SUMMARY ***REPORTABLE***

CASE NO.: CC 10/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE v DANIEL JOAO PAULO and JOSUE MANUEL ANTONIO

PARKER J

2010 May 31

Criminal law - 'Possession' – Meaning of in terms of Act 41 of 1971 – Court finding that the 'possession' comprises physical control of the thing in question *(corpus)* and intention to possess the article *(animus possidendi)* – The two elements explained – Court finding that the Legislature did not intend to make a person guilty of possessing something when he or she did not know that he or she had the thing at all – Court explaining situation where a person possesses a means of conveyance which contains the thing in terms of Act 41 of 1971 – Court explaining what the State must prove in order to establish possession – Court finding that the accused had joint possession of motor vehicle in or on which 30.1 kg of cocaine was found – Court holding that the State had proved beyond reasonable doubt that the accused possessed the motor vehicle and the 30.1 kg of cocaine (Alternative Count 2).

Criminal law - 'Deal in' – Meaning of in terms of Act 41 of 1971 – Meaning explained – Court holding that on the evidence the State had proved beyond reasonable doubt that the accused did 'deal in' the 30.1 kg of cocaine (Count 2) – Consequently, Court finding that presumption in s. 10(1) (d) of Act 41 of 1971 applied – Court finding that on the evidence the accused did not possess the 9.25 kg of cocaine (Count 3 and Alternative Count 3).

Criminal procedure - Act 51 of 1977, s. 174 – Tests applied by the Courts confirmed – Court applying the tests against the particular crimes with which the accused are charged, namely, dealing in and/or possession of cocaine in terms of Act 41 of 1971 – Court finding that since the accused were in prima facie joint possession of the motor vehicle containing the 30.1 kg of cocaine they were presumed to be in possession of the cocaine and the prima facie assumption may be discharged by proof of certain matters the Court explained – Court finding further that since the accused were in possession of the motor vehicle containing the 30.1 kg of cocaine it is presumed that they dealt in the cocaine unless the contrary is proved in terms of s. 10(1)(d) of Act 1 of 1971 – Court finding further that the assumption of 'possession' and the statutory presumption of 'deal in' have not been discharged – Consequently, Court dismissing the s. 174 application with respect to Count 2 and Alternative Count 2 of the charges – Court not finding the accused possessed the motor vehicle when the 9.25 kg of cocaine was found in or on the motor vehicle when the motor vehicle was in possession of the Police for some nine months (Count 3 and Alternative Count 3) – Consequently, Court granting the s. 174 in respect of Count 3 and Alternative Count 3 – Court also discharging accused in respect of Count 1 and Alternative Count 1 because the quantifiable items in Count 1 are the sum of the quantifiable items in Count 2 and Count 3.

Held, that, in order to establish 'possession' in terms of Act 41 of 1971 the State must prove that an accused was knowingly in control of the prohibited dependence-producing drug in circumstances which showed that he or she was assenting to being in control of the drug.

Held, further, that 'possession' of the prohibited drug is satisfied by knowledge only of the existence of the drug and not its qualities.

Held, further, that, if a person is in possession of a means of conveyance, prima facie his or her possession of that means of conveyance leads to a strong inference that he or she is in possession of the contents. The prima facie assumption is discharged if the person proves or raises a real doubt in that (a) he or she was, for instance, a servant or a bailee and he or she had no reason to suspect that the means of conveyance contained illicit substance or prohibited dependence-producing drugs in terms of Act 41 of 1977.

Held, further, that the presumption in s. 10(1) (d) of Act 41 of 1971 applies where the State proves beyond reasonable that an accused is in possession of that means of conveyance containing the prohibited dependence-producing drugs.

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
Delivered on: 2010 May 31

RULING ON S. 174 APPLICATION

PARKER J: [1] In this matter, Mr Truter represents the State and Mr McNally the accused persons. The accused persons (Daniel Joao Paulo (the 1st accused) and Josue Manuel Antonio (the 2nd accused)) are facing the following charges:

(1) Count 1: 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.

