REPORTABLE

CASE NO.: SA 85/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DANIËL JOAO PAULO **First Appellant**

JOSUE MANUEL ANTONIO **Second Appellant**

And

THE STATE **First Respondent**

and

ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA ***Amicus Curiae***

Coram: SHIVUTE CJ, MARITZ JA *et* MAINGA JA

Heard: 11 April 2012

Delivered: 30 November 2012

APPEAL JUDGMENT

MAINGA JA(SHIVUTE CJ AND MARITZ JA CONCURRING)

[1] This is an appeal with the leave of this Court granted after the Court below had refused the appellants leave to appeal.

[2] On 20 December 2007 at about 01h25 the appellants arrived at a roadblock outside Keetmanshoop in a Toyota Land Cruiser with registration number KEA-88-61. It was driven by the 2nd appellant and the 1stappellant was seated as a passenger. The vehicle was stopped by the members of the Drug Law Enforcement Unit of the Police Force. Sergeant van Wyk, with the permission of the appellants, conducted a search of the vehicle in their presence and, in theprocess he got the distinct smell of cocaine. He continued with the search and found a false compartment concealed underneath the vehicle. Hidden inside the compartment he found62parcelswrapped in brown insulation cello tape containing a substance which he thought was cocaine.The appellants were arrested and they, as well as the Toyota Land Cruiser were taken to the Keetmanshoop Police Station. The parcelswere forwarded to the National Forensic Science Institute (NFSI) for analysis. They were weighed by the NFSI and found to contain 30,1kg cocaine (synthesized crack) with a street value of N$15 500 000.

[3] On 27 September 2008 Chief Inspector de Klerk received information which caused him to travel to Hardap Prison where the two appellants were kept in custody at the time. He picked up the two appellants and took them to Keetmanshoop Police Station. In the presence of the appellants the garage where the Toyota Land Cruiser was being kept under lock and key was opened. The spare wheel was removed and taken to the Quality Tyre Workshop where the tyre was

detached from the rim. Inside the tyre were 14parcelsof a substance which he thought wascocaine wrapped in brown insulation cello tape. These parcelswere also forwarded to the NFSI where they were analysed and found to contain9.25 kg hydrochloride and cocaine (synthesized crack) with a street value of N$4 625 000.

[4] As a result of these discoveries the appellants appeared before Parker J in the High Court on three substantive counts of dealing in, alternatively, possession of dangerous dependence producing drugs in contravention of s2(c) or (d), read with ss 1, 2(i) and/or 2(ii), 8, 10, 14 and Part II of the Schedule of Act 41 of 1971, (the Act) as amended.

[5] Count 2 relates to the 62 parcels of cocaine found on 20 December 2007; count 3 to the 14parcelsof cocaine which were retrieved from the spare wheel on 27 September 2008 and count 1 is, in essence, a combination of the allegations in counts 1 and 2. The allegations in all three counts and their respective alternatives are identical, the differences being only in dates, weights and values.

[6] In count 1 it was alleged that during the period 20 December 2007 to 30 September 2008 at Keetmanshoop appellants dealt in, alternatively were found in possession of dangerous dependence producing drugs, to wit 39,35 kg of cocaine, except admixtures containing not more than 0,1% cocaine calculated as cocaine alkaloid, with street value of N$20 125 000. In count 2 it was alleged that on 20 December 2007 they dealt in, alternatively were found in possession of cocaine alkaloid weighing 30,1 kg with a street value of N$15 500 000whereas, in count 3 the allegation was that on 30 September 2008 they dealt in, alternatively were

found in possession of cocaine alkaloid weighing 9,25 kg with a street value of N$4 625 000.

[7] Appellants pleaded not guilty to all the main and alternative counts. At the end of the State case,after consideration of an application in terms of s 174 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), they were acquitted and discharged on counts 1 and 3. They were eventually convicted at the end of the trial on count 2 and each was sentenced to 10 years imprisonment of which 4 years was conditionally suspended for 5 years.The 31,1 kg cocaine and the Toyota Land Cruiser with registration number KEA-88-61 were ordered forfeited to the State.

[8] The appeal lies against the appellants' convictions only. There are eighteen grounds of appeal, the majority of which do not directly relate to the judgment on conviction handed down on 19 January 2011 but to the Court's ruling on the application for discharge brought by the appellants in terms of s 174 of the Criminal Procedure Act, 1977.

I interpose here to remark in passing that, if there is a party that could have been aggrieved by the s 174 ruling, it should have been the respondent. I must confess to some difficulty in understanding why the appellants were acquitted and discharged on count 3. The evidence on that score is that, after the appellants had been arrested, the vehicle was taken to the Police Station at Keetmanshoop where it was kept under lock and key at one of the garages at the station. There is no evidence that the fourteen parcels eventually retrieved from its spare wheel in the presence of the accused were or could have been 'planted'. More so, if regard is

being had to the fact that they were wrapped in a similar fashion as the sixty-two parcels found earlier in the hidden compartment.The fact that the cocaine constituting that charge was retrieved nine months later from the Toyota Land Cruiser does not detract from the prima facie inference that the appellants had been in possession of the cocaine at all relevant times before their arrest on 20 December 2007. However, in the absence of a cross-appeal, it is not necessary to deal with their discharge any further.

