

**A CRITICAL ASSESSMENT OF THE EFFECTIVENESS OF THE LEGAL
FRAMEWORK ON DRUG OFFENCES IN NAMIBIA**

**A THESIS SUBMITTED IN FULFILMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
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INGRID LERATO UNENGU

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Supervisor: Professor J. Baloro

Abstract

The purpose of the study was to critically assess drug offences (created by the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971) in Namibia. What the study set out to do was to determine if the current law dealing with drug offences was effective. The study primarily made use of qualitative, rather than a quantitative, research method. A documentary study was done by way of desktop review of relevant Namibian legislation, relevant academic publications, media reports as well as case law. Research material was also sourced from the Internet. The researcher undertook empirical field research comprised of personal and group interviews conducted with identified stakeholders.

The main issue queried was the issue of drug trafficking, that is, whether the drug legislation criminalises drug related offences, such as drug trafficking. It was established that drug trafficking is not criminalised by the Namibian Drugs Legislation. The study further assessed the constitutionality of the presumptions contained in Section 10 of the Namibian Drug Legislation that basically assumes that an accused has committed a certain drug related offence, such as when the accused is found in possession of dagga exceeding 115 grams in mass or any prohibited dependence producing drug the accused is deemed to have dealt in that dagga or drug, unless such an accused proves the contrary. A comparison was drawn between the Namibian and South African legal position with regard to that issue. The case law studied showed that the presumptions that are still part of the Namibian Drug Legislation have already been declared as being unconstitutional in South Africa. It was concluded that indeed the Section 10 presumptions were unconstitutional in Namibia insofar as they were in conflict with the constitutional right to be presumed innocent until proven guilty in a court of law.

The study also investigated how the Namibian drug law deals with the issue of the instrumentalities and proceeds of drug related offences. At the end of this investigation it was established that the Namibian drug law does not sufficiently deal with this particular issue.

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Dedication

TO

MY CHILDREN:

MICHAELLA LUISE GRACE SOABES

CHANNELLE NANKALI AOCHAMUS

TI-A MUSIGENI UNENGU

MANUEL MAGANO UNENGU

THANDI NANGURA UNENGU

QUEEN KAPANGO UNENGU

This thesis is dedicated to you. You are my greatest achievement. I am humbled and honoured to be your mother.

Declarations

I, Ingrid Lerato Unengu, hereby declare that this thesis is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree to any other institution of higher education.

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Date

CHAPTER 1: INTRODUCTION

1.1 Background

C.R. Snyman¹ categorizes drug offences as crimes against public welfare. Therefore drug offences affect not only drug users, drug dealers or drug traffickers, but affect the entire community. In Namibia crimes relating to drugs, predominantly dealing or possession/use of prohibited or dangerous dependence-producing substances, are created in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971.² However, this Act is relatively old and may not sufficiently address the increasing incidents of drug offences in Namibia. Often drug offences (such as the use, possession, trafficking or dealing) are linked with the commission of other serious and violent offences, such as rape, robbery and murder due to the fact that, “[t]he criminal uses drugs to acquire ‘Dutch courage’, and this makes him fearless and irrational when carrying out his acts.”³ Z.B. Barry outlined in her paper that:

*[i]nitially the most prominently abused drugs were cannabis and mandrax, which contains [sic] methaqualone. Since the late 1990’s, drug syndicates have also succeeded in introducing drugs like cocaine, crack, amphetamines, ecstasy and heroin into the country. Namibia, with its cosmopolitan inhabitants, created a small lucrative market for virtually all kinds of illicit drugs manufactured worldwide. Local drug dealers established links with their foreign counterparts and the latter then regularly visit and stay in Namibia for the sole purpose of trading in drugs.*⁴

¹Snyman, C.R. 1995, *Criminal Law*, Butterworths, P385

² Hereinafter referred to as the “Act” or the “Namibian Drug Act/Legislation” unless the context indicates otherwise

³Dambazau, A.B. 1994, *Law and Criminality in Nigeria: An Analytical Discourse*, University Press Plc, P95

⁴ Barry, Z.B. 2007, *Challenges in the investigation, prosecution and trial of transnational organized crime in Namibia*, Office of the Prosecutor-General, Ministry of Justice, Namibia. Resource Material Series no 73. United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders. ISSB 0256-5471 (2007), Vol. 73, P83

This is illustrative of the fact that drug trafficking does occur within the borders of Namibia. The current drug law may be failing in specifically criminalizing conduct such as drug trafficking. Another area that the current legal framework may not be addressing properly is that of confiscation and forfeiture of the proceeds of illicit drug dealings. However, same cannot be confirmed as a matter of fact without more detailed research.

1.2 Statement of the problem

Drug offences are a growing concern in Namibia. Recent court cases and newspaper articles attest to that fact. Reference can be made to the unreported Namibian High Court case of *The State v Daniel Joao Paulo and Josua Manuel Antonio*⁵ where two accused, Angolan nationals, were travelling in a vehicle which was stopped at a roadblock outside Keetmanshoop in Namibia. They were travelling from Angola to South Africa prior to their arrest in Namibia. A subsequent search of the vehicle revealed a false compartment concealed underneath the vehicle. Hidden inside the compartment were 62 parcels wrapped in brown insulation cello tape containing a substance thought to be cocaine and at a later stage scientifically proven to have contained cocaine. At the end of the trial each accused was convicted and sentenced to 10 years imprisonment of which 4 years was conditionally suspended for a period of 5 years.

Reference can further be made to a recent newspaper article reporting that a cocaine smuggler was jailed for 6 years⁶. All these cases involve drug traffickers who were caught in Namibia en route to neighbouring countries. The misuse of drugs and the illicit trafficking of drugs are therefore of particular concern. However, these acts are, strictly speaking, not specifically criminalized in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 that creates drug offences, with reliance made on presumptions created

⁵ Case number CC10/2009, heard by Parker J and the judgment delivered on 19 January 2011

⁶ Werner Menges 'Cocaine smuggler jailed for 6 years' *The Namibian* (10 October 2011)

in the Act when dealing with drug and drug-related offences. In this regard Barry observes that, "...the lack of relevant criminalizing legislation has made this country a haven for transnational organized groups."⁷

Drug offences in general are complex in nature. For example the offence of possession of a dependence producing substance (be it a prohibited or dangerous dependence-producing substance) is one of the few crimes where the offender and the victim are one and the same person⁸. The fact that Namibia depends on an Act that at times does not specifically criminalise certain conduct, such as drug trafficking, and relies on certain presumptions to establish whether a drug offence has been committed, is a cause for concern. In the cases of *S v Noble*⁹ and *S v Kuvare*¹⁰ the state relied on the presumption contained in section 10(1)(a)(i) of the Act in charging the accused with the offence of dealing in cannabis. This presumption is to the effect that any person found in possession of 115g or more of cannabis is presumed to have dealt in the cannabis unless the contrary is proven. The accused were convicted and sentenced by the courts a quo, but the matters went on appeal and review respectively. In both of these cases the accused managed to successfully rebut the presumption under discussion and their convictions and sentences were set aside.

The presumptions contained in section 10 of the Act are questionable insofar as it can be argued that they are in contravention of Article 12(1)(d) of the Namibian Constitution¹¹ which provides for the presumption of innocence. It is trite law that in criminal cases the onus is on the state to prove the guilt of an accused beyond reasonable doubt. However, in terms of the

⁷ Barry, Z.B, *supra*, P77

⁸ As advanced by Lab, S.P, 1997, *Crime Prevention: Approaches, Practices and Evaluations*, 3rd Edition,

Anderson Publishing, P35

⁹ 2002 NR 67 (HC)

¹⁰ 1992 NR 7 (HC)

¹¹ Article 12 (1) (d) reads, "All persons charged with an offence shall be presumed innocent until proven guilty according to the law, after having had the opportunity of calling witnesses and cross-examining those called against them".

presumptions contained in section 10 of the Act, the accused must rebut such presumptions. In essence it is presumed that the accused committed the offence provided for by the presumptions, unless the accused proves otherwise. Thus the onus is on the accused to prove that these presumptions are not applicable to him/her. This reversal of the onus of proof may be viewed as infringing the constitutionally protected presumption of innocence of the accused.

In addition to the afore-mentioned, drugs such as mandrax are not defined in the enabling Act, as opposed to the South African Drugs and Drugs Trafficking Act, Act 140 of 1992, where mandrax is specifically listed as a prohibited dependence-producing substance. Under Namibian law the drug called methaqualone is prohibited and the state must prove, ordinarily through scientific evidence, that the mandrax contained methaqualone. It is clear from the cases of *S v Iipumbu*¹², *S v Maniping* and *S v Thwala*¹³ that the state erred in charging the accused with dealing in or being in possession of mandrax, whilst such is not a prohibited dependence-producing drug unless it is scientifically proven that it contained methaqualone, and the result of such error was that the convictions and sentences were set aside in all these cases. The study will critically focus on the legal framework in place dealing with drug offences in Namibia. This includes its adequacy in dealing with drug offences and drug-related conduct. Specific emphasis will be placed on drug trafficking and how the law dealing with drug offences deals specifically with drug trafficking. The study will also critically focus on how the issue of the proceeds of drug offences is dealt with by the legal framework currently in place.

¹² 2009 (2) NR 546 (HC)

¹³ 1994 NR 69 (HC)

1.3 Objectives of the study

The purpose of the study is to critically assess drug offences (created by the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971) in Namibia. The key issues to be addressed are as follows:

- Does the current legal framework adequately deal with drug offences in Namibia?
- What are the different types of offences created by the Act dealing with drug offences in Namibia?
- To what extent does the legal framework omit to criminalise certain conduct such as drug trafficking?
- How does the Act or any other relevant law provide for and deal with the instrumentalities and proceeds of drug offences?
- What role, if any, do drugs play in the commission of other serious offences such as murder, robbery and rape?

1.4 Significance of the study

Drug offences continue to be a growing concern in Namibia. These offences include dealing in, use or possession of dependence-producing substances. The substances are categorized as being either prohibited or dangerous dependence-producing substances. The specific offence committed will depend on the substance (prohibited or dangerous) and conduct (use, possession or dealing) involved. The legal framework dealing with drug offences is a relatively old Act (Abuse of Dependence-producing Substances and Rehabilitation Centres

Act, Act 41 of 1971) and some aspects relating to drug offences are addressed in the Prevention of Organised Crime Act.¹⁴ Very little has been written about these Acts.

The study will focus on the adequacy or otherwise of the legal framework dealing with drug offences in Namibia. The proposed study will reveal whether the current legal framework adequately addresses the escalating drug-related incidents such as drug trafficking which may not have been prominent in Namibia when the primary Act was enacted. By investigating the legal framework dealing with drug offences and social conduct involving drugs the study will contribute to a better understanding and development of knowledge relating to and the enforcement of the law relating to, drug offences or conduct involving drugs (such as drug trafficking) in Namibia.

1.5 Limitation of the study

Although the researcher did not foresee major obstacles likely to face the proposed study one or two impediments were encountered. The researcher experienced time constraints as the study was undertaken on a part-time basis due to the researcher's full-time employment. Due to time and fund limitations the researcher was not be able to cover the entire Namibia. Participation in the personal interviews was on a voluntary basis and thus depended on the voluntariness and availability of the respondents.

As previously mentioned, due to my full time employment it was difficult to take time off and focus solely on the research process. Time also played a role with respect to the persons to be interviewed. Again, this was mainly due to their employment and the nature of such employment. I did not succeed in interviewing any judges as all attempts at setting up interviews failed. With magistrates and prosecutors the interviews had to be scheduled before and after the commencement of courts. With respect to defence attorneys it was also very

¹⁴ Act 29 of 2004

difficult to secure interviews with them as they were busy and they had precious little time to spare. Candidate legal practitioners were cautious to grant an interview without the consent of their principals. This was also the same situation with some legal aid attorneys and prosecutors who preferred to remain anonymous so as not to have to answer to their Heads, being the Chief: Legal Aid as well as the Prosecutor-General, about taking part in interviews without their consent.

In addition to that, due to the nature of my employment as a magistrate some interviewees felt somewhat compelled to grant an interview or made it appear as if they were doing me a favour, despite me making it clear that I sought the interview with them as a legal scholar and further despite emphasis being placed on the fact that the interviews were completely on a voluntary basis. In light of my employment this placed me in a very uncomfortable position. When the issue was taken up with these individuals they insisted on being anonymous, a solution that worked for us all. Another difficulty encountered was with the police officers attached to the Drug Law Enforcement Unit. Understandably, they too had little time to spare as they were constantly busy with operations or being called out to attend to scenes where a drug related offence occurred or was about to occur. The only solution was to interview as many members of the Namibian Drug Law Enforcement Unit as possible collectively. Interview questions were put to the group and thereafter a group interview ensued.

1.6 Literature Review

Under Namibian law drug offences are statutory offences which are created by the Abuse of Dependence-producing Substances and Rehabilitation Centres Act.¹⁵ Namibia is not a significant producer of narcotics. However, drug usage and trafficking do take place in

¹⁵ Act 41 of 1971

Namibia.¹⁶ This is attributed to the fact that Namibia is used as a transit country by drug traffickers and inevitably drugs infiltrate the Namibian society. Therefore, drug misuse and drug trafficking constitute a social problem in Namibia.