(1a) Alternatively: Contravening section 2(d) 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 – Possession of dangerous dependence producing drugs.

(2) 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.

(2a) Alternatively: Contravening section 2(d) 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 – possession of dangerous dependence producing drugs.

(3) Count 3: 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.

(3a) Alternatively: Contravening section 2(d) 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 – possession of dangerous dependence producing drugs.

Both accused persons pleaded not guilty to all the charges.

[2] At the close of the State case Mr McNally made an application for discharge of the accused persons (s. 174 application). Mr Truter opposed the application. Section 174 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA) governs applications for discharge at the close of the State case. The section provides:

> If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he (or she) may be convicted on the charge, it may return a verdict of not guilty.

[3] I observed in *S v Naftalie Kondja and Others* Case No. CC 04/2006 (Unreported) at p. 5 respecting the interpretation and application of s. 174 that the following general principle emerges in the authorities:

> The State bears the onus of presenting sufficient evidence before the Court in order for the Court to call on the accused person to defend himself or herself. If at the close of the State case there is no case for the accused to answer, he or she must be acquitted. The accused must not be put on his or her defence in the hope that his or her evidence would supplement the State case.

The authorities (some of which counsel referred to me) are, for example, *S v Ningisa* Case No. CC 04/2002 (Unreported); *S v Phuravhtha and Others* 1992 (2) SACR 544 (V); *S v Lubaxa* 2001 (4) SA 1251 (SCA); *S v Nakale and Others* 2006 (2) NR 455 (HC); *S v Naftalie Kondja and Others* supra; *S v Manuel Alberto da Silva* Case No. CC 15/2005 (Unreported); *S v Ryno Van Zyl* Case No. 37/2008 (Unreported); *S v Pio Marapi Teek* 2009 (1) NR 127 (SC).

[4] Nugent AJA propositioned the general principle succinctly thus in *S v Lubaxa* supra at 1256A:

> I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself.

In other words, the accused person is entitled to be discharged if there is 'no evidence'; and as Brand AJA said in *S v Pio Marapi Teek* supra, it is trite principle that "no evidence" in terms of the section means no evidence upon which a reasonable court, acting carefully, may convict. In this regard Brand AJA observed as follows at 131A-C:

> Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under the section. But the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg *S v Mpetha* 1983 (4) SA 262 (C) at 265; *S v Nakale* supra at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?

[5] I now proceed to apply the aforementioned principles and others yet to be treated to the facts of this case. In doing so, I must at the outset mark these significant sign posts which conduce to the determination of the present s. 174 application. Sign post (1): Most of the facts in this case are not disputed, as Mr Truter submitted, and I did not hear Mr McNally to contradict Mr Truter. Sign post (1) leads to sign post (2): the determination of the present application turns principally on the interpretation and application of certain provisions of Act 41 of 1971, which, *inter alia*, contain the definition of the proscription of the form of the crimes with which the accused persons are charged. (See Snyman, *Criminal Law*, 3rd edn. (1995): pp. 60 – 69.)

[6] Act 41 of 1971 (as amended) in material parts provides:

> 1. **Definitions.–** In this Act, unless the context otherwise indicates–

…

"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, transshipment, administration, exportation, cultivation, sale, manufacture, transmission or prescription thereof;

…

"dependence-producing drug" means any substance referred to in the Schedule to this Act;

…

"possess" includes keeping, storing or having in custody or under control or supervision, and "possession" has a corresponding meaning;

…

2. **Dealing in, use or possession of prohibited or dangerous dependence-producing drugs prohibited. –** Notwithstanding anything to the contrary in any law contained, any person–

(a) who deals in any prohibited dependence-producing drug or any plant from which such dependence-producing drug can be manufactured; or

(b) who has in his possession or uses any such dependence-producing drug or plant; or

(c) who deals in any dangerous dependence-producing drug or any plant from which such drug can be manufactured; or

(d) who has in his possession or uses any dependence-producing drug or plant referred to in paragraph *(c)*.

shall be guilty of an offence and liable on conviction–

(i) in the case of a first conviction for a contravention of any provision of paragraph *(a)* or *(c)* to a fine not exceeding R30 000 or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment;

(ii) in the case of a second or subsequent conviction for a contravention of any provision referred to in paragraph (i), to a fine not exceeding R50 000 or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

10. **Presumptions.** – (1) *(a)* If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of–

…

(ii) any prohibited dependence-producing drugs.