[9] Appellants' counsel concedes that some of the grounds of appeal overlap or essentially deal with the same issues. In the process even the most insignificant matters were seized upon in an attempt to bolster the substance of the appeal. It seems to me that appellants' counsel trawled through both the s 174 ruling and the judgment appealed against in the hope of finding an error which may find favour with the Court in the appeal. Such an approach is not in the best interest of justice because it tends to waste the time of the parties and the Court. See *Hindjou v The Government of the Republic of Namibia* 1997 NR 112 (SC) at115B-D.

[10] The judgment of the Court below was concise. First, it restated the conclusion which it arrived at in the s 174 ruling based on an English case of *R v Lewis* (G.E.L.) 1988 87 Cr. App. R. 270 (Court of Appeal) at 472, namely,

> '. . . that if a person is in possession of a motor vehicle or other means of conveyance (it) leads to a strong inference that the person is in possession of its contents, 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'.

It then proceeded to consider the version of the appellants that one Guilhermino had asked the 1st appellant to take the vehicle to South Africa.The Court referred to him as ‘a mysterious person’because the vehicle was actually registered in the name of another person who had made a declaration to the effect that the 2nd appellant was authorised to drive the Toyota Land Cruiser for private use. Thereafter, it proceeded to comment on a belated assertion advanced for the first time in argument at the conclusion of the trial on the merits that s 10(1)(*e*) of the Act was unconstitutional. The Court found that, without citing the Minister responsible for the administration of the Act and Attorney-General, the point was unprocedurally raised. The Court nevertheless stated that it need not rely on the evidential presumptions in s 10 of the Act because the evidence was overwhelming that the appellants were jointly in possession of the vehicle; that the State had proved its case beyond reasonable doubt and that the appellants had dealt in the drugs found therein.

[11] The grounds of appeal which would be relevant to the judgment appealed against are those mentioned in paragraphs 1,2,3,4,6,13,16,17 and 18 of the Notice of Appeal. Grounds of appeal 1–4 overlap and so do 16–18 as they deal with essentially the same issues.The grounds of appeal can thus be summarised as follows:

1. The Court below erred when it held that:

(a) a driver who comes in possession of a vehicle has a duty to inspect the vehicleto ensure that he or she will not convey any illegal substances in it, such duty not being part of the Namibian law;

(b) the appellants acted in common purpose;

(c) Guilhermino was a ‘mysterious person’and, as a result, the evidence of the appellants was rendered false beyond reasonable doubt whereas, the evidence established that the vehicle in question was registered in the name of Guilhermino Beatriz;

2. The Court below erred when it applied the presumptions in s 10(1)*(d),* (10)*(e)* and 10(2) of the Act despite the fact that such presumptions are unconstitutional and illogical.

[12] I turn first to the constitutional challenge to the presumptions in s 10(1)*(d)*, (10)*(e)* and 10(2) and the assertion that the Court below relied on them.

[13] Section 10(1)(*d*), (1)(*e*) and 10(2) reads:

‘10 Presumptions

(1) (a) . . .
(b) . . .
(c) . . .
(d) If in any prosecution for an offence under section 2(a) and (c) or section 3(a) it is proved that the accused conveyed any dependence-producing drug or any plant from which such drug could be

manufactured, it shall be presumed that the accused dealt in such drug, unless the contrary is proved.

(e) If in any prosecution for an offence under section 2(a) or (c) or section 3(a), it is proved that the accused was upon or in charge of or that he accompanied any vehicle, vessel or animal on or in which any dependence-producing drug or any plant from which such drug could be manufactured, was found, it shall be presumed that the accused dealt in such drug or plant, unless the contrary is proved.

(2) If in any prosecution for an offence under this Act it is proved that a sample which was taken of anything to which such offence refers, was or contained any dependence-producing drug or that such drug could be manufactured therefrom, such thing shall be deemed to possess the same properties as such sample, unless the contrary is proved.'

[14] The Court below declined to entertain the challenge to the constitutionality of s 10(1)(*e*) of the Actwhen it was raised for the reason that the Minister responsible for administering the Act was not cited and the Attorney-General was not heard. In that regard the Court below stated:

> '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 to times for ages out of number, that it, the common law rule of *audi alteram partem* of natural justice, for this Court to consider the constitutional challenges, as Mr McNally appears 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.'