Despite the increase in the commission of the various types of drug offences and conduct involving drugs, Namibia still relies on an Act that it inherited from South Africa in dealing with these offences. Z.B Barry¹⁷ observes that the Act is very old and does not comply with the obligations provided by the United Nations Convention against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988,¹⁸ to which Namibia is a signatory. A.N Brown elaborates on the Convention by stating that the, “1988 UN Drugs Convention was, however, the product of work intended specifically to address drug trafficking and that is reflected in its contents.”¹⁹ He further asserts that the Parties to the Convention recognize that links exist between illicit drug trafficking and other organized crime.²⁰ This international criminal activity (illicit drug trafficking) undermines the stability, sovereignty, security and economy of the States. Bearing that in mind, a study needs to be carried out to determine whether the Namibian Drugs Legislation is in compliance with the obligations created by the UN.

As previously mentioned, Namibia still depends on the Act that it inherited from South Africa. However, the latter enacted a new law: the Drugs and Drugs Trafficking Act, Act 140 of 1992, which repealed the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971. South Africa subscribed to the UN Drugs Convention as well. It

¹⁶ <<http://www-rohan.sdsu.edu/faculty/rwinslow/africa/namibia.html>> Accessed on 19/04/2011

¹⁷ Barry Z.B, *supra*, P1

¹⁸ Hereinafter referred to as the “Convention “or the “UN Drugs Convention”, unless otherwise indicated.

¹⁹ Brown, A.N. 1996, *Proceeds of Crime: Money Laundering , Confiscation & Forfeiture*, W. Green/Sweet & Maxwell

²⁰ *Ibid*

may be useful to draw some comparative analysis with the South African Drug Law²¹ vis-à-vis Namibian laws²², in order to establish whether Namibia can learn any lesson(s) from South Africa and if such lesson(s) can be of assistance in reforming Namibia's drug law (if necessary).

Loveland argues that, "[the] war on drugs is not a war on drugs-which are after all but chemical and herbal substances-but on those who use drugs and those who make money producing, transporting, buying and selling them."²³ This statement begs the question as to what happens to the proceeds of drug offences in Namibia. Section 8 of the Act provides for the forfeiture of certain items to the State after the accused has been convicted. After a second or subsequent conviction any money found on the convicted person or standing to his credit in any account with any banking institution, building society or financial institution as defined, respectively, in the Banks Act, 1965 (Act 23 of 1965), the Building Societies Act, 1965 (Act 24 of 1965), or the Financial Institutions (Investment of Funds) Act, 1964 (Act 56 of 1964), or which is standing to his credit in any other savings account established by law may be declared forfeited to the State.²⁴ One may, based on this provision argue that, to some degree, the Act does provide for the confiscation of the instrumentality and proceeds of crime.²⁵ However, it is still arguable whether these provisions sufficiently deal with the law on the proceeds of crime. Should the offender be a repeat offender in order for the fruits of his/her unlawful conduct to be declared forfeited to the State? One also wonders whether the provision, supposedly dealing with a technical issue such as the law on the proceeds of crime, is perhaps not too vague. These are but some of the issues warranting a more detailed study.

²¹The Drugs and Drugs Trafficking Act, Act 140 of 1992

²²The Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971

²³ Loveland, I 1995, *Modern Legal Studies: Frontiers of Criminality*, Sweet & Maxwell, P196

²⁴ Section 8(1)(d) of the Abuse of the Dependence-Producing Substances and Rehabilitation Centres Act, Act 41 of 1971

²⁵ Barry Z.B, *supra*, P1

One distinctive feature standing out from the works analyzed is the fact that there is no detailed study on the workings of the law creating and dealing specifically with drug offences as well as conduct involving drugs (such as drug trafficking) in Namibia. The envisaged study aims to fill this gap in knowledge.

1.7 Methodology

1.7.1 Research design

The research primarily made use of qualitative, rather than quantitative, research. A documentary study was conducted by way of desktop review of relevant Namibian statutory law, relevant academic publications, media reports as well as case law. Official government reports were sourced from the offices of the Prosecutor-General, Chief Magistrate and the Drug Law Enforcement Unit of the Namibian Police. Research material was also sourced from the internet. The researcher undertook empirical field research consisting of personal and group interviews conducted with identified stakeholders.

1.7.2 Population

The research findings were generalized to persons actively involved in the Namibian Criminal Justice System, especially those involved in the investigation, prosecution, defence and adjudication of offences involving drugs.

1.7.3 Sample

The researcher made use of simple random sampling to draw samples from the target population group. The main criterion was to avoid bias and ensure that each and every person in the population has the same probability of being selected. Adult interviewees were selected from the target population. The interviewees consisted of 10 magistrates (comprising both district and regional court magistrates), 10 prosecutors, 10 defence attorneys and 10 officers

attached to the Drug Law Enforcement Unit of the Namibian Police. The total number of the targeted sample was 40.

1.7.4 Research Instruments

The researcher made use of personal and group interviews to collect data. Purposive key informant interviews were conducted. Interview questionnaires were semi-structured, consisting of a set of predetermined questions which could be modified according to what the interviewer perceived to be appropriate. This allowed the respondents an opportunity to express their opinions on a particular subject. The interviewer was also able to investigate unexplored areas that arose from the answers provided by the respondents, picking up on information that the interviewer might not have known before or had neglected to pick up on.

1.7.5 Procedure

Both empirical and desktop review research was undertaken. With regard to empirical research the aim was to conduct key informant interviews with as many voluntary interviewees as time and funds would allow. Semi-structured questions were used in carrying out these interviews. The existing literature pieces, relevant legislation, newspaper reports and case law were analysed.

1.7.6 Data Analysis

The data was mainly analysed by using the triangulation method. This method consists of cross-checking information and conclusions through the use of multiple procedures and sources. By engaging in such cross-checking the researcher aimed to establish whether the different procedures and sources were in agreement, because once they were in agreement one has corroboration. The data was as a result thereof more accurate.

1.8 Research Ethics

The researcher at all times strove to be honest and objective during the course of conducting the proposed research. The researcher also strove to be consistent with her thoughts and to be careful when critically analyzing the works done by others. There was the utmost respect for the intellectual property rights of others. The researcher undertakes to adhere to the University of Namibia's protocols relating to ethical research.

1.9 Chapter Outline

Chapter 1: *Introduction*. This is an introductory chapter providing background information about the study, outlining the research problem to be investigated, the objectives of the study, significance of the study, the limitation of the study, the literature review as well as the methodology used for the study.

Chapter 2: *Drug trafficking in Namibia* determines issues such as whether drug trafficking takes place in Namibia, whether there is an offence such as "drug trafficking" in Namibia, whether the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 specifically criminalises drug trafficking and considers drug trafficking as an organised crime. The issues are discussed by analysing case law, legislation, literature as well as the field research.

Chapter 3: *The constitutionality of the section 10 presumptions* is focused on assessing the constitutionality of the presumptions contained in section 10 of the Namibian Drug Legislation. The presumptions are outlined in this chapter and these presumptions have the basic effect that an accused is presumed to have committed the drug related offences to which the presumptions relate, unless the contrary is proven by the accused. It is examined whether

the section 10 presumptions are in conflict with the constitutionally protected presumption of innocence.

Chapter 4: *Namibian and South African drug laws: A comparative analysis*. This chapter is a comparative analysis of the Namibian and South African Drug Laws where specific emphasis is placed on the issue of drug trafficking, the presumptions relating to drug offences as well as the provisions dealing with the proceeds and instrumentalities of drug offences. The comparative analysis encompasses the legislation dealing with drug offences in each country, literature as well as case law.

Chapter 5: *The Namibian Abuse of Dependence-producing Substances and Rehabilitation Centres Act and the instrumentalities and proceeds of drug offences*. The chapter aims to determine what happens to the proceeds of drug offences in Namibia. In other words, this chapter will determine how the issue of the instrumentalities and proceeds of drug offences is dealt with in the Namibian Drug Law. The chapter sets out the confiscation process which involves the identification of the property, the tracing of the property and thereafter the freezing or seizure of the property. The issue of search and seizure, which was initially not a focal point but was raised as an issue of concern during the field research, is also dealt with in this chapter. The relevance of money laundering in relation to drug related offences is also discussed with reference to the Prevention of Organised Crime Act, Act 29 of 2004 (an Act commonly referred to as "POCA"). By way of comparison, the South African position in relation to the issue of the instrumentalities and proceeds of drug related offences is considered.

Chapter 6: *International co-operation with specific focus on Namibia and the United Nations Convention against the illicit traffic in narcotic drugs and psychotropic substances of 1988*. The chapter mainly explores whether or not Namibia is in compliance with the duties and

obligations created by the UN Convention. The chapter outlines these obligations and duties and thereafter the Namibian drug law is analysed to determine its compliance with such obligations and duties.

Chapter 7: *Combating of the Abuse of Drugs Bill*. This chapter focuses on how the bill differs from the Namibian Drugs Act by drawing a comparison between the two. During the comparative process we look at the main differences between the Act and the Bill. Amongst others, drug related offences created in the Act as well as the Bill are discussed. There is specific emphasis on the issue of drug trafficking and its criminalisation. The chapter considers the Bill and the duties and responsibilities of Namibia contained in the UN Drugs Convention. The chapter also contains a critique of the Bill with particular emphasis being placed on the mandatory sentences prescribed by the Bill.

Chapter 8: *Drugs and the Commission of other offences*. The primary aim of this chapter is to establish whether drugs play any role in the commission of other serious offences. During the course of the discussion we briefly consider how the issue of drugs and the subsequent commission of an offence will practically present itself. In this context there is a discussion on the defence of intoxication. The chapter also proceeds to discuss the issue of traps and undercover operations in relation to drug offences. The issue of traps and undercover operations was raised by the participants in the field research conducted which in turn necessitated its inclusion in the present study although the issue was not initially a focal point of the study. Thus the chapter concludes with a discussion of traps and undercover operations (and matters incidental thereto) in relation to drug offences.

Chapter 9: *Conclusion and Recommendations*. This chapter consist of a summary of the main findings of the study and makes recommendations where problems were found with the effectiveness of the Namibian Drugs Legislation.

CHAPTER 2: DRUG TRAFFICKING IN NAMIBIA

2.1 Introduction

This chapter discusses issues such as whether drug trafficking takes place in Namibia, whether there is an offence such as “drug trafficking” in Namibia, whether the Act specifically criminalises drug trafficking and considers drug trafficking as an organised crime. Before we commence with a detailed investigation of these issues let us proceed to outline the provisions of the Abuse of the Dependence-Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 which are most relevant to the present study. Specific emphasis will be placed on the sections of the Act where the different types of offences are created as well as other incidental matters such as the provisions in the Act dealing with instrumentalities and proceeds of drug related offences.

In Namibia, crimes relating to drugs, predominantly dealing or possession/use of prohibited or dangerous dependence-producing substances, are created in the Abuse of the Dependence-Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. Thus any person accused of having committed a drug related offence will be charged in terms of this Act. Sections 2 and 3 are the main sections of the Act which criminalise certain conduct involving drugs and makes provision for the penalties to be imposed upon conviction. In that regard, section 2 states as follows:

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 substance 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 thirty thousand rands or to imprisonment for a period not exceeding 15 years or to both such fine and 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 to a period not exceeding 25 years or to both such fine and such imprisonment.*
- (iii) *in the case of a first conviction for a contravention of any provision referred to in paragraph (b) or (d), to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.*
- (iv) *in the case of a second or subsequent conviction for a contravention of any provision referred to in paragraph (iii), 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.*

Section 3 goes on to stipulate as follows:

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

- (a) *who deals in any potentially dangerous dependence-producing drug; or*
 (b) *who uses or has in his possession any drug referred to in paragraph (a),*

shall be guilty of an offence and liable on conviction-

- (i) *in the case of a conviction for a contravention of any provision of paragraph (a), to a fine not exceeding R20 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;*
- (ii) *in the case of a conviction for a contravention of any provision of paragraph (b), to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.*

The Act also defines the terms that it employs in criminalising conduct involving drugs. The most relevant terms are defined as thus:

Possess-“includes keeping, storing or having in custody or under control or supervision, and ‘possession’ has a corresponding meaning”

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.”

Dangerous dependence-producing drug-“means any substance referred to in Part I of the Schedule to this Act.”

Dependence-producing substances-“means dependence-producing drugs and includes alcoholic liquor.”

Potentially dangerous dependence-producing drug-“means any substance referred to in Part III of the Schedule to the Act.

The parts of the Schedule to the Act are rather extensive and thus we will focus only on those parts relevant to this study. In Part I of the Schedule to this Act the following substances are classified as Prohibited dependence-producing substances:

Cannabis (*dagga*) and the whole plant or any portion or product thereof is classified as a Hallucinogen. It is consumed as *marijuana*, *hashish* or as an oil extract from the resin. Generally these preparations are smoked after being mixed with a cigarette for a ‘joint’. The preparations can also be swallowed. Cannabis is a sedative, but it also has hallucinogenic effects which may last up to several hours;²⁶

²⁶ SARPCCO: *Drugs Identification & Trafficking & Identification of Chemical Equipment Course Manual*. The manual can be found at <sarpcco.org/index.php/activities/training>Last accessed on 19 September 2013

Heroin (diacetylmorphine) is classified as an opiate and is derived from the opium poppy. Opiates depress the central nervous system and are used to reduce anxiety, boredom, physical and emotional pain. Heroin is preferred by consumers because it is relatively potent, dissolves easily in water for injection purposes and penetrates the blood-brain barrier more quickly than morphine. Heroin can also be snorted, smoked or inhaled by means of a method known as 'chasing the dragon' where it is heated in foil and the fumes inhaled;²⁷

Methamphetamines are commonly referred to as uppers and speed. They can be inhaled through the nose, swallowed or injected;²⁸

Prepared opium is classified as an opiate and is a naturally occurring drug derived from the opium poppy.²⁹

The following are classified as Dangerous dependence-producing substances:

Cocaine, excluding admixtures containing not more than 0,1 per cent of cocaine, is a central nervous system stimulant and is extracted from the leaf of the coca bush that occurs naturally. Cocaine is used to elevate the mood, to overcome fatigue and to improve performance. Although commonly snorted, cocaine can be injected as well;³⁰

Methaqualone is the key component in mandrax;

Opium, excluding admixtures containing not more than 0,2 per cent of morphine calculated as an anhydrous morphine.