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

(c) If in any prosecution for an offence under section 2 *(c)* it is proved that the accused was found in possession of a quantity of dangerous dependence-producing drugs which exceeds the quantity of such dependence-producing drugs prescribed in writing by a medical practitioner, dentist or veterinarian during a period of thirty days immediately preceding the date on which such dangerous dependence-producing drugs were found in his possession, for use by the accused or his spouse or child under the age of eighteen years or by any animal of which he or his spouse or such child is or was the owner or which is or was in the care of the accused, it shall be presumed that the accused dealt in such drugs, unless the contrary is proved.

(d) If in any prosecution for an offence under section 2 *(a)* or *(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.

…

Schedule

PART I

PROHIBITED DEPENDENCE-PRODUCING DRUGS

All the substances mentioned in this Schedule include the following:

(a) the isomers of the substances where the existence of such isomers is possible in the specific chemical compounds;

(b) the esters and ethers of the substances and the isomers thereof where the existence of such esters and ethers is possible;

(c) the salts of the substances or the isomers thereof or the esters or ethers of the said substances or the isomers thereof, where the existence of such salts is possible; and

(d) all the preparations and admixtures of the substances where such preparations and admixtures are not expressly excluded.

…

> Cocaine except admixtures containing not more 0,1 per cent cocaine, calculated as cocaine alkaloid.

[7] Sign post (3): Unlike most of the cases Mr McNally was enamoured with and which counsel referred to this Court, the courts in those cases had, at least, one of the following forms of benefit which this Court does not have in these proceedings, namely, (a) the versions of the accused persons given in evidence during their trials were tested in cross-examination (see, for example, *State v Karen Wendy Hendricks and Others* Case No. 111/1994 (Unreported); *State v Gabriel Gariseb* Case No. CA 99/2000; *John Sam v The State* Case No. SA 16 (A)/2001 (Unreported); *Charles Sibande and Chimphotwa Amon Banda v The State* Case No. SA 16/2001 (Unreported)) and (b) detailed and comprehensive s. 115 (of the CPA) statements written under the hands of the accused persons (see, for example, *State v Ryno Van Zyl* supra.)

[8] It would seem Mr McNally missed sign post (2) and sign post (3), leading Mr McNally, with respect, to go dangerously astray in his s. 174 application and the oral submission in support thereof, as I shall demonstrate shortly.

[9] I pass to consider the interpretation and application of the relevant provisions of Act 41 of 1971 which, as I say, contain the definition of the proscription of the form of the crimes with which the accused are charged.

[10] Mr McNally commenced his submission by referring the Court to a dozen of cases (about 10 of them from South Africa), as aforesaid, where the Courts have interpreted and applied the word ‘possession’ in similar penal legislation. Mr Truter also referred the

Court to a number of cases, and many of them were already on the shopping list of Mr McNally's. I am grateful to both counsel for their industry in locating the cases. I have not overlooked the cases that counsel referred to me. I do not think I should embellish this judgment with copious passages in those cases. More important, I refrain from doing so because many of the cases are not of real assistance in the consideration of the present application, keeping in view the facts and circumstances peculiar to the present case; and more significant, unlike most of the cases referred to me concerning the interpretation and application of the aforementioned relevant provisions of Act 41 of 1971 (as amended), the Courts in those cases were not seized with a s. 174 application or suchlike application. The significance of this observation has already been noted under sign post (3).