These obiter remarks of the trial Court cannot be endorsed without qualification. The validity of legal provisions which the Prosecution may seek to rely on or

enforce against an accused person in criminal proceedings may be challenged collaterally in those proceedings. Whether it would be permissible or appropriate for acourt seized with a criminal matter to also determine the merits of the collateral challenge in the same proceedings will depend on a number of circumstances such as the nature of the challenge, jurisdictional requirements, procedural constraints, the rights of persons who are not parties to the proceedings and the interests of fairness and the administration of justice – to mention a few. If, for example, the court in question lacks jurisdiction to determine the collateral issue, the issue must be raised and determined in a court of competent jurisdiction.[1]Even if a collateral

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[1] [1] Compare, for example, *S v Sheehama* 2001 NR 28 (HC), where the appellant, in an appeal against his conviction in the magistrate's court of the possession of dagga in contravention of s 2(b) of Act 41 of 1971 asserted in that court that the consumption of dagga was part of his religious practice of Rastafarianism and that the prohibition infringed his right to religious freedom guaranteed by Article 21(1)(b) and (c) of the Namibian Constitution. Hannah J whose judgment was concurred in by Gibson J dismissed the appeal and in the course of the judgment had this to say at 283B:

> 'However, what exercised our minds at the outset of the appeal was the procedure adopted by the defence and whether it would be proper to allow the appellant to take these constitutional points before us.'

The learned Judge continued at 285C-I to state that:

> 'Another difficulty arising from that procedure is that it excludes interested parties from participating in the proceedings. When constitutional rights are raised it often happens that parties other than the Prosecutor-General and an accused have an interest in the outcome. The present case is a prime example. I should have thought that the Attorney-General acting on behalf of the Minister of Health would have a strong interest in the outcome. But under the procedure approved in Walker's case . . . the Attorney-General would have no means by which to intervene.

With considerations such as those just mentioned in mind I return to the words of art 25(2). In my opinion, the sub-article does not contemplate a two-tier approach for relief. It does not contemplate an approach where the evidential foundation for the relief sought is laid in an incompetent court and the matter is then adjudicated upon by a competent court. In my opinion, the Sub-Article contemplates a direct approach to a competent court. Such approach will normally be by way of application and there will then be present all the practical advantages which accompany such a procedure. The aggrieved person who, of course, will bear the burden of establishing his claim that a fundamental right or freedom has been infringed or threatened sets out his evidence in his founding affidavit. No question of ambush arises. The respondent, who in the circumstances of the present case would be the Prosecutor-General, is then afforded the opportunity to answer and any interested party afforded the opportunity to intervene.

That was the procedure followed in the *Nasilowski and Others v Minister of Justice and Others* 1998 NR 96 (HC). The applicants sought and obtained an order suspending criminal proceedings instituted against them in Walvis Bay magistrate's court pending the determination of an application for declarations on certain constitutional matters.

That is the procedure which the appellant in the instant case should have adopted.

As the appellant adopted the incorrect procedure the magistrate quite properly convicted him. He had no other choice. And for the reasons I have given it would be wrong for this Court, sitting on appeal from the magistrate's decision, to consider the constitutional questions which have been raised.'

challenge is raised in criminal proceedings in a court of competent jurisdiction, it may not always be appropriate or permissible to determine the challenge in the course of such proceedings. This, for example, may be the case when persons with a direct and substantial interest in the outcome of the collateral challenge are not parties to the criminal proceedings; if evidence will be required to determine the validity of the legal provision being challenged collaterally and whether the issue at hand is so complex and important that it should be determined by a Full Bench – or even by this Court in terms of s. 15 of the Supreme Court Act, 1990 – rather than by a single judge. In such instances, the courtmay direct that the prosecution be stayed for the time being until the collateral issue has been competently determinedunless, in the exercise of its judicial discretion, the court considers the issue to be so patently without merit or a procedurally abusive ploy intended to delay the prosecution. On the other hand, there may be instances where the collateral issue is purely legal in nature and so easily determinable that the court may deem it appropriate to decide it in the course of the criminal proceedings. In those instances, it may be necessary for the court to invite *amicus curiae* contributions in argument from persons with a legal interest in the matter who are not parties to the proceedings.[2]

[15] When the matter was called in this Court, the same issue arose, albeit on an expanded basis and, being before a different forum,in a different context.It turned on whether the constitutionality of s 10(1)(*e*)of the Act was properly before this Court, given the late stage and manner in which it was raised in the Court below and whether the constitutionality of ss 10(1)(*d*) and (2) of the Act could be raised for the first time on appeal when the Court below had not had the opportunity to

[2] Compare *S v Zemburuka (1)* 2003 NR 112 (HC)

pronounce itself on the issue and, if so, whether it was necessary for the Court to decide those issues in the circumstances of this case. I must be quick to say that, upon the direction of this Court, the Attorney-General was notified by the registrar of the challenges and, as a result the Government Attorney subsequently briefedsenior and junior counsel to appear *amicus curiae*on behalf of the Attorney-General.At the hearing of the appeal the question was posed to Mr Hinda who appearedon behalf of the appellants. After further reflection on the considerations and authorities referred to earlier, Mr Hinda conceded that the issue was not properly before Courtand that the following remarks made inthe case of *Gurirab v Government of the Republic of Namibia and Others*,[3] on which the appellants' initially relied,were distinguishable:

> 'In this regard Mr Obbes had argued, correctly in my opinion, that a litigant is entitled to invoke any provision of the Constitution during litigation, at any time during litigation. But this of course is subject to the safeguards mentioned in the Namibian High Court decision of *Vaatz v Law Society of Namibia* 1990 NR 332 (HC) at 336,1991 (3) SA 563 (Nm)) at 567E-F (SA).
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> In that decision Levy J, in his judgment, concurred in by Strydom AJP, said:
>
> > 'A litigant can invoke any provision of his country's constitution at any time during the litigation. Should the other party be taken by surprise, the Court will decide whether or not such party is entitled to a postponement and whether there should be a special order as to costs.'"