²⁷ Ibid, P110

²⁸ Ibid, P125

²⁹ Ibid, P110

³⁰ Ibid, P122

In addition to criminalising certain conduct involving drugs the Namibia Drugs Act also makes provision for the issue of forfeiture of the instrumentalities and proceeds of drug offences in section 8. In this respect, section 8(1) of the Act reads as follows:

Notwithstanding anything to the contrary in any law contained, the court convicting any person of an offence under this Act shall declare-

- (a) any dependence-producing drug or any plant from which such drug can be manufactured, which was used for the purpose of or in connection with the commission of the offence or which was found in the possession of the convicted person;*
- (b) any vehicle, vessel, aircraft or receptacle or other thing which was used for the purpose of or in connection with the commission of the offence or for the purpose of conveying or removing any dependence-producing drug or any plant referred to in paragraph (a) which was used for the purpose of or in connection with the commission of the offence, or the rights of the convicted person to such vehicle, vessel, aircraft, receptacle or thing;*
- (c) in the case contemplated in section 2 (a) or (c), 3 (a) or 6, any immovable property which was used for the purpose of or in connection with the commission of the offence, or the rights of the convicted person thereto;*
- (d) if it is a second or subsequent conviction under section 2 (a) or (c), any money found in the possession of the convicted person or which the court is satisfied is standing to his credit in any account with any banking institution, building society or financial institution as defined, respectively, in the Banks Act, 1965 (Act 23 of 1965), the Building Societies Act, 1965 (Act 24 of 1965), or the Financial Institutions (Investment of Funds) Act, 1964 (Act 56 of 1964), or which is standing to his credit in any other savings account established by law, to be forfeited to the State.*

The court declares the drugs found on the accused, the vehicle used in the commission of the offence, immovable property and money found in possession of the accused or any money standing to his credit, forfeited to the state. Thus it becomes the property of the state. The last provisions of the Act which will also be a focal point during the study are the Section 10

presumptions. Only those presumptions that are of importance to the present study will be highlighted. These are section 10(1)(a) which states that:

If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of-

- (i) dagga exceeding 115 grams in mass;*
- (ii) any prohibited dependence-producing drugs;*

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

(b) If in any prosecution for an offence under section 2 (a) it is proved that the accused was the owner, occupier, manager or person in charge of cultivated land on a date on which dagga plants were found on such land, of the existence of which plants the accused was aware or could reasonably be expected to have been aware, it shall be presumed that the accused dealt in such dagga plants, 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 a 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 a drug could be manufactured, was found, it shall be presumed that the accused dealt in such drug or plant, unless the contrary is proved.

(3) If in any prosecution for an offence under this Act it is proved that any dependence-producing drug or plant from which such a drug could be manufactured was found in the immediate vicinity of the accused, the accused shall be deemed to have been found in possession of such drug or plant, unless the contrary is proved.

The provisions quoted above will mainly be what the study will focus on as opposed to the entire Act which deals with other matters that are of no relevance to the present study. We will now proceed to discuss the issue of drug trafficking.

2.2 Does Drug Trafficking take place in Namibia?

There is no definition of the term “drug trafficking” in the Namibian Drug Legislation. Generally drug trafficking can be defined as the transshipment of narcotics. Thus it is the route that the drugs travel from its place of origin to its destined place. In respect of the transshipment of narcotics in relation to Namibia, Barry observes that:

*Namibia can be categorised as being mostly a transit country because drugs such as cocaine, heroin and mandrax destined for neighbouring countries finds its [sic] way there via Namibia. This contraband is being smuggled by road into and/or through the country in furniture trucks (hidden amongst ordinary freight), in public transport (hidden amongst personal belongings) and even in cross-border parcel courier services. The truck and courier drivers are sometimes corrupted and paid by the drug traffickers to smuggle the drugs either into or through the country. International drug couriers also fly via Namibia to neighbouring countries with drug parcels in producing countries like Brazil.*³¹

What can be concluded from the observation made above is the fact that drugs are trafficked through Namibia due to the fact that Namibia is used as a transit point. This finding is supported by the empirical research conducted, newspaper articles and case law. During a group discussion held on 03 July 2013 with members of the Namibian Police’s Drug Law Enforcement Unit one member indicated that she caught a Tanzanian national with heroin in a bus travelling to South Africa. He had a Tanzanian citizenship and was also a permanent resident of South Africa. He was found in possession of heroin (having swallowed the bullet like tubes as established by means of an x-ray carried out on him) which he had been

³¹Barry, Z.B, supra, p3

transporting to South Africa from Tanzania.³² Another member of the Drug Law Enforcement Unit narrated that he arrested two Tanzanian nationals at a house in the upmarket area of Kleine Kuppe in Windhoek, Namibia. The two had recently travelled from Tanzania and were on their way to South Africa prior to their arrest. They had transported cocaine by swallowing the bullet-like tubes that the cocaine had been wrapped in.³³ Again, this was the finding of a medical examination (x-rays) carried out.

In yet another incident, a member of the Drug Law Enforcement Unit observed three male persons, one from the Democratic Republic of Congo, one from Burundi and another from Tanzania, as they were busy packing cocaine into bullet-like tubes. The male person from Tanzania was a permanent resident from South Africa. The Tanzanian national and the person from the Democratic Republic of Congo had only recently arrived in Namibia and were issued with visitor's entry permits.³⁴ Another incident related was about an Angolan national who had been arrested at the Hosea Kutako Airport. He had arrived in Namibia from South Africa but before that he had arrived in South Africa from Brazil. After a medical examination (X-Rays) it was discovered that the suspect had swallowed "bullets" (as the cocaine wrapped in cello tape is often referred to). He had been on his way back to Angola prior to his arrest.³⁵ Below see an illustrative photo of the bullet-like tubes wrapped in cello tape.

³²Fieldnote, 32. Group discussion held on 03 July 2013 at the offices of the Drug Law Enforcement Unit of the Namibian Police, Windhoek

³³Ibid, 03 July 2013

³⁴Ibid, 03 July 2013

³⁵Ibid, 03 July 2013

Figure 1: Cocaine wrapped in cello tape commonly referred to as “bullets”



Source: Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)-Drug Trafficking Report 08 September 2011, International Conference Centre, Grand Baie, Mauritius.

When one has regard to the case law one will find further evidence of drug trafficking in Namibia. In the case of *Daniel Joao Paulo and Another v The State* an unreported case of the Namibian Supreme Court³⁶ the two accused, Angolan nationals, were travelling in a vehicle which was stopped at a roadblock outside Keetmanshoop in Namibia. They were travelling from Angola to South Africa prior to their arrest in Namibia. A subsequent search of the vehicle revealed a false compartment concealed underneath the vehicle. Hidden inside the

³⁶Case no SA 85/2011, heard on 11 April 2012 and judgement delivered on 30 November 2012 by Mainga JA (with Shivute CJ and Maritz JA concurring)

compartment were 62 parcels wrapped in brown insulation cello tape containing a substance thought to be cocaine and at a later stage scientifically proven to have contained cocaine. At the end of the trial each accused was convicted and sentenced to 10 years imprisonment of which 4 years was conditionally suspended for a period of 5 years.

In the unreported appeal judgement of Miller, AJ in the case of *Chukwujekwu Nwoye Okaforudeji v The State*,³⁷ the appellant was a 35 year old male who was charged with contravening section 2(c) of Act 41 of 1971. The allegation was that on 25 February 2010 the appellant was found dealing in 1027 grams of cocaine, which is a dangerous dependence-producing substance. The appellant admitted guilt in the Windhoek Regional Court and was convicted upon his plea of guilty. The accused was sentenced to 10 years imprisonment of which 2 years were suspended on condition that the appellant was not convicted again of contravening section 2(c) of Act 41 of 1971, committed during the period of suspension. The appellant appealed against the sentence. With respect to the issue of drug trafficking the learned judge remarked as follows, “The facts admitted by the appellant and established at the trial are to the effect that the appellant acted as a courier conveying the drugs found in his possession from South America with Angola being his final destination.”³⁸

Support for the contention of drug trafficking taking place in Namibia is further found in newspaper articles such as the article stating that a South African single mother was jailed for 6 years after being caught at the Hosea Kutako International Airport upon her arrival into Namibia from Luanda, Angola. She was caught smuggling cocaine worth about N\$1,35 million into Namibia.³⁹ In another article two men were arrested after police and customs

³⁷Case no SA 21/2012, heard on 30 July 2012 and *ex tempore* judgement delivered on 30 July 2012 by Miller AJ (with Parker J concurring)

³⁸*Ibid*, p2

³⁹Menges, Werner ‘SA cocaine courier jailed for six years’ *The Namibian* (04 April 2012)

officials had intercepted them at the Ariamsvlei border post. They were found with 100 packets of dagga with an estimated street value of N\$622 980-00.⁴⁰ Another article reported that a Nigerian cocaine courier's sentence of eight years imprisonment was confirmed by the High Court of Namibia on appeal.⁴¹ Considering all these incidents of drug trafficking, one can state it as a matter of fact that drug trafficking does indeed take place in Namibia.

2.3 Is Drug Trafficking Criminalised by the Namibian Drug Law?

With all the relevant sections of the Namibian statutory law on drugs outlined in the introduction of this chapter it will be noted that in those sections no mention is made specifically of the offence of drug trafficking. In fact, no mention is specifically made of the offence of drug trafficking in the rest of the Namibian Drug Act. Thus although it is a fact that drug trafficking does take place in Namibia there is no provision in the Namibian Drug Legislation dealing specifically with the issue of drug trafficking. Interviews have revealed this insofar as 8 out of the 10 magistrates interviewed, 7 out of the 10 prosecutors, 10 out of 10 defence attorneys and 8 out of 10 Drug Law Enforcement officers confirmed that drug trafficking is not specifically criminalised in the Namibian Drug Law.⁴² All the law enforcement officers also conceded that they have never investigated cases where the accused were specifically charged with drug trafficking. Thus, there is merit in the contention that the current drug law does not specifically criminalise conduct such as drug trafficking.

Since drug dealing and drug use and possession are criminalised let us draw a distinction between drug trafficking and drug dealing in order to show why conduct that amounts to dealing may not necessarily be the same as conduct that constitutes drug trafficking. Let us take the example of a person who goes to Brazil from South Africa in order to go and

⁴⁰Cloete, Luqman 'Police intercept dagga at border' *The Namibian* (28 May 2013)

⁴¹Menges, Werner 'Cocaine smuggler's appeal dismissed' *The Namibian* (13 August 2012)

⁴²Fieldnotes, 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 24, 25, 26, 27, 28, 29, 30, 31 and 32

purchase drugs that he/she intends selling in South Africa. The person is on his/her way back to South Africa via Namibia when he/she is arrested with the drugs in his possession. In terms of the Namibian Drug Act this person will be charged with the offence of dealing in the drugs whilst no actual dealing took place. The person did not have the intention to engage in dealing in the drug in Namibia. In contrast the person was smuggling the drugs through Namibia in order to deal in the drugs in South Africa. Thus the person engaged in trafficking the drugs through Namibia, with his destination having been South Africa prior to his arrest. The offence committed by this person is drug trafficking as opposed to drug dealing. The current Namibian Drug Legislation does not recognise the conduct of drug trafficking. There is thus an omission in the law.

Since drug offences in Namibia are statutory offences the Namibian Drug Act prescribes the offences that persons must be charged with when having committed a drug related offence. Thus the accused are charged with either dealing in or being in possession of a dependence-producing substance, be it prohibited, dangerous or potentially dangerous. Case law such as the cases of *The State v Stoffel Davids*⁴³, *The State v Stanley Kanao*⁴⁴, *Ken Inem Ude v The State*⁴⁵, *Samuel Mraji Andile v the State*⁴⁶ and *Edwin Lebina Modibedi v The State*⁴⁷ will similarly show that charging persons who committed drug related offences with the offences of either possession or dealing provided for by the current Namibian Drug Legislation does not mean that such persons are not successfully prosecuted and convicted for drug offences.

⁴³CR 01/2008 [2008] NAHC 25

⁴⁴Unreported review case of the High Court of Namibia (Case nr: CR 113/2008). Judgment was delivered on 16 October 2008 by Parker, J (as he then was)

⁴⁵CA 12/2011 [2013] NAHCMD 149 (6 June 2013)

⁴⁶An unreported review judgment of the High Court of Namibia delivered on 26 October 2010 by Botes, AJ (Case no: CA54/09)

⁴⁷An unreported review judgment of the High Court of Namibia delivered on 10 July 2008 by Parker, J (as he then was) (Case no: 126/2005)

In all these cases the accused were charged with the offences of either possession or dealing in drugs, prosecuted, convicted and sentenced. Let us briefly consider the cases separately.

