CASE NO. SA16/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between :

CHARLES SIBANDE FIRST APPELLANT

CHIMPHOTWA AMON BANDA SECOND APPELLANT

And

THE STATE RESPONDENT

Coram: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba, A.J.A.

Heard on : 10/04/2002

Delivered on : 11/10/2002

APPEAL JUDGMENT

Chomba, A.J.A.: The sole legal issue which was argued before us and which falls to be resolved in this appeal against conviction only is that of guilty knowledge. This issue arises from the following acknowledged facts which constitute common cause as determined by the court a quo.

On 6th August 1997 the two appellants going by the pseudonyms of Charles Sibande and Chimphotwa Amon Banda respectively and travelling on fake Malawian passports, were found at the Inter Cape Mainliner Bus station in Windhoek. They were about to board a Johannesburg bound bus when vigilant police officers of the Drug Enforcement Unit in the Namibian Police Force

accosted them. Each one of the appellants had earlier been noticed to be carrying a black bag. The bags were later found to contain what appeared like transformers.

For reasons to be discussed later there is need to describe how the so-called transformers were packaged and how each of them looked like. When the contents of each bag were emptied what was yielded were two boxes. Charles Sibande, that is the first appellant, who was the first to be accosted was asked what the contents of the boxes were. He replied that they contained electrical transformers. He was unable to produce any papers relating to how they were acquired or upon the authority of which they were being externalised from Namibia. When each box was opened it indeed yielded what appeared to be transformers. Each transformer was quite greasy outwardly on one side and on the top and it had electric wires attached to it. Each was also sealed and well secured by some nuts and, as warrant officer Sydney Ettiene Philander the first prosecution witness said, each transformer was so properly sealed that no one could see what was going on inside. On a closer look at the electric wires they were found to be falsely attached to the transformers and were easily detached from it. The sealing was such that a transformer had to be broken in order to discover what it contained. When this was done the contents turned out to be a powder which was indisputably found to be cocaine.

The second appellant, Chimphotwa Amon Banda’s black bag contained items similar to those found in Charles Sibande’s bag. There were therefore four boxes found in the bags recovered from both appellants. The boxes contained

72 so-called transformers in all. When all the 72 were broken up the total quantity of cocaine found weighed 72.5 kg.

It was on the basis of the foregoing facts that the appellants were charged with dealing in dangerous dependence producing drugs contrary to section 2(c) read with section 1(i) and/or 2(ii), 8 and 10 and Part II of schedule to Act No. 41 of 1971. Each appellant pleaded not guilty to the charge but after a full trial they were both convicted accordingly and each was sentenced to 10 years imprisonment.

It was only after they had been charged in the names Charles Sibande and Chimphotwa Amon Banda respectively that the appellants revealed their true identities to be Vicmor Monerr and Elias Isanaku respectively. They also owned up as to their nationalities. The first appellant said that he was a Cameroonian citizen with mixed parentage, a Nigerian mother and Cameroonian father. The second appellant said he was a Nigerian. Each appellant stated that he separately entered the Republic of South Africa and was at the material time a refugee in that country. Each claimed that he held recognized United Nations Refugee Status. They both lived in Johannesburg where both were in part-time employment earning some R800.00 per month.

In professing their innocence as to the nature of the contents of the so-called transformers, the explanation they offered for the first time at their trial was to the following effect. On or about 3rd August 1997 they were in a club in Johannesburg with a mutual friend only known as Louis. Louis was at that time a man both appellants had known for a couple of months. In the course of their conversation with them Louis told them that he had intended to make a

trip to Namibia on behalf of one, Clifford, but he could not do so because of his physical incapacity arising from a motor accident in which he had been involved. At that time Louis had all the markings of an accident victim. He asked if they could undertake the trip instead. To this end he asked if they had passports, but although they had none in fact, they agreed that they did have passports. By arrangement with Louis the two appellants later met Clifford who reaffirmed what Louis had earlier told them. Clifford said that he could remunerate them with US$1,000 if they made the trip to pick up electrical transformers in Windhoek and bring them back to the Republic of South Africa. They became so excited about the prospect of earning US$ 1,000.00 that the same night they visited a place called Hillbrow in Johannesburg where they knew fake passports were obtainable. Each purchased a passport at R150. Subsequently the US$ 1,000.00 was paid to them and they were told that in Windhoek they would receive the transformers from two men named Felix and George. They were to meet with Felix and George at Continental Hotel.