The observation should be understood in the context of a civil case it was made where the procedural rules are different and litigants may join other parties to the proceedings. It would be absurd, for example, to raise the issue under consideration in a criminal trial at the sentence stage. In this case where evidence

[3] 2006 (2) NR 485 (SC) at 493J–494A–B

may well have been be required to determine the issue and it may have resulted in s 10(1)(*d*), (10)(1)(e) and 10(2) being declared unconstitutional it could not be raised for the first time per chance in counsel's concluding arguments on conviction in the Court below. It could have been raised by way of a substantive application in which all interested parties could have been cited and which would have allowed for the presentation of all evidential material required to properly ventilate the issue.

[16] The procedure adopted by the appellants to raise the constitutionality of two more presumptive provisions in this Court without the benefit of the views of the Court below has the effect of obliging this Court to sit effectively at first and final instance on the issue. Needless to say this Court is the highest Court in the land and it is not generally desirable for a Court to sit as a Court of first and last instance.[4] In *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011(2) 469 at 474D–475A–E, this Court declined to entertain an issue of standing in environmental cases on which the High Court had not made any ruling. In *Bruce and Another v Fleecytex Johannesburg CC and Others*1998(2) SA 1143 (CC) at 1148D–E,the Constitutional Court of South Africa albeit in a different context stated as follows:

> '[8] It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.'

[4] *National Gambling Board v Premier, Kwazulu Natal and Others* 2002 (2) SA 715 (CC) at 727B.

[17] There are exceptions to the rule, such as the obligation of this Court under s 79(2) of the Constitution of Namibia to hear and determine constitutional issues that may be referred to it by the Attorney-General.In such instances, the rules of court specifically provide for procedures to ventilate the issues at hand and to allow for an informed adjudication[5]. It is different, however, when constitutional issues which require evidence are raised for the first time on appeal. In the absence of an application to receive further evidence, appeal procedures do not allow for the consideration of evidence outside the four corners of the proceedings in the Court below. That evidence does not in any way deal with the constitutionality of the sections in question. In the circumstances, it would not be appropriate in the circumstances of this case for this Court to decide the constitutionality of the provisions attacked on appeal for the first time.

[18] The appellants' failure to raise the constitutionality of s 10(1)*(e)* properly and timeously in the High Court also inhibits their ability to raise it now in this Court for the same reasons.[6] Without derogating from the observation in *Gurirab v Government of the Republic of Namibia,* above, it should be as a matter of a general principle be required that issues of the nature under consideration be raised in courts from which the appeal arises before it can be entertained in this Court. The views of the Court below are of particular significance and value to us.[7]This Court being a Court of ultimate resort in all cases, will entertain proceedings as a Court of both first and final instance 'only when it is required in the interest of

[5]Compare Rule 6 of the Rules of the Supreme Court.
[6] See: *S v Bierman* 2002 (5) SA 243 (CC) at 245F–G; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 (5) BCLR 422 (CC) at paras [18], [21] – [24].
[7] See: *Schroeder v Solomon & 48 Others* 2009 (1) NR 1 (SC) at 12E-13B par [21]

justice.' And only in circumstances where it will be appropriate to do so. The concession by Mr Hinda was therefore properly made.

[19] I now turn to consider the merits of the matter. Under the circumstances,my approach in deciding upon the appeal is to consider whether, on the evidence recorded unaffected by the alleged irregularities arising out of the trial Judge's misdirections, there is proof of the appellants'guilt beyond reasonable doubt.[8]The appellants' principal defence in the Court below was that they did not have the required *mens rea*to possess or deal ina dangerous dependence producing drug. But, before counsel turned to develop the real issues on which this appeal is anchored in argument, he spent some time in argument on the irregularities that the appellants claim have been committed by the Court below, particularly, the phraseology which the learned Judge employed in the course of his ruling in the s 174 application. As part of his reasoning, the trial Judge stated:

> 'The State has proved beyond reasonable doubt that the accused persons were in *prima facie* joint possession of the aforementioned motor vehicle and the 30,1 kg of cocaine that were found in or on the motor vehicle on 20 December 2007.From the totality of evidence I have no doubt in my mind that the substances is cocaine as referred to in Part II of the Schedule to Act 41 of 1971 and also that its weight is 30,1 kg and its street value was N$15 500 000,00.'