In the case of *The State v Stoffel Davids*⁴⁸ the accused was convicted in the Magistrate's Court on two charges of having contravened the provisions of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971. Upon review the conviction in respect of both charges was confirmed by Muller, J. In the matter of *The State v Stanley Kanao*⁴⁹ the accused was charged with one count of being in possession of a prohibited dependence-producing substance, namely cannabis. The weight of the cannabis found in the possession of the accused was 2 grams and the value N\$6-00. The accused pleaded guilty before the Walvis Bay Magistrate's Court and was convicted on his own plea of guilty. On review, the High Court confirmed the conviction. In the same manner in *Ken Inem Ude v The State*⁵⁰ the accused was charged with two counts of dealing in cocaine weighing 2776.7644 grams and valued at N\$139 006-07. The accused pleaded guilty in the Regional Court of Windhoek and was convicted as charged. The appeal lodged by the accused against sentence was dismissed by the High Court. In the case of *Samuel Mraji Andile v the State*⁵¹ the appellant was charged with dealing in cannabis valued at N\$246 000-00 and weighing 82 kg. The appellant pleaded guilty to the charge and was convicted on 12 May 2009. The appellant appealed against the sentence imposed upon conviction which was 7 years imprisonment of which 2 years were conditionally suspended for a period of 5 years. The appeal was dismissed. Furthermore, in the matter between *Edwin Lebina Modibedi v The State*⁵² the appellant was charged in the Windhoek Magistrate's Court on one count of contravening section 2(b) of the Abuse of Dependence-producing substances and rehabilitation Centres

⁴⁸Supra, p26

⁴⁹supra, p26

⁵⁰supra, p26

⁵¹supra, p26

⁵²supra, p26

Act, Act 41 of 1971, to wit, dealing in cannabis weighing 11 kg. He pleaded not guilty to the charge and was tried and ultimately convicted and sentenced. He appealed against the conviction but the judge dismissed the appeal.

It is worth noting that in all but one of the afore-mentioned cases, the accused pleaded guilty. The consequence of the guilty pleas of the accused was that the state did not need to prove the guilt of the accused as the accused were convicted on their guilty pleas. I am mindful that this particular fact does not detract from the fact that the accused were charged in terms of the Namibian Drug Legislation and accordingly convicted. This illustrates the fact that such drug law was successfully used to charge and convict persons who committed drug related offences even though the provisions were not really tested as they would have been during a trial.

Be that as it may, other noteworthy examples of successful prosecutions are also outlined by Barry insofar as she states:

In 1997 two refugees from Cameroon and Nigeria were caught at the Windhoek International Bus Terminal with 17.5 kgs of cocaine, then valued at about 8 million (US\$1.1 million), cleverly hidden inside 72 electrical transformers in their luggage. The duo were on their way to Johannesburg in South Africa with their stash. Sharp-eyed officers from the drug squad noticed the two arriving from South Africa in the morning with very little luggage and noticed them again the same afternoon at the bus terminal with large black bags each. They became suspicious and went into action. The two were convicted of dealing during February or March 1999 and they were both sentenced to 10 years' imprisonment. In 1999 the High Court sentenced an admitted Nigerian cocaine dealer to ten years' imprisonment for dealing 7.5 kg of cocaine. He tried to smuggle the drugs into the country hidden in the soles of ladies shoes. The judge commented that the drug problem was an international concern and Namibia must protect the interests of other countries when sentencing offenders. In November 2000 the Regional Court of Windhoek sentenced two Tanzanians to 10 years imprisonment for

*dealing in 3,303 Mandrax tablets and 100 grams of heroin. The heroin was found to be a potentially lethal cocktail of diamorphine and methaqualone.*⁵³

Bearing in mind the success stories of the current drug law, is there really a need for conduct such as drug trafficking to be specifically criminalised? In addressing this issue one should not lose sight of the fact that it has been established that drug trafficking does in fact take place in Namibia. Those persons found trafficking illicit drugs are charged either with the offence of possession or that of dealing. Even if no actual dealing is involved the persons found in possession of the illicit drug are charged with dealing, a fact attributed to the presumption of dealing contained in section 10 of the Act (the presumptions contained in such section will be discussed in more detail in the chapter to follow). Furthermore it is rare that the actual drug dealers, as opposed to the “runners”(a term used to describe those individuals who sell drugs on behalf of drug dealers)⁵⁴ and mules (a term used to describe those individuals who smuggle drugs on behalf of drug dealers)⁵⁵, are actually charged with the offences currently catered for by the Namibian Drug Law. Thus those who benefit from the illicit trade in drugs go unpunished. In fact there are instances where the drug dealer will be the one paying a court imposed fine on behalf of a “runner” or a “mule”.⁵⁶

2.4 Summary

Those involved in illicit drug trade fuel the demand that keeps the whole drug industry going and this in turn entails harm to the community. They have less regard for the values of the community than for their own pecuniary interest as is evidenced by the predominantly high

⁵³Barry Z B, supra, p 84

⁵⁴Fieldnote, 32. Group discussion held on 03 July 2013 at the offices of the Drug Law Enforcement Unit of the Namibian Police, Windhoek

⁵⁵Ibid, 03 July 2013

⁵⁶Ibid, 03 July 2013

value of the illicit drug trade.⁵⁷ This view is supported by Hoff, AJ (as he then was), in the case of *S v Sibonyoni*,⁵⁸ where he states, “There can be no doubt that dealing in cocaine is a serious crime and that drug dealers are unscrupulous criminals and further that the courts have a duty to protect members of society from exploitation by these elements.” Criminalising drug trafficking will cast the net wider and target those at the centre of the drug trade, namely the actual drug dealers.

Consequently, drug trafficking will not be limited to the person found with the drugs, but will include other role players as well. In a sense, the offence of drug trafficking will be a continuing offence insofar as the offence will continue as long as the illicit drugs are in the possession of the person trafficking it or of someone who was a party to the drug trafficking or even of a person acting on behalf of, or in the interests of, the original drug trafficker or party to the drug trafficking. Much like in the case of theft being a ‘continuing crime’,⁵⁹ two significant consequences will flow from drug trafficking being a continuing crime. Firstly, regardless of where the drug trafficking originally took place the drug trafficker may be tried at the place where he or she is found with the drugs. This will be the situation regardless of whether or not the conduct of the perpetrator is regarded as drug trafficking by the law of the place where it occurred. Secondly, those who render assistance to the drug trafficker whilst the drug trafficking continues will be guilty not merely as accessories after the fact, but for the offence of drug trafficking itself.⁶⁰

⁵⁷ In support of this contention and for an overview of the estimated annual value of the illicit drug trade see: *Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)-Drug Trafficking Report* 08 September 2011 on P4

⁵⁸ 2001 NR 22 at p25

⁵⁹ In this regard see Jonathan Burchell and John Milton, 1997, *Principles of Criminal Law*, Second Edition, Juta & Co, Ltd. P552

⁶⁰ *Ibid*, p552

Added to that it must be recognised that drug trafficking operates on an international level. It is a global illicit trade that involves the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.⁶¹ This recognition is clearly expressed by Miller, J in the case of *Chukwujekwu Nwoye Okaforudeji vs The State* in which he stated:

*The international trafficking in drugs between States and continents is not only a Namibian problem. It is an international problem and it behoves courts in Namibia, when persons are found within the jurisdiction of this court engaged in smuggling of drugs internationally, to make it plain that the courts will also do their duty in the international fight against drug trafficking. The fight against drug trafficking is an international one and one must be slow to impose sentences that will discourage those drug enforcement agencies involved in drug combating internationally by imposing sentences that may create the impression that Namibia is a safe haven where drugs can be distributed into Namibia and neighbouring states.*⁶²

Further, it must be noted that drug trafficking is a transnational organised crime which threatens peace and human security, violates human rights and undermines economic, social, cultural, political and civil development of societies around the world.⁶³ Due to the diversification of organised crime in the sense that illicit drugs may be sourced from one continent, trafficked across another and marketed in yet another, it is imperative that the Namibian Drug Legislation keeps abreast with these developments and creates greater leverage against drug traffickers. One way in which such greater leverage can be created is by specifically criminalising drug trafficking.

⁶¹As defined by the United Nations Office on Drugs and Crime <<http://www.unodc.org/unodc/en/drug-trafficking/>>Accessed on 14 August 2013

⁶²Supra, P3

⁶³As asserted by the United Nations Office on Drugs and Crime <<http://www.unodc.org/unodc/en/drug-trafficking/>>Accessed on 14 August 2013

In addition to the aforesaid, 7 out of the 10 prosecutors⁶⁴ interviewed (amounting to 70% of the total prosecutors interviewed) conceded that they experience difficulty in proving that an accused person charged with being in possession of or having dealt in a dangerous or prohibited dependence-producing substance, had in fact dealt in or been in possession of such prohibited or dangerous dependence producing substance. One prosecutor⁶⁵ elaborated this dilemma further by giving the example of a truck driver who smuggles illicit drugs into the country by means of the truck he drives. The police officer will charge the truck driver with either dealing or possession of the illicit drugs. However the truck driver then disputes having any knowledge about the illicit drugs or that the packages in which such drugs were, in fact contained the drugs. The prosecutor lamented on the difficulty of how the state would then prove that the truck driver knew about the existence of the drugs in the truck.

The dilemma faced by the prosecutors, especially in relation to the issue of “possession” is acknowledged by Fortsen⁶⁶ insofar as he states, “Any person approaching the concept of possession for the first time could reasonably be forgiven if he expected the legal principles involved to be straightforward. They are not”. He continues by explaining as follows:

Given that in general terms, a person has in his possession whatever is in his physical custody or under his control, it may be thought that possession is a purely physical concept involving no mental ingredient at all whereas, in fact, the law separates the physical element of possession (the corpus) from the mental element (the animus possidendi), i.e. the intention to possess.⁶⁷

The example of the truck driver not knowing that what was found in the truck was an illicit drug is deliberated on by the same author under what is termed ‘The container cases’ where he further questions, “Is the person who knowingly exercises custody or control of a parcel,

⁶⁴Field notes 11, 12, 13, 14, 15, 16 and 17

⁶⁵Field note 12

⁶⁶ Fortson, Rudi, 1996, *Misuse of Drugs and Drug Trafficking Offences*, Third Edition, Sweet & Maxwell, P 64

⁶⁷Ibid, p77

box or other container thereby deemed to be in possession of its contents, if he (a) has no idea what they are; (b) cannot see inside the container; (c) has no opportunity to examine it, or (d) has no authority to do so?”⁶⁸The author goes on to explain that the first step in determining these issues is for the prosecution to prove that the accused was in possession of the drugs. It is therein that the difficulty lies, for the simple reason that the prosecution cannot and does not know the state of mind of the accused.

What is more, in dealing with the issue of possession, Liebenberg J in the case of *The State v Kanditu*⁶⁹, found that the accused had not admitted the element of possession and thus the accused should not have been convicted in the Opuwo Magistrate’s Court, where the accused had been charged with the offence of possession of cannabis. The conviction and sentence were subsequently set aside. In the same way Parker J (as he then was) in the case of *The State v Daniel Joao Paulo and Josua Manuel Antonio*⁷⁰ held that the state had not proved that the accused were in possession of the vehicle (where 14 packets of cocaine had been concealed) on 30 September 2008 (the date on which the packets of cocaine had been found) within the meaning of the provisions of the Namibian Drug Act. The accused were found not guilty and discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 on that particular count. Similarly in the case of *Gabriel Gariseb v The State*,⁷¹ the accused was charged with dealing and alternatively, possession of a prohibited dependence producing substance (mandrax tablets) after a rectangular parcel wrapped in paper and cello tape had been found behind the driver’s seat in the truck driven by the accused. The court opined that the state must prove that the accused had knowledge of the contents of the parcel prior to him

⁶⁸Ibid, p95

⁶⁹CR 25/2012 [2012] NAHCNLD 05 (02 November 2012)

⁷⁰*The State v Daniel Joao Paulo and Josua Manuel Antonio*, supra

⁷¹An unreported judgment of the High Court of Namibia delivered on 07 May 2002 by Hoff, J (Case no: CA 99/2000)

being confronted by the police at the roadblock. The court held that the state had not proven that the accused had, prior to being stopped at the roadblock, any knowledge of the contents of the parcel in the sense that the accused knew or might reasonably have known that the parcel contained mandrax tablets or any other prohibited dependence-producing substance. The result of the court's finding was that the conviction and sentence imposed in the magistrate's court were set aside.

The predicament faced by the prosecution as well as the accused (who are *strictu sensu* charged erroneously) will be mitigated by criminalising drug trafficking. This will result in the issue of proving possession or dealing, where in actual fact drug trafficking had actually taken place, being negated without doing away with the offences of possession or dealing altogether.

CHAPTER 3: THE CONSTITUTIONALITY OF THE SECTION 10 PRESUMPTIONS

3.1 Introduction

The chapter will focus on assessing the constitutionality of the presumptions contained in section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971. By way of reminder the relevant presumptions contained in section 10(1)(a) of the Act are as follows:

If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of-

- (iii) *dagga exceeding 115 grams in mass;*
- (iv) *any prohibited dependence-producing drugs;*

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

- (c) *If in any prosecution for an offence under section 2(a) it is proved that the accused was the owner, occupier, manager or person in charge of cultivated land on a date on which dagga plants were found on such land, of the existence of which plants the accused was aware or could reasonably be expected to have been aware, it shall be presumed that the accused dealt in such dagga plants, 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 a drug could be manufactured, it shall be presumed that the accused dealt in such drug, unless the contrary is proved.

- (f) *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 a drug could be manufactured, was found, it shall be presumed that the accused dealt in such drug or plant, unless the contrary is proved.*

(3) If in any prosecution for an offence under this Act it is proved that any dependence-producing drug or plant from which such a drug could be manufactured was found in the immediate vicinity of

the accused, the accused shall be deemed to have been found in possession of such drug or plant, unless the contrary is proved.