From the US$1,000 they purchased bus tickets worth R350 each for the round trip from Johannesburg–Windhoek-Johannesburg. They got to Windhoek on the 6th of August 1997 in the morning and headed for Continental Hotel. But Felix and George were not immediately available there. They therefore, in the interim, booked a room in the hotel as they waited to establish connection with the other two men. Later in the day the manager of the hotel came up to their room accompanied by two men who were introduced as Felix and George. The appellants subsequently travelled together with the last mentioned two persons by taxi to a shop where they were given two black bags and from the shop they drove to the said bus terminal. At the terminal Felix and George

went their own way while the appellants headed to board the Johannesburg bound bus. It was thereafter that they were apprehended.

The only pillar of defence relied on at the trial and indeed pivotal in the submissions before us made on behalf of the appellants by Mr. Barnard, is that the appellants did not know that the baggages they were carrying contained cocaine. In trying to consolidate that pillar of defence stress was laid on the near perfect semblance of the so-called transformers to the real such things. It was said that even the police officers' perception of the "transformers" was that they initially took them to be real. Moreover, Mr. Barnard stressed another point, namely the fact that in this case there was no direct evidence in proof of guilty knowledge on the part of the appellants that the "transformers" contained cocaine. Therefore he further submitted that in the circumstances the prosecution had to rely on circumstantial evidence to prove the *mens rea* of guilty knowledge, but he observed that in that event the prosecution had a duty to prove beyond reasonable doubt that the inference of guilt was the only one capable of being drawn from the established facts to the exclusion of all other inferences.

Conceding the trial judge's holding that the appellants lied in certain respects in explaining how innocent their involvement in the cocaine saga was, Mr. Barnard prayed in aid the *dictum* in MAHARAJ v PARANDAYA, 1939 NPD23, viz : -

> "But the court is not entitled to say that because (the accused) has been proved to be a liar, he is therefore likely to be a criminal. It is possible that an innocent person may put up a false story, because he thinks that the truth is unlikely to be sufficiently plausible."

He also underscored the time worn principle of criminal procedure that the onus to prove a crime beyond reasonable doubt rests squarely on the prosecution and not on the defence. To this end Mr. Barnard cited the dictum in R v DIFFORD 1937 AD 370 at 373, namely–

> "……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 reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to acquittal."

We were also reminded of the statement of the same principle by being referred to R v M 1946 AD 1023 at 1027 where the following was stated: -

> "……the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if (the court) thinks that there is a reasonable possibility that it may be substantially true."

I must agree with Mr. Barnard at the outset that there was no direct evidence to prove that the appellant had knowledge that they were acting as couriers in a cocaine trafficking venture. Therefore an inference of guilt from the circumstantial evidence elicited in support of the charge of which the appellants were convicted had to be the only one reasonably possible to be drawn from the established facts to the exclusion of any others . Further I agree that an accused person should be home and dry in earning an acquittal if he can induce the court to accept that an explanation he gives is reasonably possibly true. The question I must pose and answer therefore is whether in the

present case the identical explanations given by the appellants were reasonably possibly true.

The genesis of the episode leading to the appellants' involvement in this case was said to be the casual acquaintance they had with Louis. They had known him, according to what they said, for a mere two months. The only contacts they had with him were when they met at Club La Frontier in Johannesburg where the first appellant worked and where Louis was an occasional patron. On 3rd August 1997 they again met him and he reportedly told them that he would have made a trip to Windhoek, Namibia on behalf of Clifford but for the accident he had, and he asked them to go on his behalf if they had passports; he told them that Clifford would pay them US$ 1,000.00 for the assignment. Clifford was a person the appellants hardly knew, and yet he only had to repeat what Louis had earlier said for them to implicitly believe that he was a person they could trust and for whom they could make the errand on the terms offered. Even before they received the US$1,000 they each went and purchased false Malawian passports which cost R150 a piece. Not only were the passports fake, the appellants also assumed false identities as Charles Sibande and Chimphotwa Amon Banda presumably Malawian names when in truth the appellants were West Africans.