[20] Appellants' counsel submitted that the findings were both unreasonable and irregular and resulted in the appellants not having had a fair trial. He further submitted that by holding as it did, the Court below in effect found that the State had discharged the eventualonus upon it already at the end of the State's case; that

[8] See: *S v Pillay* 1974 (2) SA 470 (NPD) at 473H; *S v Tuge* 1966 (4) SA 565 (AD) at 568F – G; *S v Smith* 1965 (4) SA 166 (CPD) at 168C).

by making such a finding before the appellants had the opportunity to testify in their defence, the Court left them with an impossible hurdle to surmount;that the Court applied the incorrect standard of proof required at the close of the State's case and that it did not distinguish between a burden of proof and a duty to rebut. On the Court's findingsregarding the weight and street value of the substance, it was submitted that the Court failed to distinguish between fact and conjecture and, therefore, erred on the facts and committed an irregularity. It was further submitted that the learned Judge had no grounds for such a finding and further that the Judge erred in making credibility findings as regards the evidence by the State at the conclusion of the State's case when it is trite law that credibility plays but a limited role at that stage of the proceedings.

[21] Legitimate as some of the criticism about the formulation of the reasons for the ruling in terms of s 174 of the Court below might be, for the purposes of this appeal, the criticism takes the appellants' case no further than that. It seems to me that, what the Court below sought to express in so many words wasthe measure of its satisfaction that, on the evidence, the State had established a *prima facie* case which required an answer from the appellants. The trial Court maywell have muddled its formulation of the test for a discharge, but a insubstantial deviation from the perfect does not by that reason alone result in the accused not being afforded a fair trial.[9]'At the heart of the right to a fair criminal trial and what infuses its purposes, is for justice to be done and also to be seen to be done.'[10]Even if I were to accept that the trial Judge erred in his formulation of the test to be applied when assessing the sufficiency of evidence for purposes of a s 174application at the

[9] See: *S v Dzukuda and Others*; *S v Tshilo* 2000 (2) SACR 443 (CC) at 457G.
[10] Ibid., at 456b–e (per Ackermann J)

close of the Prosecution's case, the error - which, in effect, set the evidential bar higher for the State than that required by law – did not prejudice the appellants. As will be apparent from the discussion of the merits which follows, the State had made out a strong *primafacie case* against them and it would not have been appropriate to grant their application for a discharge on Count 2.Notwithstanding the unfortunate formulation, I am not persuaded that it constituted an irregularity which vitiated the proceedings and precludes consideration of the merits in the appeal.

[22] It is common cause between the parties that appellants were the occupants of the Toyota Land Cruiser with registration number KEA-88-61when they were stopped at a roadblock outside Keetmanshoop. It is also common cause that their vehicle was searched and 62blocks called parcels containing cocaine were retrieved from a false compartment under the vehicle, which when weighed on an assized scale its mass, was established at 30,1 kg. This evidence, on the application of basic legal principles and common sense without resort to any presumption in s 10 of the Act, proves that the appellants had physical custody and knowledge of the cocaine. There is no real dispute that cocaine is a prohibited substance in terms of the Act. The evidence, given the substantial quantity and the value thereof, including the locality where the appellants were intercepted, justifies an irresistible inference that the cocaine in their custody was not for personal consumption but for dealing purposes. From the appellants own versions regarding their respective employments, they could not have afforded to acquire cocaine of such substantial quantity and value for their personal consumption.The point where they were stopped on their way to South Africais more than a 1000 kilometres away

from –and in the opposite direction of - their respective homes[11]. Moreover, on their own evidence, their sojourn to South Africa via Namibia was intended to be a very brief one and, they would have used a different means of transport for their return journey. In those circumstances, they could not possibly have possessed the cocaine for personal consumption or use. This is so when regard is had both to the ordinary meaning of 'deal in' and its extended meaning as defined in the Act. The conventional meaning of 'deal in' is to buy and sell, but it may denote a wider meaning of 'doing business' or performing a transaction of a commercial nature.[12]

[23] The Act defines 'deal in', in relation to dependence producing drugs or plant from which such drugs can be manufactured, as including performing any act in connection with the collection, importation, supply, transhipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription thereof. There is no doubt that, by bringing the cocaine from Angola across the border into Namibia, they, in effect, imported it to Namibia - albeit with the intention of exporting it again to South Africa.

[24] In *S v Sixaxeni*[13] Marais J (as he then was) stated:

> 'The large quantity of dagga which he had in his possession, coupled with his demonstrably false denial of possession and the absence of any plausible alternative suggestion from him as to why it was in his possession, fully justify the inference that he was engaged in dealing in dagga within the meaning of the relevant statute. Indeed, he conceded himself in cross-examination that anyone possessing so large a quantity of dagga would obviously intend to sell it. The fact that the magistrate relied upon the presumption in convicting the appellant is

[11] See: S v Majola 1975 (2) SA 727 (AD) at 735G.
[12] *R v Oberholzer and Others* 1941 (OPD) 48 at 49; *S v Conco* 1962 (3) SA 988 (NDP); CR Snyman, *Criminal Law*, 4th ed at 432.
[13] 1994 (2) SACR 451 (CPD) at 451g-h

> immaterial to the result. The evidence proved beyond reasonable doubt that the appellant was in possession of this large quantity of dagga, far more than reasonably have been intended for his own use, and that his denial that he was in possession of it was false. Even without resort to the statutory presumption, the inference that he intended to deal in it was the only reasonable inference which could have been drawn in the circumstances.'