3.2 The effect of the Section 10 Presumptions

Essentially the effect of the presumptions are that the accused is presumed to have committed the offences of either dealing in or being in possession of a prohibited or dangerous dependence-producing substance, unless the contrary is proven by the accused. It is a fact that these presumptions have been declared unconstitutional in neighbouring South Africa as evident from the following cases where the presumptions were struck down. In the case of *S v Bhulwana: S v Gwadiso*⁷² the court struck down the presumption that a person found in possession of dagga exceeding 115 grams dealt in that drug. The two cases were referred to the Constitutional Court by the Cape Provincial Division. The question referred to the Constitutional Court in both the cases was whether the provisions of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 (“the Act”) are in conflict with the provisions of the Republic of South Africa Constitution Act 200 of 1993 (“the Constitution”). Section 21 of the Act provided that: “If in the prosecution of any person for the offence referred to-

(a) in s 13 (f) it is proved that the accused-

(i) was found in possession of dagga exceeding 115 grams;

it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance

Section 13(f) refers to offences mentioned in s 5(b) which, in turn, relates to the offence of dealing in certain substances, including dagga.

⁷²1995 (2) SACR 748 (CC)

The Court found that the basis of the attack on section 21(1)(a)(i) of the Act is that the section imposes a burden of proof on the accused, a so-called “reverse onus”, which is contrary to the provisions of section 25(3) of the Constitution which provides that:

“Every person shall have the right to a fair trial, which shall include the right-

- (a) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during a trial”

In the *Bhulwana* matter the accused was found in possession of 850g of dagga (cannabis). He was convicted of dealing in dagga and was sentenced to a fine of R500 or 6 months imprisonment. In addition to that a 12 month prison sentence was suspended for a period of five years on condition that he was not found guilty of dealing in drugs during that period. The matter came before the Cape Provincial Division of the Supreme Court on automatic review. The review court held that the evidence in the trial court would not have been sufficient to convict the accused of dealing in dagga in the absence of the reliance on the section 21(1)(a)(i) presumption. Thus the correctness of the conviction depended on the constitutionality of the presumption. The review judge was of the view that there were good grounds for concluding that the presumption was not constitutional and proceeded to refer the question of the constitutionality of the presumption to the full bench of the Cape Provincial Division for determination.

In the other case before the court, the *Gwadiso* matter, the accused was found in possession of 444,7g of dagga. The Magistrate’s Court expressly relied on the presumption contained in section 21(1)(a)(i) in convicting the accused. The accused was sentenced to pay a fine of R600 or to imprisonment for a period of six months. A further one month prison term was suspended for a period of four years on condition that the accused would not be found guilty

of dealing in drugs during that period. This matter also came before the Cape Provincial Division of the Supreme Court on automatic review. The review judge found that the accused's conviction for dealing could not have been sustained but for the existence of the presumption. She agreed with the finding of the review judge in the matter of *S v Bhulwana* that the presumption was *prima facie* unconstitutional. Accordingly, the court then also referred the issue of the constitutionality of the presumption to the full bench of the Cape Provincial Division of the Supreme Court.

In dealing with these two matters referred to it the court reasoned that since both possession and dealing are offences in the South African Law the effect of the presumption is that, once the offence of possession has been proved, and the amount of dagga in question is shown to have exceeded 115g, the offence of dealing is presumed to have been committed. A conviction for dealing is accepted to be a graver matter than a conviction of possession. It was submitted on behalf of the state that the section 21 (1)(a)(i) presumption was not a true reverse onus provision in that it merely imposed on the accused an evidential burden as opposed to a legal burden. Once possession in excess of 115g dagga has been shown an evidential burden would require the accused to adduce evidence which raises a reasonable doubt as to whether he or she was guilty of dealing in order to be acquitted of the offence of dealing. On the other hand, a legal burden would require the accused to demonstrate on a balance of probabilities that he or she was not guilty of dealing in order to be acquitted of that offence.

However, the court disagreed with this argument of the counsel for the state insofar as it did not accept that section 21(1)(a)(i) imposes an evidential, and not a legal, burden. The court reasoned that section 21(1)(a)(i) provides that, where an accused is found in possession of a

quantity of dagga in excess of 115g, it shall be presumed, until the contrary is proved, that the accused was guilty of dealing in dagga. The clear language of the test suggests that the presumption will stand unless proof to the contrary is produced. The court further reasoned that the effect of the presumption is that, once the State has proved that the accused was found in possession of an amount of dagga in excess of 115g, the accused will, on a balance of probabilities, have to show that such possession did not constitute dealing as defined in the Act. Even in the event that the accused raises a reasonable doubt as to whether he or she was dealing in the drug, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The court then questioned whether the imposition of this burden was a breach of the presumption of innocence as enshrined in the South African Constitution.

Furthermore, the effect of the entrenchment of the presumption of innocence requires that, where a presumption may give rise to the conviction of an accused despite the existence of a reasonable doubt as to his or her guilt, it must be justified in terms of section 33 of the South African Constitution. Section 33(1) provides that:

The rights entrenched in this chapter may be limited to the law of general application, provided that such limitation-

(a) shall be permissible only to the extent that it is-

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question, and provided further that any limitation to-

(aa) a right entrenched in Section 25 shall, in addition to being reasonable as required by para (a)(i), also be necessary.

The court stated that Section 33(1) required it to consider whether Section 21(1)(a)(i) is a reasonable, necessary and justifiable limitation in an open and democratic society based on

freedom and equality. After this consideration, Section 33(i) further requires the Court to enquire whether the limitation of the right occasioned by Section 21(1)(a)(i) negates the essential content of that right. In dealing with these requirements the court placed the purpose, effects and importance of the infringing legislation on one side of the scale and the nature and the effect of the infringement caused by the legislation on the other. The more substantial the inroad into the fundamental rights, the more persuasive the grounds of justification must be. In the present case the Court reasoned that the infringement of the presumption of innocence may result in an accused person being convicted of the offence of dealing in dagga despite a reasonable doubt as to whether he or she was in fact dealing. However, in accordance with the South African law if there is indeed doubt that the accused is a drug dealer then such an accused is entitled to the benefit of that doubt.⁷³ The Court found that it was clear that while the presumption exists, there is a risk that a person may be convicted of dealing in dagga despite the existence of a reasonable doubt as to his or her guilt. The court ruled that Section 21(1)(a)(i) was inconsistent with the Constitution and was thus invalid.⁷⁴

In the case of *S v Julies*⁷⁵ the Court struck down the presumption that an accused found in possession of a prohibited or dangerous dependence-producing drug dealt in such drug as provided in Section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act, Act 140 of 1992. The case came before the court by way of referral by the Cape Provincial Division of the Supreme Court and concerned the constitutionality of Section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act, Act 140 of 1992. The accused was convicted of dealing in three methaqualone tablets, more commonly known as mandrax, an undesirable dependence-

⁷³ *S vs Bhulwana; S vs Gwadiso*, supra, P395

⁷⁴ *Ibid*, P398

⁷⁵ 1996 (2) SACR 108 (CC)

producing substance by the Magistrate's Court in Paarl. For the conviction the trial court relied on the presumption that if in a prosecution it is proved that the accused was found in possession of any undesirable dependence-producing substance it shall be presumed, until the contrary is proven, that the accused dealt in such undesirable dependence-producing substance. The possession of any quantity of the drug created the presumption. In determining the constitutionality of the presumption the court relied on the case of *S v Bhulwana: S v Gwadiso*⁷⁶. The Court reasoned that the presumption was aimed at burdening the possessor with an onus of proof which did not accord with common sense and reasonable inference. The Court found that the presumption contained in Section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act 140 of 1992 was inconsistent with the provisions of the interim Constitution of the Republic of South Africa (Act 200 of 1993) and as such the presumption was declared to be invalid and of no force and effect from the date of the judgment.

These presumptions are still operational in Namibia as provided for in section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 and by way of substantiating the effect of these presumptions in relation to the South African Act, Jonathan Burchell and John Milton observed as follows:

The Act supplemented its extra-ordinarily wide conception of dealing with a number of presumptions which, in effect, obliged the accused to prove that he had not dealt in drugs. Thus the Act provided that anyone found in possession of drugs, or dagga exceeding 115 gram, was presumed to have dealt in the drug. The onus was then on the accused to prove that he had not dealt in the drug. The effect of this was to remove the accused from the protection of the presumption of innocence. The

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*Constitutional Court has now ruled that the presumption described above is unconstitutional and thus may no longer be applied.*⁷⁷

Obviously that which is expressed in the past tense by the authors is still what is currently happening in Namibia, considering the fact that the presumptions are still in effect in Namibia.

3.3 The constitutionality of the Section 10 Presumptions

Having outlined the presumptions and their effect the question to consider is: Are the presumptions in conflict with the constitutionally protected presumption of innocence? The presumption of innocence is protected in the Namibian Constitution where it is stipulated in Article 12(1)(d) that, “All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.” Without deviating from the task at hand it is necessary to briefly consider what is meant by the presumption of innocence. Attributed to the presumption of innocence is the fact that all persons accused of having committed an offence are presumed to be innocent until proven guilty and properly convicted by a court of law. In this regard the following explanation is given by Burchell and Milton:

*The adverb ‘properly’ involves, inter alia, compliance with the rules of evidence and criminal procedure. A conviction is an objective and impartial official pronouncement that a person has been proved legally guilty by the State (prosecution) in a properly conducted trial, in accordance with the principle of legality, ie in a trial where the State obeyed the rules of criminal law, criminal procedure, evidence, and the Constitution. A person may in the public’s subjective view be factually or morally guilty of a crime, but that does not say [sic] that he will or can be proved to be legally guilty. In a state under the rule of law (Rechtsstaat), only legal guilt counts; to ‘convict’ a person in any other way may amount to vigilantism, mob trials and even anarchy.*⁷⁸

⁷⁷Jonathan Burchell and John Milton, supra, p665

⁷⁸J Joubert (Ed), 2001, *Criminal Procedure Handbook*, Fifth Edition, JUTA Law, p6

Burchell and Milton go on to further explain the burden of proof in criminal trials as follows, “In order to obtain a conviction, the prosecution must prove the accused’s guilt beyond a reasonable doubt. The onus or burden of proof rests on the prosecution because of the above-mentioned presumption of innocence regarding the accused. This means that an accused person does not have to prove that he is innocent.”⁷⁹ If due consideration is given to the presumption of innocence and what such presumption entails as explained by the learned authors, Burchell and Milton, then it becomes clear that ordinarily, in criminal trials the accused is not expected to prove his or her innocence. On the contrary, the burden is on the state to prove the guilt of the accused beyond reasonable doubt. It is a fact that at the time that the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 was enacted the presumption of innocence was not constitutionally protected. After all, the Drug Act was enacted in 1971 whilst the Namibian Constitution came into operation in 1990. Prior to 1990 the constitution was not the supreme law of the country.

However, with the advent of the Namibian Constitution all laws became subject to the Namibian Constitution, including the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971. This makes the presumptions contained in section 10 of the Act to be in contravention of a constitutional provision, such provision being the presumption of innocence. This renders the presumptions contained in section 10 of the Namibian Drug Law unconstitutional and in the paragraphs to follow I will illustrate why I have come to that conclusion.

First and foremost it is a fact that the constitutionality of the section 10 presumptions contained in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act,

⁷⁹Ibid, p7

Act 41 of 1971 are still to be challenged in a court of law. However, our courts have expressed some views on the issue of the constitutionality of the presumptions contained in section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 without necessarily directly pronouncing themselves on the issue. For example in the case of *S v Root*⁸⁰ Van Niekerk, J (with Mainga, J, as he then was, concurring) held that the purpose of the section 10 presumptions was to assist the prosecution in proving its case by legislating for a rebuttable evidentiary presumption. In this particular case, the accused pleaded guilty and the magistrate convicted the accused after having questioned him in terms of Section 112(1)(b) of the Criminal Procedure Act and having relied on the section 10 presumptions. However, the accused was not given an opportunity to rebut the presumptions which resulted in the matter being remitted back to the magistrate to question the accused afresh. With respect to the issue of the constitutionality of the presumptions under discussion the learned judge remarked as follows:

*In dealing with the issue of the presumption as I have, I must point out that the constitutionality of the presumption is an issue on which this Court may still have to pronounce itself. In the Noble case this Court declined to do so because on appeal it was held that the prosecution had failed to prove beyond reasonable doubt that the applicant had been in possession of dagga. My judgment should, however, not be seen as an indication that reliance must necessarily be placed on the presumption.*⁸¹

Thus there is a concession on the part of the court that the Namibian High Court may still pronounce itself on the issue of the constitutionality of the presumptions contained in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971, despite this particular court remitting the matter back to the trial court in order to accord the accused an opportunity to rebut the relevant section 10 presumption.

⁸⁰CR 64/07;296/07 [2007] NACH 16 (13 April 2007)

⁸¹Ibid, p5

Let us further consider the case of *Daniel Joao Paulo and Another v The State*⁸² where the appellants raised a constitutional challenge against the section 10 presumption during the course of their appeal. The accused had been convicted in the Namibian High Court. The two accused had been stopped at a roadblock outside Keetmanshoop on their way to South Africa from Angola. Members of the Drug Law Enforcement of the Namibian Police searched the vehicle occupied by the two accused and discovered 62 parcels of cocaine in a false compartment concealed underneath the vehicle. The parcels were weighed by the National Forensic Science Institute (NFSI) and found to contain 30,1 kg cocaine (synthesized crack) with a street value of N\$15 500-00. The accused appealed against their convictions directly to the Namibian Supreme Court.