[11] It is not in dispute that the authorities converge on the proposition that as a general rule the notion of 'possession', when used in a penal statute, comprises two elements, a physical element (*corpus*) and a mental element (*animus possidendi*) (*DPP v Brooks* [1974] 2 All E.R. 840 (House of Lords; *Warner v Metropolitan Police Commissioner* (1968) 52 Cr. App. R. 373 (House of Lords); *R v Lewis (G.E.L.)* (1988) 87 Cr. App. R. 270 (Court of Appeal)); *Lockyer v Gibb* [1967] 2 Q.B 243 (Court of Appeal); *S v Adams* 1986 (4) SA 882 (A)). It is worth noting that the English cases which came before the highest Court and the next highest Court in the criminal justice system in England are among the landmark cases in which 'possession' in a similar penal statute like Namibia's statute was interpreted and applied. *Corpus* consists of either direct physical control of the article in question or mediate control through another person. Thus, 'possession' should be interpreted 'to comprehend *corpus* plus the *animus* to control, either for the possessor's own purpose or benefit, or on behalf of another (this latter alternative being equivalent to what is often termed "custody" or *detentio*) or as meaning "witting physical detention, custody or control" (*S v Adams* 1986 (4) SA 882 (A) at 891A-C, *per* Corbett JA)'.

[12] I accept Corbett JA's dictum as a correct statement of law and so I adopt it; not least because the dictum accords with the statutory definition of 'possession' in s. 1 of No. 41 of 1971. All this also means that the alleged possessor must at least be aware that he or she has the article in question in his or her physical control (*S v Adams* supra at 891G). Thus, a person does not have possession of something which has been put into that person's pocket or house without that person's knowledge. In *Lockyer v Gibb* supra where the Court of Appeal was seized with interpreting 'possession' in a similar English penal statute, Lord Parker CJ gave the illustration of something being slipped into a person's basket. While the person was unaware of what had happened there would be no possession. Thus, one may exclude from the 'possession' intended by Act 41 of 1971 the physical control of articles which have been 'planted' on a person without his or her knowledge.

[13] To bring the enquiry nearer home; if a court goes to the extreme of requiring the State to prove that 'possession' implies a full knowledge of the name and nature of the prohibited dependence-producing drug concerned, the efficacy of Act 41 of 1971 will be seriously impaired because many drug peddlers may in truth be unaware of this. In my opinion, the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities and that ignorance or mistake as to the thing's qualities will not excuse. This, it has been said, would comply with the general understanding of the word 'possess' (*R v Lewis (G.E.L*) supra at 427). Additionally and apropos the issue at hand in these proceedings, different considerations should indubitably apply to containers and motor vehicles and other means of conveyance, for example planes, boats, trains, and donkey-carts, considering the concept of 'possession' found in penal statutes explained previously.

[14] It follows, in my opinion, that 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.)* supra 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 as I proceed to demonstrate.

[15] I find that it is not disputed that the 2nd accused was the driver of the motor vehicle (Exh. 7) when the motor vehicle was stopped at a roadblock near Keetmanshoop by Namibia Police (NAMPOL) personnel manning the roadblock; and in the motor vehicle was the 1st accused as the sole passenger. That the 1st accused was not just a mere passenger in the motor vehicle is supported by the piece of evidence which I have found below, favouring the accused persons, which is that the accused persons were on 30 September 2008 not in possession of the motor vehicle and the cocaine found secreted in the spare wheel mounted to the rear of the motor vehicle. What is relevant about this piece of evidence at this point of the present enquiry is that the 1st accused asked Sgt. Van Wyk (a state witness) if he should remove the spare wheel when the 1st accused saw Sgt. Van Wyk touch the spare wheel when Sgt. Van Wyk was searching the motor vehicle. It also emerged in uncontradicted evidence that the 2nd accused, who spoke English,

translated, unsolicited, what Sgt. Van Wyk said to both accused persons. Thus, if the 1st accused was a mere passenger, unassociated with, and not accompanying, the 2nd accused, why would the 1st accused want to temper with the motor vehicle in which he was merely a passenger or act, unasked and unsolicited, as the 2nd accused's interpreter? It seems to me clear from all these undisputed facts – considered cumulatively – that the 1st accused was associated with, and was accompanying, the 2nd accused in a joint enterprise. That being the case, that is, in view of these two pieces of evidence coupled with the reasoning and its conclusions made previously, I hold that the State has also proved beyond reasonable doubt that the accused persons were in prima facie joint possession of the motor vehicle within the meaning of s. 1 of Act 41 of 1971.