The purpose of the mission as plainly put to them was that they be used in importing electrical transformers from Namibia to the Republic of South Africa. In the circumstances it should have occurred to any sensible law abiding person wanting to be innocently involved in such a transaction to ask for import documents, especially considering the information they were given that

the transformers came from South America via Angola and Namibia. They asked for none from either Clifford or from the mysterious Felix and George.

The appellants said that they were excited at the prospect of receiving US$ 1,000.00 reward. But let us look at the expenses they incurred. The passports cost was R300, return tickets were at R350 each, that is to say R700 altogether and their sustenance on the entire trip, including booking a room at Continental Hotel while they awaited the arrival of Felix and George, were all expenses from the so-called reward. That the US$ 1,000.00 was not the net reward but that their entire expenses on the trip were to be met from that amount is apparent from the answer given by the first appellant when cross examined by Ms. Jacobs who asked :-

> " So he paid you US$ 1,000.00 and you had to do everything yourself?"
> Answer – "correct."

Therefore if the appellants' story is to be considered to be reasonably possible, let alone believed, the expenses they incurred made quite a substantial inroad into the so-called reward. The appellants were not in desperate financial straits: they each had a reasonable income of R800.00 a month; and they were United Nations registered refugees in the Republic of South Africa.

Moreover as United Nations registered refugees it was more likely than not that the United Nations office in Johannesburg could have given them travel documents to enable them travel to Namibia but they chose to have recourse to the criminal subterfuge of assuming false identities and acquiring dud passports. By so doing they were putting at stake their hard won refugee

statuses because not only did they choose to travel as criminals (false names and fake passports) but their assignment was also fraught with the danger of being caught as smugglers of transformers and/or infringing the immigration laws of Namibia. The question is whether it was worth undertaking the risk-riddled journey for a paltry reward of very much less than US$ 1,000.00. That the reward was indeed less than US$ 1,000.00 was acknowledged by the first appellant when he said the following under cross-examination:

> Question " I put it to you that Clifford, or let me ask you this one. What would you have done if you found out that there was cocaine in those transformers before you boarded the bus?"
>
> Answer – "If I had discovered, if I had a slight knowledge of that what was there was cocaine I could have abandoned the whole thing and then go back and give the balance of the money to the owner." (emphasis supplied).

Quite clearly therefore the mean reward said to have been promised by Clifford was not, in my view worth the risk. On the other hand if one takes into account the street value of cocaine, namely 8 million Namibian Dollars, then it can be concluded that who ever might have participated in successfully importing the cocaine to the Republic of South Africa and in disposing of it there by sale would have expected really substantial financial gain. It is therefore easy to see why the appellants decided to throw caution to the wind and embark on what was a perilous journey.

This in my view is a classic case which fits the dictum of Denning, J, as he then was, in MILLER v MINISTER OF PENSIONS (1947) 2 ALL ER 372 at page 373 –

> "Proof beyond reasonable doubt does not mean proof beyond the shadow of a 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 it can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt ....."

In the present case it has been proved incontrovertibly that the appellants were found in possession of cocaine which was being trafficked from the Republic of Namibia to the Republic of South Africa. Prima facie the evidence against them was so strong, taking the circumstances already analysed hereinbefore into account, that it left a remote possibility that they were innocent handlers of cocaine. The yarn they spun to explain how they came into possession of it can indeed be dismissed with the sentence "of course it is possible, but not in the least probable." Even if they had no first hand knowledge that they were transporting cocaine, in the sense that they never saw it, the inference that they had constructive knowledge of it is, on the totality of the evidence against them, irresistible. I would therefore uphold the conviction of both of them as charged on the main count and dismiss their appeals.

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CHOMBA, A.J.A.

I agree

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STRYDOM, C.J.

I agree

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O’LINN, A.J.A,

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