In dealing with the constitutional challenge lodged by the appellants during the course of their appeal the learned Mainga JA held that the procedure adopted by the appellants to raise the issue of constitutionality without the benefit of the views of the Namibian High Court, from whence their case had emanated was not proper. In effect this obliged the Namibian Supreme Court to sit at first and final instance on the issue. It was the finding of the Court that it would be highly undesirable for the Supreme Court to sit as the court of first and last instance due to the fact that the Supreme Court is the highest court in the land. The constitutional challenge of the section 10 presumptions could not be considered by the Supreme Court of Namibia due to the fact that it is the highest court in the country and any party aggrieved by its finding, with regard to the constitutional challenge, would have no right of recourse nationally. In other words, the aggrieved party would not be able challenge the decision of the Supreme Court, the highest court in Namibia. The Court thus did not deal

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with the question raised in the appeal, i.e, the constitutionality of the presumptions contained in the Act.

In the matter of *Gabriel Gariseb v The State*⁸³ the state relied on the Section 10 presumptions, particularly Section 10(1)(d) and 10 (1)(e), of the Act in proving the guilt of the accused. In this case, a vehicle driven by the accused was searched by members of the Namibian Police and 414 mandrax tablets and 10 plastic bags with mandrax powder to the value of N\$26 940-00 were found. Hoff, J (with Mainga, J, as he then was, concurring) reasoned that the presumptions can only be of any assistance to the state if it is proved that the accused had the required *mens rea* to possess or deal in the illegal substance. What is more, the judge stated that the effect of the presumptions contained in Section 10 of the Act is that the onus of disproving knowledge of unlawfulness rests upon the accused. Reference was made to the fact that similar presumptions contained in the South African Drugs and Drugs Trafficking Act, Act 140 of 1992 were declared unconstitutional by the Constitutional Court, *inter alia*, on the basis that it is in conflict with the presumption of innocence entrenched in the Constitution of South Africa. In spite of such reference the judge opined that in considering the appeal it was not necessary to consider whether the presumptions contained in section 10(1)(d) and 10(1)(e) of Act 41 of 1971 are in conflict with the presumption of innocence contained in the Namibian Constitution. Although no reason was advanced by the judge for such opinion one can only speculate by stretching ones imagination that it may have something to do with the fact that the issue of the constitutionality of the section 10 presumptions of the Namibian Act was not raised by either the appellant or the respondent in the appeal that was considered by the learned judge. Thus the court could not, of its own

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accord, pronounce itself on the issue of the constitutionality of the presumptions under discussion without the issue being raised by either one of the parties to the appeal.

Against the background of the fact that our courts are yet to make a pronouncement on the issue of the constitutionality of the presumptions stipulated in the Namibian Act let us consider a recently decided case of the Namibian High Court⁸⁴, by way of comparison. The recent decision referred to is the case of *Gomes v Prosecutor-General*.⁸⁵ This recent decision pertains to the presumptions contained in section 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956.⁸⁶ This section is employed to charge and prosecute accused persons with the offence of being in possession of suspected stolen property. Section 7 (1) states:

*Any person who in any manner, other than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1990 (Act 12 of 1990), Ordinance of 1935 (Ordinance 11 of 1935), without having reasonable cause, proof of which shall be on such first mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he received them or that such person has been duly authorised by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen.*⁸⁷

In the case in point the accused was found in possession of three welding machines by the police on his employer's premises. The indication from the accused was that he had purchased two of these machines from one of his co-accused. The accused was tried in the

⁸⁴Werner Menges 'Law on stolen property unconstitutional' *The Namibian* (14 August 2013). The article is also contained in <<http://allafrica.com/stories/201308141304.html>> Accessed on 28 August 2013

⁸⁵(A 61/2012) [2013] NAHCMD 240 (09 August 2013)

⁸⁶Hereinafter referred to as the "Ordinance", unless the context indicates otherwise

⁸⁷Section 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956

Regional Court on the main count of theft, alternatively contravening section 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956-Possession of suspected stolen property. The part of the Ordinance which was declared unconstitutional by the High Court required a person found in possession of stolen property to prove that he or she had a reasonable belief that the goods had been the property of the person from whom it was received, or that the person had the authority of the owner to dispose of it. The learned judge reasoned that it is an accepted principle of law that there is no onus on an accused to persuade a court that he had acted responsibly in acquiring goods alleged to have been stolen. If the version of an accused is reasonably possibly true such an accused is entitled to an acquittal, even if the explanation given by the accused is improbable. The only instance in which the court is entitled to convict such an accused would be where the court is satisfied not only that the explanation is improbable but that it is false beyond a reasonable doubt. However, in terms of the section of the Ordinance, which was attacked, a court was bound to convict an accused person despite the fact that there was an equal probability that the accused was innocent. The judge reasoned further that the presumption of innocence was infringed by the existence of the risk that an accused person may be convicted despite the existence of reasonable doubt. This was in contrast to the argument of counsel for the respondent that the section under discussion created an evidential burden and that a presumed fact may be rebutted by evidence giving rise to reasonable doubt.

Furthermore, the judge held that should the reverse onus contained in section 7 (1) of the Ordinance be retained, the risk of innocent people being convicted and sent to jail was too high and would be contrary to the purpose of the presumption of innocence which is to minimize the risk of innocent persons being convicted and imprisoned. Ndauendapo J (with Shivute J concurring) found that the phrase “proof of which shall be on such first-mentioned

person” contained in the Ordinance required an accused person to prove his or her innocence and as such violates the constitutional right to be presumed innocent until proven guilty. In the result the presumption was declared unconstitutional.⁸⁸

If one is to consider the reasoning of the learned judge in the *Gomes* case the probability of the presumptions contained in section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 being in contravention of the constitutionally protected presumption of innocence is equally high. The presumption in the afore-mentioned matter and the section 10 presumptions have the same effect, being that the onus is on the accused to prove his or her innocence. This is clearly in contrast to what is accepted in our criminal law and procedure.

However, in a more recent development of the same case an appeal was lodged against the judgement of the High Court in the Supreme Court of Namibia. In the case of the *Prosecutor-General of the Republic of Namibia v Joao Carlos Vidal Gomes and Others*⁸⁹ Smuts JA (with Mainga JA and O’Regan AJA concurring) found that the issue to be determined was whether the reverse onus contained in section 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956 impermissibly infringed upon the right to a fair trial entrenched in Article 12 of the Namibian Constitution. The rights invoked in this article include the presumption of innocence.

It was argued on behalf of the Prosecutor-General that the High Court erred in failing to find that words should be read into section 7 in order to establish an evidential burden. It was further argued by counsel for the Prosecutor-General that the common law should be

⁸⁸*Gomes v Prosecutor-General*, supra, note 82

⁸⁹Case No: SA 62/2013, heard on 05 March 2015 and judgement delivered on 19 August 2015

developed so that the impugned words create an evidential burden to be satisfied by evidence creating a reasonable doubt.

The judgement of the High Court was defended by counsel for the first respondent (*amicus curiae*), who submitted that the impugned words infringed the presumption of innocence embodied as a central component of the right to a fair trial entrenched in Article 12. Counsel referred to members of the community engaging in informal trade who would be at risk of conviction even if an evidential burden were to be read into Section 7. He further argued that, upon a purposive approach to Article 22 of the Constitution, Section 7 was unconstitutional and that an evidential burden should also not be read into Section 7.

In considering the issue of constitutional interpretation the court referred to the case of *Government of the Republic of Namibia v Cultura*⁹⁰ in which it was held that in order to avoid narrowness the provisions of Chapter 3 of the Namibian Constitution entrenching the fundamental rights and freedoms are to be, “broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legalism.”⁹¹ Thus, close regard is to be had to the language of the Constitution itself to identify the purpose of the constitutional provision. The court held that the right to a fair trial, encompassing the presumption of innocence, is not absolute. It is a flexible concept which requires that a balance be struck between an individual’s rights to a fair trial and the State’s obligation to protect the interest of the public in effectively combating and prosecuting crime.

⁹⁰ 1993 NR 328 (SC) and more recently followed in *Attorney-General of Namibia v Minister of Justice and Others* 2013 (3) NR 806 (SC)

⁹¹ *Ibid*, para 7

With respect to section 7 the court reasoned that the particular provision requires the prosecution to establish three elements beyond reasonable doubt. The elements are firstly that the accused was found in possession of the goods, other than stock or produce; secondly that the goods were acquired other than at a public sale, and thirdly that the goods had been stolen. Once the prosecution has proven these elements beyond a reasonable doubt the accused must establish on a balance of probabilities that he or she had reasonable cause for believing at the time of the acquisition of the goods that the person from whom the goods were received was the owner or authorised by the owner to dispose of them. This burden of proof upon the accused effectively provides for statutory criminal liability for the negligent, albeit innocent, acquisition or receipt of stolen property.

The court reasoned that it is justifiable for the legislature to discourage the market for stolen goods by obliging people acquiring goods otherwise than at a public sale to take steps to ascertain satisfactorily that the goods are not stolen. The requirement of reasonable cause seeks to balance the interest of the accused with the interest of the broader public. The test for reasonableness remains objective in that what is reasonable will be construed from the circumstances in which an accused in a particular case find himself or herself.

Another consideration of the court in determining whether a reverse onus constitutes an infringement of Article 12 of the Namibian Constitution is the nature of the offence. The court found that the offence established in section 7 is not as serious an offence such as theft and that factors such as the seriousness of the offence significantly reduce the risk of innocent persons being convicted. A further consideration relevant to the issue of whether section 7 is an impermissible infringement of Article 12 relates to the purpose of Section 7. In respect of this, the Court held that the value of discouraging people from acquiring goods other than at a

public sale unless satisfied they are not stolen is clear. The consequence will be an obligation on the public to make enquiries in a manner that might help diminish traffic in stolen goods. According to the court the importance of section 7 in combatting crime, including violent crimes such as robbery, is beyond dispute. Thus, the need to diminish traffic in stolen goods and curtail robbery and theft in Namibia is a compelling legislative objective. The court further opined that the inherent flexibility of the right to a fair trial permits a balance between the rights of the individual and society as a whole when addressing the pressing issue of the prevalence of violent crime in the form of robberies as well as theft and the stolen goods market that is fed by both.

In the view of the court the means chosen by the legislature in addressing that issue is compatible with the Namibian Constitution. The provision has the effect of affirming the importance of law abiding citizens taking steps to discourage criminal conduct and refraining from implicating themselves in its ambit. The purpose of section 7 in requiring members of the public to be vigilant in order to avoid traffic in stolen goods is a legitimate state objective which is pursued by reasonable means. The court concluded that section 7 does not constitute an infringement of Article 12 of the Namibian Constitution and the appeal succeeded.

What is important to note from the most recent judgement is one of the key issues taken into account by the court in determining whether section 7 impermissibly infringed upon the right to a fair trial, more specifically the presumption of innocence. The issue is the seriousness of the offence. Generally, drug offences are accepted to be serious in nature, certainly more serious than the offence of theft, which offence is incidentally more serious than the section 7 statutory offence discussed in the above cases. Thus the likelihood that a court faced with a constitutional challenge on the section 10 presumptions arriving at a different conclusion is

high. This stance is supported by the case law discussed in this Chapter in terms of which these presumptions were declared unconstitutional in South Africa.

3.4 Summary

As previously stated in criminal proceedings the burden is on the state to prove the guilt of an accused beyond a reasonable doubt. The reverse onus contained in section 10 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 bears the risk of innocent people being convicted and sent to jail in the event that they are unable to discharge the onus of prove. Also worth considering is the fact that there is simply no comparison between the accused and the State as far as proving that an offence has been committed is concerned, especially when consideration is given to the resources available to each of these respective parties. Granted from the perspective of the prosecution the presumptions are there to assist the State in proving an essential element of drug offences such as possession, especially the mental aspect. After all, the State cannot, and does not, know the state of mind of the accused. Thus these presumptions are of assistance to the state. This is also the view held by all the prosecutors who were interviewed for this study.⁹²

However, let us go back to the issue of the resources that the state has as opposed to those that an accused person has. The resources that the state has at its disposal and that which most accused have in Namibia cannot be compared. The state has far more resources at its disposal than the resources that an accused person has. Added to that is the fact that it will lead to a state of anarchy if a person accused of having committed an offence is found guilty without the state proving the guilt of such an accused beyond a reasonable doubt in a court of law. Accused persons who are not legally guilty will be convicted whilst they are innocent.

⁹²Field note, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20

Such a situation cannot be allowed in a state governed by the rule of law. Hence the state bears the onus to prove the guilt of an accused beyond reasonable doubt in criminal proceedings.

What is perhaps the most important consideration is the fact that all laws are subject to the Namibian Constitution due to the fact that the Constitution is the supreme law of the land. This can be ascertained from Article 1(6) of the Namibian Constitution which states that, “This Constitution shall be the Supreme Law of Namibia.” Article 140(1) of the Namibian Constitution goes on to state that, “Subject to the provisions of the Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.” Thus the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971 is subject to the Namibian Constitution and its provisions. The Namibian Constitution provides for the presumption of innocence (that all accused are presumed to be innocent until proven guilty in a court of law). An accused cannot be expected to prove his or her innocence due to a burden being placed on him or her to do so by a legislative enactment. To show what I mean let us consider the following: if an accused is required to prove his or her innocence the accused is in essence presumed to be guilty until he or she proves his or her innocence. Logically such a reversal of proof is contrary to the constitutional presumption of innocence. It is thus my submission that the presumptions contained in section 10 of the Namibian Drug Law are clearly in conflict with the presumption of innocence entrenched in Article 12(1)(d) of the Namibian Constitution.

CHAPTER 4: NAMIBIAN AND SOUTH AFRICAN DRUG LAWS: A COMPARATIVE ANALYSIS

4.1 Introduction

This chapter will be a comparative analysis of the Namibian and South African drug Laws. Specific emphasis will be placed on the issue of drug trafficking, the presumptions as well as the provisions dealing with the proceeds and instrumentalities of drug offences. It has already been stated that in Namibia all drug related offences are created in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971.