[25] The Constitutional Court of South Africa referred with approval to Marais J's observation above in *S v Bhulwana, S v Gwadis*o[14] when O'Regan J stated:

> 'If an accused is found to have been in possession of a large quantity of dagga, it might, depending on all the circumstances and in the absence of an explanation giving rise to a reasonable doubt, be sufficient circumstantial evidence of dealing and a justification for the imposition of a higher penalty.' (See also *S v Mathe* 1998(2) (OPD) at 229d-g).

[26] In *S v Sixaxeni,* the dagga involved weighed 64,4 kg, in *S v Bhulwana, S v Gwadiso,* the dagga weighed 850 g and 444,7 g respectively and in *S v Mathe,* the dagga weighed 133,9 kg.

[27] But counsel for the appellants submitted that the State failed to prove that the appellants either had the *corpus* of the cocaine in question or the *animus* to be in possession of the same. It is contended that, while the appellants had control of the vehicle, they had no knowledge that the cocaine was within their physical detention or control. Counsel made reference to numerous cases to support the submission, *inter alia,S v Adams* 1986(4) 882 (AD) (possession of dangerous weapon); *S v Brick* 1973(2) SA 571 (AD) (possession of indecent or obscene photographic matter); *Rex v Keswa* 1949(3) SA 1 (OPD) (possession of intoxicating

[14] 1996 (1) SA 388 (CC) at 396G – H

liquor); *R v Binns and Another* 1961(2) SA 104 (TPD) (possession of intoxicating liquor); *S v Smith, supra,*(unlawful possession and transportation of explosives and possession of implements of house-breaking).

[28] The principle gleaned from the above cases which the appellants seek to rely on is abridged in *S v Smith, supra*, at 171D–E as follows:

> 'The concepts of custody or possession comprise two main elements: they are, firstly, the physical element of *corpus*, i.e. physical custody or control over the *res* in question, exercised either mediately or immediately, and the mental element of *animus*, i.e. the intention to exercise control over the thing.'

[29] The application of this principle in our law does not support the reliance of the Court below on the English Court of Appeal judgment in *Lewis'* case that, '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 i'.. . ' It is now settled in our law, that *mens rea* is an essential ingredient of the offence created by s 2(1)*(a)* of the Act in the sense that an accused person cannot be convicted of dealing in any dependence-producing drug unless he or she knows that the substance in which he or she is dealingis a prohibited drug[15] .

[30] The version of the appellants as summarised by their counsel in the Court below is recorded verbatim as follows:

> '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 who he knew had such a licence.

[15] See S v Pillay, supra, at 472F; S v Smith, supra, at 171C

> 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 apartment was when Sergeant Van Wyk opened it at the roadblock outside of Keetmanshoop.'

[31] Counsel for the appellants argued that there should have been evidence that the appellants had either placed the substance in the secret compartment themselves or had known that it was hidden there. *In casu*, he submitted, there was no such evidence and that none can be inferred. He further submitted that the versions of the appellants are corroborated by the documents found in the vehicle, namely, the identity document of the owner of the vehicle, the registration documents in respect of the specific vehicle and the document that authorised the 2nd appellant to drive the vehicle, the validity of which were never disputed.

[32] That the vehicle was ownedby the appellants was not the State's case as presented to the trial Judge, nor found by him to be the position. I shall assume in favour of the appellants that the vehicle belonged to Ms Guilhermina Beatriz Peyavali Vieria Clemente Lubamba and that Mr Guilhermino, who allegedly asked them to take the vehicle to South Africa, was her husband as testified to by the 1st appellant. But the declaration madeunder oath by the alleged owner, Ms Guilhermina, is not entirely consistent with the version of the appellants that Mr Guilhermino had asked them to take the vehicle to South Africa where he wanted to spend the holiday. The declaration states that 'Guilhermina Beatriz Peyavali Vieria Clemente Lubamba. . . hereby declare that Josue Manuel Antonio, (2nd appellant) is authorised to drive a car of the make of Toyota Land Cruiser, of darkgrey colour,

licence registration number KEA-88-61, for private use'(my emphasis). It must have occurred to the appellants when they received that document, on their version, that they were not authorised to drive it for private use but rather, that they had to drive it to South Africa on behalf of the owner or her husband.One would have expected them to require that the document should reflect the true purpose of the journey. When they accepted the declaration as it was received in evidence, the authorisation to be gleaned from its express wording is that they were using the vehicle for private purposes. In actual fact, that declaration, notwithstanding their denials, is consistent with the version theygave in response to Sergeant van Wyk's enquiry, i.e. that they were going to Upington to visit their brother. Upon that reply - which suggested that they were indeed using the vehicle for private purposes - Sergeant van Wyk asked them to pull it off the road.They obliged, whereafter he informed them that he was going to search for illegal drugs, firearms and anything which might be illegally conveyed on or in it. Their nervous reaction led him to conclude that there was something wrong.

