[11] It seems to me clear that the cumulative effect of Exh 'U1'/ 'TI', Exh 'YI' and Exh 'Z1' is without a doubt the following. The person in whose name the property in the motor vehicle is registered by the authorities in Angola is Miss or Mrs Lubamba, and not some mysterious character, Mr. Guilhermino. The said Miss or Mrs Lubamba authorized the 2nd accused to drive the motor vehicle for the 2nd accused's own 'private use', and not for the use of a certain Mr. Guilhermino, whose name does not feature at all anywhere in the documentary evidence presented to the Court. All this evidence taken cumulatively is indubitably weighty against the accused persons. In the face of all this, I find that the accused persons have not told the truth.

[12] It follows inevitably from the aforegoing reasoning and conclusions respecting the present point that, as I have already intimated, I must reject as false the evidence of the accused persons that some mysterious and unseen character, a Mr. Guilhermino, gave the motor vehicle to the 1st accused in order for the 1st accused to drive the vehicle to Upington, South Africa, for and on behalf

of the mysterious Mr. Guilhermino, and that the accused persons did not know that the aforementioned cocaine was being conveyed in that motor vehicle. I am, therefore, impelled to the inexorable conclusion that when the accused persons were found in possession of the motor vehicle at the roadblock, as aforesaid, they were not undertaking any errand for some mysterious Mr. Guilhermino. They were pursuing a 'private use' for themselves of the motor vehicle; and very far away from Oshikango, the destination recorded in Exh 'YI'.

[13] One last point. I have given deep and careful look at Mr. McNally's enthusiastic and vigorous submission about what he alleges to be the unconstitutionality of the presumption in s. 10 (1) (e) of Act 41 of 1971. The Honourable Minister responsible for administering the Act has not been cited. It would be a glaring affront to the most fundamental jurisprudential touchstone of natural justice that has stood the test of time for ages out of number, that is, the common law rule of *audi alteram partem* of natural justice, for this Court to consider the constitutional challenge, as Mr. McNally appears to urge the Court to do, when the responsible Honourable Minister, who would be expected to carry out any order that the Court might make, has not been cited and, above all, the Honourable Attorney-General has not been heard.

[14] In any case, I fail to see how *S v Shikunga* 1997 NR 156 and the other cases referred to me by Mr McNally on the point can assist the accused persons. For instance, unlike in *Shikunga*, *in casu*, the provisions of s. 10 (1) (e) of Act 41 of 1971 are a far cry from the provisions of s. 217 (1) (b) (ii) of the CPA. According to

the CPA provisions, where a confession is made to a magistrate and reduced to writing by him or her, or is confirmed and reduced to writing in the presence of the magistrate, the confession, upon the mere production thereof at the proceedings in question, is presumed, unless the contrary is proved, to have been freely and voluntarily made by such person, etc. In the instant case, the State has the onus of proving, and it did prove, beyond reasonable doubt that the accused possessed the motor vehicle in which the cocaine in question was conveyed. The explanation of the accused, which I have set out previously, was that the owner of the motor vehicle, some mysterious Mr. Guilhermino, gave the vehicle to the 1st accused for the 1st accused to drive the vehicle for and on behalf of the unseen Mr. Guilhermino to South Africa from Angola; whereupon the 1st accused solicited the help of the 2nd accused to drive the vehicle to South Africa and that the accused were not aware that the motor vehicle contained the cocaine in question. I have previously rejected all that evidence as false. For that reason I concluded that both accused persons were jointly in possession of the motor vehicle and of the aforementioned amount of cocaine. Thus, in the instant case, only a strong inference was held by me to have existed and the accused persons were given the opportunity upon the authority of *R v Lewis (G.E.L.)* supra to dispel the strong inference which they failed totally to do. Additionally, according to the definition section of Act No. 41 of 1971, i.e. s. 1,

> **'deal in'**, in relation to dependence-producing drugs or any plant from which such drugs can be manufactured, includes performing any act in connection with the collection, importation, supply, transhipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription thereof.

[15] From the evidence that I have found to exist and which I have accepted the conclusion is irrefragable that, as I have said *ad nauseam*, the accused persons were in joint possession of the motor vehicle and its contents, including the aforementioned cocaine and they were driving the vehicle to South Africa, from Angola, through Namibia. Accordingly, I conclude that the evidence is overwhelming that 'in relation to' the cocaine the accused persons were 'performing an act in connection with … the exportation or transmission' of the cocaine within the meaning of s. 1 of Act No. 41 of 1971. I have not relied on the presumption in s. 10 (1) (e) to hold that the accused persons did 'deal in' the cocaine within the meaning of s. 1 of Act No. 41 of 1971: the evidence itself accounts for a finding that they did 'deal in' the cocaine. It is clear from the above reasoning and conclusions that this Court did not, pace Mr. McNally, 'saddle the accused with a presumption of guilt in terms of s. 10 (1) (e) of Act No. 41 of 1971'. It has, therefore, not become necessary in the adjudication of the present matter to express myself on the constitutional challenge raised by Mr McNally.

[16] For all the aforegoing reasoning and conclusions, I hold that the State has proved beyond reasonable doubt the guilt of the 1st accused and the 2nd accused on the main Count 2. And I do so hold, secure in the knowledge that as was stated authoritatively by Denning J (as he then was) in the memorable case of *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) at 373 (cited with approval by this Court in *S v Simon* 2007 (2) NR 500 at 512B-D), 'Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt.'

[17] Whereupon, I find the 1st accused and 2nd accused guilty on the main Count 2:

Mr Daniel Joao Paulo,

Mr Josue Manuel Antonio,

I convict you on the offence of contravening section 2(c), read with sections 1, 2(i) and/or 2(ii), 8, 10, 14 and Part II of the Schedule, of Act 41 of 1971, as amended – dealing in dangerous dependence producing drugs.

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PARKER J

COUNSEL ON BEHALF OF THE STATE:	Adv. O S Sibeya
Instructed by:	Office of the Prosecutor General
COUNSEL ON BEHALF OF THE 1ST ACCUSED	
AND THE 2ND ACCUSED:	Mr P McNally
Instructed by:	Lentin, Botma & Van den Heever