[16] Furthermore, it is not contradicted that having obtained permission from the accused persons to search the said motor vehicle, Sgt. Van Wyk did search the motor vehicle and he did find 62 packets of a substance wrapped in brown cellophane wrapping material popularly known as 'cello tape'. From the totality of the evidence I have no doubt in my mind that the substance 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.

[17] It follows from the aforegoing reasoning and conclusions that, in my opinion, 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. Having so found I also conclude that the presumption in s. 10(d) of Act 41 of 1971 must apply. Accordingly, it is presumed that the accused persons dealt in the 30.1 kg of cocaine, found on the said motor

vehicle on 20 December 2007, within the meaning of s. 10(d) of Act 41 of 1971, unless the accused persons proved the contrary in terms of the said s. 10(d).

[18] In this regard, the question that arises is this: Has the accused persons proved the contrary? They have not done any such thing; not even one iota of proof in that behalf has been placed before the Court by the accused persons. In his oral submission, Mr McNally submitted that 'at the commencement of the hearing the accused gave an explanation of (their) plea, namely that they did not have the *corpus* ..., that they did not have the *animus*, that they did not have the *mens rea*.' With respect, I fail to see how this flash of a statement, touching on the law, from the Bar by counsel on behalf of the accused persons can possibly amount to proving or raising a real doubt in the matter that the accused persons were, for instance, servants or bailees who had no reason to suspect that the contents of the motor vehicle were cocaine so as to discharge the prima facie assumption that they possessed the motor vehicle and the 30.1 kg of cocaine (*R v Lewis (G.E.L)* supra), or how that flash statement can possibly amount to proof 'to the contrary' against the presumption in terms of s. 10(1) (d) of Act 41 of 1971.

[19] Yet again, Mr McNally sought to persuade the Court that the fact that Sgt. Van Wyk could not dispute certain matters or that Sgt. Van Wyk agreed with certain matters put to him during cross-examination constitutes proof of the truthfulness of those matters; e.g. that a Guilhermino requested the accused to take the car to Upington in the Republic of South Africa; that the 2nd accused only got involved because he is in possession of a SADC driver's licence; and that it was a form of employment for Angolans to either take cars from Angola to South Africa, or from South Africa to Angola.

[20] The fact that Sgt. Van Wyk could not dispute those statements – indeed, Sgt. Van Wyk was being truthful, in my view, when he said he could not dispute those facts – or

that Sgt. Van Wyk agreed with some of those statements is irrelevant; it has no probative value capable of proving the truthfulness of those matters. In my opinion, the fact that a witness cannot dispute a statement or that the witness agrees with a statement put to the witness by counsel during the witness's cross-examination evidence on matters that are within the knowledge of that counsel's client only cannot *ipso facto* by any stretch of legal imagination amount to proof of the truthfulness of those statements.

[21] The irrefragable fact that remains is that the accused persons, as I have already found, did deal in 30.1 kg of cocaine within the meaning of s. 10(1) (d) of the Act 41 of 1971, with a street value of N$15, 500,000.00, 'unless', in the words of s. 10(1) (d) of Act 41 of 1971, 'the contrary is proved'; and the contrary, as I say, has not been proved by the accused persons. Additionally, I have found that the accused persons were in prima facie joint possession of the said 30.1 kg, with a street value of N$15, 500,000.00, in the wee hours of 20 December 2007, and the accused persons have not, as I say, discharged the prima facie assumption. This 30.1 kg of cocaine is the subject of Count 2 and Alternative Count 2.