[33] This brings me to the presence of the Sellotape, the pop rivet gun and the pop rivets found inside the vehicle. It is undisputed that the pop rivets holding the panels of the false compartment and the Sellotape which was used to wrap up the cocaine parcels were identical to the ones in the vehicle. The only inference to be drawn is that they were part of the material and tools used in the construction of the hidden compartment and to pack and stash the cocaine. It is quite probable, in my view, that they were kept in the vehiclefor running repairs in case the false compartment would have been damaged due to the bad condition of the roadsin Angola - as testified to by the appellants. Appellants testified that they found the

items in the vehicle. In my view, be it on their version, they must have known or been informed of the purpose of the items, from which the inference logically follows that they also knew about the cocaine. That inference is supported by the presence of the two partially used bottles of deodorant and the perfumed Auto Silicon which Sergeant van Wyk testified had been found in the passenger compartment of the vehicle. They were clearly used to ‘damp[en] the smell’ of the cocaine. The two bottles of deodorant were located within easy reach in the back pocket of the driver’s and passenger’s seats while the perfumed Auto Silicon was actually at handbetween the driver and passenger’s seat.

[34] The 1st appellant testified that from the time he had received the vehicle up to the time that they were arrested, he did not get any‘funny smell’. Both Sergeant van Wyk and Chief Inspector de Klerk testified that the distinctive smell of cocaine in the cabin of the vehicle was overwhelming. Mr McNally, who appeared on behalf of the appellants in the Court below, asked Mr Shomeya, a Senior Forensic Analyst at the NFSI, during cross-examination what the first thing that would strike him should he come into contact with cocaine would be? Mr Shomeya’s response was 'the smell’. The trial Judge also remarked during the proceedings on the strong smell of the cocaine entered as an exhibit in Court. The claim by the appellants, particularly the 1st appellant who worked for a pharmaceutical business,that they did not smell the cocaine inside the vehicle was clearly untruthful under the circumstances. The smell of the cocaine filled a largecourt room and yet appellants claimed that they could not smell it in the vehiclenotwithstanding the scorching heat of Angola and Namibia during that time of the year and the fact that they had the vehicle in their possession for more than a week. The handy presence of deodorant and perfumed

Auto Silicon belies their claim of ignorance. Moreover, common sense dictates that, if they had no knowledge of the cocaine, the smell should have caused them to investigate the source thereof. They did not. Having regard to the testimony of the overwhelming smell, I am driven to the conclusion that the appellants, notwithstanding their protests to the contrary, must have smelledthe substance but did not investigate it any further because they knew exactly where it came and what was causing it .

There are numerous other pieces of evidence that tends to show that appellants had knowledge of the cocaine such as, for example, the reaction of the appellants when Sergeant van Wyk took a torch with the intention of inspecting underneath the vehicle.The 2nd appellant immediately placed his hands over his head. What is crucial about that reaction is that, the 2nd appellant did that before Sergeant van Wyk discovered the false compartment. The 1st appellant was asked by the Court during cross-examination whether that reaction connoted anything 'in Angola'. His reply was that it is done 'when you are surprised by something, shocked'. There was no reason for the 2nd appellant to be shocked at the mere indication that the undercarriage of the vehicle was going to be inspected unless he knew that it is likely to lead to the discovery of the false compartment containing the cocaine. That he feared discovery is an inescapable inference.Another example is their reaction when Chief Inspector de Klerk took them from Hardap Prison to Keetmanshoop Police Station and informed them of the cocaine hidden in the spare wheel. The appellants immediately informed him that they were not responsible for <u>that</u> cocaine, because the vehicle had been in police custody for several months.

[35] I now turn to consider other issues that were raised, namely, the challenge to the finding of the trial Court that it was satisfied beyond reasonable doubt that the substance found in the hidden compartment of the vehicle was cocaine with a street value N$15500 000. The appellants submitted that Mr Shomeya analysed only four of the 62 parcelsfor purposes of determining the percentage of the cocaine and that the Court acted unreasonably and committed an irregularity when it concluded on the basis of his evidence that the cocaine weighed 30.1 kg - especially in view of the fact that Mr Shomeya conceded that the four parcels which he had weighed,did not contain 100% cocaine, but cocaine in the following percentages 46%, 42,4%, 52,2% and 39,2%. Counsel pointed out that he further conceded that the cocaine had been combined with some other substance(s), the nature and weight of which compared to that of the cocaine had not been determined. The preliminary tests conducted were positive and indicated that all the parcels contained cocaine. The correctness of these tests were subsequently supported by the sampled analysis of the four parcels done by Mr Shomeya. The value of the cocaine is irrelevant for purposes of conviction. What the State sought to prove is that the appellants were dealing in cocaine. Whether Mr Shomeya failed to determine the percentage of the other 58 parcels is not material, given the provisions of s 10(2) of the Act quoted earlier in this judgement: in the absence of evidence to the contrary, the other samples are deemed to possess the same properties as the analysed samples. On that basis the Court below was entitled to conclude that the substance in the other 58 parcels contained between 39,2% and 52,2% cocaine.