4.2 A comparative analysis of the Namibian and South African Drug Laws

Although South Africa initially also made use of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act⁹³ that country repealed this Act by the Drugs and Drug Trafficking Act.⁹⁴ The repeal came about after South Africa subscribed to the United Nations Convention against Illicit Drug Traffic in Narcotics Drugs and Psychotropic Substances, which was concluded in Vienna in 1988. The Convention proposed measures relating to the suppression of drug trafficking by means of international co-operation. The prevention of the laundering of the proceeds of drug trafficking and the confiscation of the assets of persons engaged in the unlawful trafficking in drugs are some of the measures included in the United Nations Convention.⁹⁵

In more detail let us commence with the offence of money laundering. The elements of this offence are stated in Article 3(b) of the 1988 UN Convention, which reads:

⁹³ Act 41 of 1971

⁹⁴ Act 140 of 1992

⁹⁵ Jonathan Burchell and John Milton, *supra*, p30

3(1) Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

b) i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;⁹⁶

The United Nations Drugs Convention is mostly devoted to fighting organised crime in relation to drug offences, such as drug trafficking. Co-operation is mandated amongst the member states in tracing and seizing drug-related assets. Article 5 of the Convention deals with the issue of confiscation in terms of which state parties are required to confiscate the instrumentalities and proceeds of drug offences. The relevant part of Article 5 (titled “Confiscation”) provides as follows:

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

⁹⁶Article 3 (b) of the 1988 UN Convention

b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.⁹⁷

Thus State Parties are required to empower their courts or other competent authorities to order that bank, financial, or commercial records be made available or be seized. In terms of this provision any State Party may not decline to act on the ground of bank secrecy.

It is in order to give effect to the afore-stated measures contained in the 1988 UN Convention that South Africa repealed Act 41 of 1971 and replaced it with Act 140 of 1992. In contrast, Namibia still makes use of Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971, in not only dealing with drug related offences but also when dealing with the instrumentalities (any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences)⁹⁸ and proceeds of such drug related offences. Although Namibia is also a State Party to the United Nations Convention⁹⁹ the fact that South Africa repealed its drug law after having subscribed to the United Nations Convention must be an indication that the drug law still being used in Namibia, despite Namibia having ratified the United Nations Convention,¹⁰⁰ did not

⁹⁷ Article 5 of the 1988 UN Convention

⁹⁸ The term "instrumentalities" is discussed in detail in Chapter 5 on P70 of the present study

⁹⁹ As confirmed on <www.esaamlg.org/userfiles/DRUG-TRAFFICKING-REPORT.pdf> Accessed on 26 July 2013

¹⁰⁰ Ibid, p19

sufficiently give effect to the measures contained in the United Nations Convention, with particular emphasis to the laundering of the proceeds of drug trafficking and the confiscation of the assets of persons engaged in drug trafficking. Namibia has enacted legislation, being the Prevention of Organised Crime Act, Act 29 of 2004 (commonly referred to as “POCA”), dealing with money laundering as well as the instrumentalities¹⁰¹ and proceeds of offences. However, POCA does not deal specifically with drug related offences as it deals with offences in general. Thus it does not specifically give effect to the measures contained in the United Nations Convention insofar as it relates to drug related offences, more particularly drug trafficking.

In addition to that, Namibia relies on presumptions where the accused is in essence required to prove his or her innocence. These presumptions were declared unconstitutional in neighbouring South Africa as evident from the following cases, discussed in detail in the preceding chapter, where the presumptions were struck down. In *S v Bhulwana: S v Gwadiiso*¹⁰² the court struck down the presumption that a person found in possession of dagga exceeding 115 grams dealt in that dagga. Further, in the case of *S v Julies*¹⁰³ the court struck down the presumption that an accused found in possession of a prohibited or dangerous dependence-producing drug dealt in that dangerous dependence-producing drug. Although the courts are still to hear a constitutional challenge of the presumptions contained in section 10 of Act 41 of 1971 our courts have leaned towards questioning the constitutionality of these presumptions as is evident from the cases discussed in the preceding chapter.¹⁰⁴ Clearly South African courts saw that there is something fundamentally wrong with requiring an accused person to prove his or her guilt while the Constitution clearly stipulates that accused persons should be presumed innocent until proven guilty.

¹⁰¹ Supra, p57 (Refer to Footnote 98)

¹⁰² 1995 (2) SACR 748 (CC). Refer to the detailed discussion of the case on P36 of the present study

¹⁰³ 1996 (2) SACR 108 (CC). Refer to the detailed discussion of the case on P39 of the present study

¹⁰⁴ See P36 of the present study

Furthermore, in the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, Act 41 of 1971, drugs such as mandrax are not defined in the enabling Act, as opposed to the South African Drugs and Drugs Trafficking Act, Act 140 of 1992, where mandrax is specifically listed as a prohibited dependence-producing substance. This is done in Part III of Schedule 2 where mandrax is specifically mentioned and listed as follows, “Methaqualone, including Mandrax, Isonox, Quaalude, or any other preparation containing methaqualone and known by any other trade name.” In contrast, under Namibian law the drug called methaqualone is prohibited and the State must prove, ordinarily through scientific evidence, that the mandrax contained methaqualone. Methaqualone is the prohibited substance, not mandrax. Hence, the state must prove that the mandrax contained the prohibited substance methaqualone. It is clear from the cases of *S v Iipumbu*¹⁰⁵ and *S v Maniping; S v Thwala*¹⁰⁶ that the state erred in charging the accused with dealing in or being in possession of mandrax, whilst such is not a prohibited dependence-producing drug unless it is scientifically proven that it contained methaqualone, and the result of such error was that the convictions and sentences were set aside in all these cases.

In the case of *S v Iipumbu* the appellant appeared in the Oshakati Magistrate’s Court charged with contravening several provisions of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. Although he pleaded not guilty the appellant was convicted, after evidence was led, on both the main count as well as its alternative. He was sentenced to 5 years imprisonment on the main count and 4 years imprisonment on the alternative count, with the court ordering that the sentences run concurrently. The appellant lodged an appeal against both the conviction and sentence in the High Court. In terms of the

¹⁰⁵ 2009 (2) NR 546 (HC)

¹⁰⁶ 1994 NR 69 (HC)

charge annexures the accused was charged with a count of dealing in dagga (contravening Section 2 (a) of Act 41 of 1971), alternatively possession or use of dagga (contravening Section 2 (b) of Act 41 of 1971). The drugs involved in respect of this count and its alternative were 594 grams of dagga.

The appellant was charged in the second annexure with dealing in a potentially dangerous dependence-producing drug (contravening section 3(a) of Act 41 of 1971) alternatively, for possession or use of a potentially dangerous dependence-producing drug (contravening section 3(b) of Act 41 of 1971). The drugs referred to in these charges are two and a half pieces of mandrax and 594 grams of pure cannabis. The counsel for the respondent drew the court's attention to the fact that the appellant was wrongly charged under section 3 of Act 41 of 1971 which deals with potentially dangerous dependence producing substances as set out in the Schedule under Part III of the same Act. Cannabis and mandrax are not listed under Part III. The appellant should have been charged under section 2 of the Act. The court agreed with the submissions made. The court cautioned that the word "Mandrax" does not appear under Part II and that prosecutors should refrain from referring thereto as if it was a dangerous dependence-producing drug. The prohibited drug is called methaqualone and the State must prove that what the accused dealt in, used or had in his possession contained methaqualone, generally through scientific evidence. It was the finding of the court that there was no evidence that the appellant was either found in possession or dealing in the prohibited dependence-producing drug called Methaqualone. The court upheld the appeal against conviction and sentence.

In the matter between *S v Maniping*; *S v Thwala* the two cases were set down for review and the court heard arguments on the following questions:

- (1) When an accused is charged with a contravention of either s 2(a) or s 2(b) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 involving Mandrax tablets and he/she pleads guilty, will it suffice if he/she admits that the substance found was Mandrax or does the magistrate have to go further in his s 112 (1) (b) questioning?
- (2) Would a certificate of a scientific analysis be required, the content and result of which the accused can then admit in all instances?
- (3) Would it suffice if the accused admits that he/she has specific knowledge of Mandrax and that the relevant tablets are indeed Mandrax?

In the case of *Benjamin Maniping* the accused appeared before the Swakopmund Magistrate's Court on a charge of unlawfully possessing a prohibited dependence-producing substance, being 356 Mandrax tablets. Pursuant to his guilty plea he was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977¹⁰⁷. After the questioning he was convicted and sentenced a fine of N\$2000-00 or 2 years imprisonment with a further 2 years imprisonment conditionally suspended. In the case of *Khanyisile Thwala*, the accused also appeared before the Swakopmund Magistrate's court where she pleaded guilty to a charge of possessing a prohibited dependence-producing substance, being three Mandrax tablets. She was questioned in terms of Section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977. After the questioning she was convicted and sentenced to a fine of N\$600-00 or 6 months imprisonment with a further 6 months imprisonment conditionally suspended. It was the reasoning of the court that in both cases the charge made no mention of Methaqualone and referred only to Mandrax. Although under the South African the Drugs and Drug Trafficking

¹⁰⁷ In terms of this section the court questions the accused, after a guilty plea on a serious charge, to establish whether the accused indeed admits the allegations in the charge as well as all the elements of the offence. If the court is satisfied, at the end of the compulsory questioning, that the accused has admitted all the allegations in the charge as well as the elements of the offence that the court will find the accused guilty and convict the accused.

Act, Act 140 of 1992, Mandrax is classified as a prohibited dependence-producing drug, no such provision is made under the Namibian Act. In Namibia the substance which is prohibited is referred to as Methaqualone. The court held that the charges should have referred to Methaqualone. The wording of the charges as they stood did not disclose an offence and based on that ground alone the court decided that the convictions must be set aside.

In dealing with the questions previously stated the court dealt with them on the assumption that the charges disclosed an offence. In the view of the court, a court must have material before it, before it can determine the dependability of an admission made by the accused. The court further reasoned that in a case where the charge is one of dealing in or possession of a prohibited drug common sense dictates that it is almost inevitable that an admission made as to the nature of the substance which is subject to the charge will be based on previous illegal association with that substance. The normal course to take in such a case is to refrain from asking any further questions. The State must then produce an analyst's certificate or adduce other acceptable evidence of the nature of the charge. In conclusion the court held that the cases must be disposed of on the basis that the charges did not disclose an offence. The conviction and sentence in each case were set aside.

In the case of *S v Majiedt*¹⁰⁸ the accused, a police officer, was charged with the theft of 23 899 Mandrax tablets, a contravention of section 2(a) of Act 41 of 1971, namely dealing in the same Mandrax tablets containing methaqualone, and, alternatively, of being in possession of the said Mandrax tablets. The alleged Mandrax tablets had been stolen from the forensic laboratory in Windhoek. The tablets had been brought to the forensic laboratory for scientific

¹⁰⁸(CC 27/96) [1996] NAHC 61

analysis after being confiscated by the Drug Law Enforcement Unit from a person arrested in an operation of the unit at Bagani. The issue was not whether the tablets were Mandrax tablets, but whether the tablets contained methaqualone as there are Mandrax tablets that do not contain this harmful drug. The learned judge was unable to find that the tablets were Mandrax since there was evidence that the stolen tablets were tampered with and, as such, the court could not conclude that the tablets tested by the forensic scientist were the tablets that had been stolen. In the end the accused was convicted merely of the theft of two boxes containing an unknown quantity of tablets as well as an attempt to contravene section 2(a) of Act 41 of 1971 of dealing in two boxes containing an unknown quantity of tablets.

The likelihood that the outcomes in the afore-mentioned cases would have been different had Mandrax been specifically listed in the Namibian Drug Act is high. By way of an illustration let us consider the case of *Hanifa Bebee Khan v The State*¹⁰⁹ where the appellant appealed against her conviction of dealing in two hundred and forty three mandrax (methaqualone) tablets as well as being in possession of one hundred and fifty grams of cannabis (dagga) in the Magistrates Court. The appellant was in a tuck shop when the police arrived and it was in the same tuck shop that the police discovered the drugs after receiving information to that effect. The information received was that the drugs were stored under the floor on top of which an empty crate was placed. The accused moved the crate from the floor, which had been described, lifted a wooden panel in the floor and produced a yellow plastic packet and a clear plastic packet, which respectively contained the mandrax tablets and the dagga. The court had to deal with the issue of whether the guilt of the accused was established beyond reasonable doubt if the evidence of the production of the drugs by the appellant, which was

¹⁰⁹ An unreported case of the Kwazulu-Natal High Court, Pietermaritzburg, Republic of South Africa, Case No. AR 55/10, Appeal judgement delivered on 07 July 2010 by Judge Swain

elicited by the questioning of the police, was excluded. If the guilt of the appellant was not established, then clearly the admission of such evidence would be prejudicial to the appellant.

The court was satisfied with the evidence of the two state witnesses as to the location where the drugs were hidden, which was in accordance with the detailed information that they had been given. The court held that the appellant had the necessary physical control over the drugs as well as the intention to exercise such control. The court was thus satisfied that even if the evidence of the production of the drugs by the appellant is excluded, the remaining evidence still established her guilt beyond reasonable doubt. The admission of the evidence of her production of the drugs, would consequently not be prejudicial to the accused. The appeal was subsequently dismissed, meaning that the conviction and sentence of the trial court stood. In the South African case the fact that the tablets found were Mandrax tablets was not an issue. It is not far-fetched to conclude that this may be attributed to the fact that the drug Mandrax is specifically listed in the South African drug law.