[22] Under Count 3, the evidence I accept is that Chief Insp. De Klerk found 14 packets of cocaine weighing 9.25 kg, with a street value of N$4,625,000.00, on or in the aforementioned motor vehicle on 30 September 2008. The 14 packets of cocaine were secreted in the spare wheel of the said motor vehicle (Exh. 7). The motor vehicle had been parked under lock and key by the Drug Law Enforcement Unit (DLEU) personnel in a garage at the Police Station premises of NAMPOL in Keetmanshoop since 20 December 2007. The wheel was removed on 30 September 2008. It is therefore indisputable that the motor vehicle was at all material times under the control of the Police for about nine months – under lock and key, as aforesaid. Added to this is this significant

piece of uncontradicted evidence, which I intimated previously. While Sgt. Van Wyk was searching the motor vehicle on 20 December 2007, as aforesaid, he walked towards the spare wheel which 'was covered'. He touched the spare wheel, whereupon the 1st accused asked Sgt. Van Wyk if he, the 1st accused, could remove the spare from its mounting at the rear of the motor vehicle. In the circumstances, I take it that the 1st accused offered to remove the spare wheel to enable Sgt. Van Wyk to search it. Sgt. Van Wyk responded tersely, 'No, leave it.' No explanation for Sgt. Van Wyk's rebuff of the 1st accused's assistance is before this Court.

[23] Standing on its own, each of these two pieces of evidence may not amount to anything significant, but their cumulative effect should have weighty probative value respecting the interpretation and application of 'possession' and 'deal in' in terms of Act 41 of 1971, which I have already treated above. Keeping all these aspects in my mind's eye, I hold that the State has not proved that the accused were in possession of the motor vehicle on 30 September 2008 or that they conveyed the cocaine within the meaning of s. 10(1) (d) of Act 41 of 1971, and so the accused persons need not be saddled with discharging the assumption of possession and proving the contrary to dealing in the 14 packets of cocaine.

[24] The aforegoing disposes of Count 2 and Count 3 and their alternative counts. From what I have found previously about the 14 packets of cocaine under Count 3 and Alternative Count 3 and my reasoning and conclusions thereanent Count 2 and Count 3, it becomes obvious that Count 1 and Alternative Count 1 cannot survive the s. 174 application because the quantifiable items in Count 1 are the sum of the quantifiable items in Count 2 and Count 3; those items have ingeniously been added to get the sum in Count 1.

[25] Having applied my mind – as I should – I come to the reasonable and inexorable conclusion that it cannot be said that the evidence thus far that I have accepted is of such poor quality that it could not be relied upon by any reasonable Court. *A fortiori* and apropos the nature of the crimes with which the accused persons have been charged with, since I have held that the State has proved beyond reasonable doubt that the accused persons were in prima facie joint possession of the motor vehicle (Exh. 7) and the 62 packets of cocaine that were found on or in the said motor vehicle on 20 December 2007, the prima facie assumption, as I have said *ad nauseam*, is only discharged if the accused persons proved or raised a real doubt in the matter that they were, for instance, servants or bailees who had no reason to suspect that the contents of the said motor vehicle were 62 parcels of cocaine (see *R v Lewis (G.E.L.)* supra). Additionally, having applied the presumption in s. 10(1)(d) of Act 41 of 1971, as I am entitled to do, as demonstrated previously, it is presumed that the accused persons dealt in the 62 packets of cocaine, 'unless the contrary is proved'; and as I have said more than once, the contrary has not been proved.

[26] For all the aforegoing reasoning and conclusions thereanent the charges and the s. 174 application, I come to the inevitable and reasonable conclusion that as respects Count 2 and Alternative Count 2 there is ample credible evidence that the 1st accused and the 2nd accused committed the offences referred to in the charge, but the same cannot be said for Count 1 and Alternative Count 1 and Count 3 and Alternative Count 3.

[27] In the result, the application by the accused persons in terms of s. 174 of the CPA –

(1) succeeds in respect of Count 1 and Alternative Count 1 and Count 3 and Alternative Count 3.

(2) is dismissed in respect of Count 2 and Alternative Count 2.

PARKER J

COUNSEL ON BEHALF OF THE STATE:	Adv. Truter
Instructed by:	Office of the Prosecutor General
COUNSEL ON BEHALF THE ACCUSED PERSONS:	Mr McNally
Instructed by:	Lentin, Botma & Van den Heever