[36] An argument was made that the trial Court was wrong to have found that the appellants were jointly responsible for the cocaine. That finding cannot be faulted,

as I have already stated, they both had knowledge of the presence of the cocaine in the vehicle. The 2nd appellant was actually the person who had been authorised to drive the vehicle and their denials that they could not smell the cocaine which was so overwhelming to the witnesses who came into contact with it, must be rejected as false beyond reasonable doubt.

[37] It was also argued that the trial Judge relied on the presumptions in s10 to convict the appellants. The purpose of the presumption in s 10(1)*(e)* is to assist the State in securing convictions by partly alleviating its burden of proof in respect of certain elements of the offence. The purpose of the subsection is to cast an onus on the occupants of a vehicle in or on which a dependence-producing drug was found to establish that they had no knowledge of the presence thereof on or in the vehicle. That the assistance afforded is partial is clear, for in each case certain factual premises have first to be established by the State with requisite degree of proof before the particular presumption can be invoked. Each provision . . .starts by saying: 'If in any prosecution for an offence . . . it is proved that . . . '. The different factual premises for the presumptions to apply are then prescribed. The words 'it is proved' in the presumptions ordinarily means that proof by adducing the necessary evidence in the usual way. In other words, the words ought to be restrictively interpreted as meaning actual and not presumptive proof.[16] In this case the State had to actually prove that the substance found in the false compartment was cocaine and that it was found in the possession of the appellants. The evidence of the smell, the reactions of the appellants at the discovery of the cocaine, the Sellotape, the pop rivet gun, the rivets and the perfumed spraysare all facts relevant to prove that appellants knew about the presence of the cocaine in the vehicle. The

[16] See S v Majola, supra, at 734H–735A).

place where they were arrested, the direction they were travelling in and the quantity of the cocaine found on the vehicle are matters that go to show thatthey were dealing in cocaine. All these factors, when considered in the context of all the other evidence, make it unnecessary for the Court to rely on any of the presumptions contemplated in s 10(1) of the Act when considering its verdict.

[38] Appellants' versions are fraught with difficulties. They could not explain why Guilhermino could not drive the vehicle himself to South Africa. Nor could they explain who would drive back the vehicle to Angola after Guilhermino had used it during his holiday in South Africa. More still, they had no single personal particular of the person to whom they had to deliver the vehicle. The 1st appellant's explanation upon a question by counsel for the State was that Guilhermino had informed him that, once they had arrived in Upington, he should call him. The 1st appellant had visited Brazil, Nigeria, Democratic Republic of Congo, Congo Brazzaville and South Africa before he undertook this journey and should have known that a visitor who enters another country is required to furnish the address where he or she is going to reside in that country to the immigration authority at the port of entry. It is unlikely that appellants would have proceeded to a foreign country without the address where the vehicle was to be delivered. On their own version they were hired for reward to take the vehicle to Upington. There could be no reason why their employer would have withheld the identity of the person and address where the vehicle was to be delivered. Their version is further compounded with much difficulty if regard is had to the fourteen parcels secreted in the spare wheel. If as they said Guilhermino asked them to take his vehicle to South Africa and he concealed the cocaine in the tyre without informing them, surely he must

have foreseen, given the bad conditions of the roads in Angola, that should they get a puncture, they would find the cocaine in the tyre. The inference again is inescapable that whether their version is correct, or not, they knew about the presence of the cocaine in the vehicle and the tyre.

[39] It appears that all the State witnesses who testified did so with solemn and sincere endeavour to be as frank and accurate as possible. There is no reason why Sergeant van Wyk would have lied or been mistaken that they told him at the roadblock that they were visiting a brother at school in Upington; nor could he falsely accuse the appellants of their reactions when he took a torch to check underneath the vehicle. That goes for the smell that led to the discovery of the false compartment which contained the parcels of cocaine.

[40] In all circumstances, the evidence as a whole as recorded established the appellants' guilt beyond reasonable doubt. The appellants' version is improbable, not possibly true on the proven facts and falls to be rejected as false. The appellants were correctly convicted.

[41] I therefore make the following order:

The appealsare dismissed.

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MAINGA JA

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SHIVUTE CJ

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MARITZ JA

APPEARANCES

APPELLANTS:	GS Hinda (with him P McNally) Instructed byLorentzAngula Inc.
FIRST RESPONDENT:	C Moyo Instructed bythe Prosecutor-General
AMICUS CURIAE:	JJ Gauntlett SC (with him F B Pelser) Instructed by the Government Attorney.