Added to that, there is a difference in the penalty clauses between the Act applicable in Namibia and the Act applicable in South Africa. In Namibia the maximum sentence to be imposed is 15 years imprisonment whereas in South Africa the maximum sentence to be imposed is 25 years imprisonment.¹¹⁰ More often than not maximum sentences are enacted by the legislature in order to curb a particular offence. During the interviews there was a call from the prosecution to have the sentences prescribed by the Namibian Drugs Act increased and to do away with the option of a fine.¹¹¹ Although this suggestion may not curb the increase in incidents involving drugs, it may have a deterrent effect on those who transgress the drug law as well as those who have the intention of transgressing it.

¹¹⁰See *S v Sibonyoni*, *supra*

¹¹¹Field Note 11, 12, 13, 14, 15 and 16

The South African Drug Law also makes provision for the police to exercise powers in respect of entry, search, seizure and detention. Conversely, the Namibian Drug Law does not make such a provision except for the detention and interrogation of certain persons. It then comes as no surprise that magistrates, prosecutors, defence attorneys and members of the Namibian Drug Law Enforcement Unit experience difficulty when it comes to issues of entry, search and seizure in relation to drug related offences. Although this issue will be discussed more fully at a later stage¹¹² suffice to say that lack of guidelines with respect to the issues of entry, search and seizure results in the afore-mentioned parties resorting to seek solutions in other laws, predominantly the Criminal Procedure Act. However, this approach is problematic insofar as the provisions of the Criminal Procedure Act are general and not tailor-made for drug offences.

Another dissimilarity worth considering is the fact that South Africa has members of the police drug unit stationed at airports such as at the Johannesburg international airport. This can be confirmed from the case of *Muholi v The State*¹¹³ where members of the South African Drug Unit intercepted a parcel meant for the accused at the Johannesburg international airport. Hidden in the side of the parcel were packets of a substance that was subsequently proved to be heroin weighing 494.3 grams with a market value in excess of R200 000-00.

In contrast to the South African position where members of the drug unit are stationed permanently at airports, in Namibia, members of the Drug Law Enforcement Unit only conduct operations from time to time at places such as the airports,¹¹⁴ which are one of the ports of entry of drugs into Namibia. Comparing the two approaches it is more effective for

¹¹² Chapter 5, p74

¹¹³ [2006] SCA 44 (RSA)

¹¹⁴ Field Note 32

members of the drug unit to be stationed at as many ports of entry as possible. They will need to have the required skills and expertise to recognise drug activities, as well as being able to profile drug smugglers and or mules and being able to identify the different types of drugs. These are activities that immigration officials and the like might not be able to detect.

4.3 Summary

It is clear that there is a benefit to comparing the South African Act with the Act of Namibia. This is especially with regard to the issue of the constitutionality of the section 10 presumptions. It is a fact that South African case law is no longer binding in Namibia. However, it remains persuasive and as such the cases where the South African courts pronounced themselves on the constitutionality of the presumptions their judgements have persuasive value in Namibia. A further aspect where Namibia can emulate South Africa is with respect to the obligations contained in the United Nations Convention. Practical lessons can also be learnt from South Africa such as, for example, permanently stationing members of the Drug Law Enforcement Unit at as many ports of entry into Namibia as possible which, in turn, will assist in the fight against offences involving drugs, especially drug trafficking.

CHAPTER 5: THE NAMIBIAN ABUSE OF DEPENDENCE-PRODUCING SUBSTANCES AND REHABILITATION CENTRES ACT AND THE INSTRUMENTALITIES AND PROCEEDS OF DRUG OFFENCES

5.1 Introduction

The aim of this chapter will be to examine what happens to the proceeds of drug offences in Namibia. In other words, this chapter will examine how the issue of the instrumentalities¹¹⁵ and proceeds of drug offences is dealt within the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. Section 8 of the Namibian Act provides for the forfeiture of certain items to the State after the accused has been convicted. The section provides as follows:

Notwithstanding anything to the contrary in any law contained, the court convicting any person of an offence under this Act shall declare-

- (a) any dependence-producing drug or any plant from which such drug can be manufactured, which was used for the purpose of or in connection with the commission of the offence or which was found in the possession of the convicted person;*
- (b) any vehicle, vessel, aircraft or receptacle or other thing which was used for the purpose of or in connection with the commission of the offence or for the purpose of conveying or removing any dependence-producing drug or any plant referred to in paragraph (a) which was used for the purpose of or in connection with the commission of the offence, or the rights of the convicted person to such vehicle, vessel, aircraft, receptacle or thing;*
- (c) in the case contemplated in section 2 (a) or (c), 3 (a) or 6, any immovable property which was used for the purpose of or in connection with the commission of the offence, or the rights of the convicted person thereto;*
- (d) if it is a second or subsequent conviction under section 2 (a) or (c), any money found in the possession of the convicted person or which the court is satisfied is standing to his credit in any*

¹¹⁵ supra, p57 (Footnote 98)

account with any banking institution, building society or financial institution as defined, respectively, in the Banks Act, 1965 (Act 23 of 1965), the Building Societies Act, 1965 (Act 24 of 1965), or the Financial Institutions (Investment of Funds) Act, 1964 (Act 56 of 1964), or which is standing to his credit in any other savings account established by law, to be forfeited to the State.

(2) A declaration of forfeiture under subsection (1)(b) or (c) shall not affect the rights which any person other than the convicted person may have to the vehicle, vessel, aircraft, receptacle, thing or immovable property concerned, if it is proved that he did not know that the vehicle, vessel, aircraft, receptacle, thing or immovable property was used or would be used for the purpose of or in connection with the commission of the offence concerned or that he could not prevent such use.

(3) The provisions of section 360(4) and (5) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), shall mutatis mutandis apply to any declaration of forfeiture under this section.

(4) If any immovable property is declared to be forfeited under subsection (1)(c), the registrar or clerk of the court making the declaration shall transmit the title deeds of such property to the registrar of deeds concerned who shall endorse a note on the title deeds of such property to the effect that the said property has so been declared forfeited.

(5) Any person who has the possession or custody of any title deed or bond required by a registrar or clerk of the court for the purposes of any endorsement in terms of subsection (4), shall deliver such deed or bond to the registrar or clerk of the court within a period of fourteen days after the registrar or clerk of the court has demanded it in writing.

(6) If any such person notifies the registrar or the clerk of the court in writing at the time of the delivery of such title deed or bond that he has a right of retention in respect thereof, the registrar or clerk of the court, as the case may be, shall return such title deed or bond to such person as soon as it is no longer required by him for the purposes of subsection (4).

(7) Any person who fails to comply with the provisions of subsection (5), shall be liable for the costs which the registrar or the clerk of the court concerned may incur in obtaining an order of the court for the production of such deed or bond.¹¹⁶

¹¹⁶Section 8 of the Namibian Drugs Act

Therefore, after a second or subsequent conviction any money found on the convicted person or standing to his credit may be declared forfeited to the State. One may, based on this provision argue that, in its own way, the Act does provide for the confiscation of the instrumentality and proceeds of crime.¹¹⁷ However, it is still arguable whether these provisions sufficiently deal with the law on the proceeds of crime. Should the offender be a repeat offender in order for the fruits of his/her unlawful conduct to be declared forfeited to the State? One also wonders whether the provision, supposedly dealing with a technical issue such as the law on the proceeds of crime, is perhaps not too vague. These are but some of the issues warranting a more detailed discussion.

5.2 The profitability of the illicit drug trade

The importance of the forfeiture of the instrumentalities¹¹⁸ and proceeds of drug offences is vested in the undeniable fact that those involved in the illicit drug trade generate income from such trade. The drug trade has predominantly high value and is one of the largest sources of illicit funds worldwide. On an international level the illicit drug market generates millions, if not billions of dollars from the illicit drug trade. In fact the United Nations Office on Drugs and Crime (UNODC) 2010 World Drug Report¹¹⁹ estimates the profits derived from the illegal narcotics trade to amount to US\$600 billion¹²⁰ per annum.

Let us consider this statement by way of illustration:

At current levels, world heroin consumption (340 tons) and seizures represent an annual flow of 430-450 tons of heroin into the global heroin market. Of that total, opium from Myanmar and the Lao People's Democratic Republic [sic] yields some 50 tons, while the rest, some 380 tons of heroin and morphine, is produced exclusively from Afghan opium. While approximately 5 tons are consumed and

¹¹⁷ Barry Z.B, supra, p9 (Also refer to Footnote 98 on p57)

¹¹⁸ supra, p57 (Footnote 98)

¹¹⁹ United Nations Office on Drugs and Crime, supra, p31

¹²⁰ My own emphasis

seized in Afghanistan, the remaining bulk of 375 tons is trafficked worldwide via routes flowing into and through the countries neighbouring Afghanistan. The Balkan and northern routes are the main heroin trafficking corridors linking Afghanistan to the huge markets of the Russian Federation and Western Europe. The Balkan route traverses the Islamic Republic of Iran (often via Pakistan), Turkey, Greece and Bulgaria across South-East Europe to the Western European market, with an annual market value of some \$20 billion¹²¹. The northern route runs mainly through Tajikistan and Kyrgyzstan (or Uzbekistan or Turkmenistan) to Kazakhstan and the Russian Federation. The size of that market is estimated to total \$13 billion¹²² per year.¹²³

Thus, it is little wonder that those that profit from the illicit drug trade have substantial assets. Some of these assets are used to commit further drug offences and the proceeds of those offences enrich those involved in the illicit drug trade. Thus, those involved in the illicit drug trade derive some or other benefit from it and “what is being regarded as a benefit is not, of course, the drug itself but the money paid to buy the drug on the basis that the money was derived from previous drug trafficking.”¹²⁴ An efficient tool in the fight against serious and organised crime, such as drug trafficking, where the main objective is to acquire benefit, is targeting the proceeds of such a crime.

5.3 The forfeiture procedure

Having said that, it is worth noting that the provisions of section 8 of the Namibian Drug Act only become operational upon conviction. Thus, the accused must first be found guilty and convicted on a drug offence by a competent court of law before the provisions in question can be of any assistance as far as the forfeiture of the instrumentalities¹²⁵ and proceeds of drug offences are concerned. In addition to that, the accused must be a repeat offender before the

¹²¹ My own emphasis

¹²² My own emphasis

¹²³ United Nations Office on Drugs and Crime, *supra*, p31

¹²⁴ Fortson R, 1996, *The Law on the Misuse of Drugs and Drug Trafficking Offences*, Third Edition, Sweet & Maxwell, p311

¹²⁵ *supra*, p57

actual confiscation and forfeiture can be made. Section 8 (1) of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, specifically states as follows, “Notwithstanding anything to the contrary in any law contained, the court convicting any person of an offence under this Act shall declare-”. Thus, the accused must first be convicted before the provisions of section 8 can be invoked. We will consider this fact in detail at a later stage. For now let us consider the definitions of the relevant terms and the process of the confiscation of the instrumentalities¹²⁶ and proceeds of drug offences. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime¹²⁷ defines “proceeds” as any economic advantage, derived from or obtained, directly or indirectly. It may consist of any property and the term “property” includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property. “Instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences. “Confiscation” is defined as a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.

The term “freezing” or “seizure” is defined in the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism¹²⁸ and means temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority. The term “forfeiture” could be used for a measure of confiscation in civil proceedings, but also for the confiscation in criminal proceedings.

¹²⁶ Ibid

¹²⁷ 1990 Convention

¹²⁸ 2005 Convention

The process of confiscation involves the identification of the property, the tracing of the property and thereafter the freezing or seizure of such property. Firstly let us consider the issue of identification and tracing of the property. What do these terms encompass? The term “tracing” is defined as follows, “...tracing is a term applied to a set of rules for identifying property to which, or to share in or a charge over which, a claim is made.”¹²⁹ The Unit Commander of the Drug Law Enforcement Unit of the Namibian Police¹³⁰ indicated that they do not experience much difficulty in identifying property used in the commission of the offence. The difficulty is more in the tracing of the property that forms part of the proceeds of such drug offences. The Unit Commander also conceded that generally they lacked the expertise to deal with the instrumentalities and proceeds of drug related offences, especially the financial investigation. Not only do they not have the technical “know how” but they work mostly in the field and not in an office environment, an environment where financial investigations are mostly conducted. The suggestion from the Unit Commander was that the Drug Law Enforcement Unit be assisted in the financial investigation by members of the Commercial Crime Unit of the Namibian Police or alternatively that some of his staff members be trained in order to enable them to conduct a financial investigation.

The importance of a financial investigation is described as follows by Golobinek:

The financial investigation is a part which is conducted in parallel with the criminal investigation and is aimed at discovering the proceeds from crime, identifying the property that can be confiscated and temporarily securing (seizing) this property to allow future final confiscation. While the goal of the criminal investigation is to detect a criminal offence and the perpetrator and to collect the evidence for the criminal procedure, the goal of the parallel financial investigation is to confiscate proceeds from crime. Therefore it is important that a financial investigation begins at an early stage of the criminal investigation, as the outcome of both can be important in achieving their respective

¹²⁹ Birks P.B.H (Ed), *Laundering and Tracing*, 1995, 1st Edition, Clarendon Press, p31

¹³⁰ Field Note 31

*goals. Successful detection and temporary seizure of property prevents its hiding and disposal and allows for an efficient final confiscation at the end of the criminal procedure.*¹³¹

Both the criminal investigation and financial investigation are of importance in relation to the confiscation of the instrumentalities and proceeds of drug offences. It then follows that those responsible for such investigations must have some degree of expertise to carry out their investigations and ensure that the objectives of both these investigations are attained. The suggestions made by the Unit Commander of the Drug Law Enforcement Unit of the Namibian Police are thus in that context not far-fetched.

It is only after the investigations are complete that the actual forfeiture process can be set into motion. In addition to the identification and tracing of the property a criminal conviction is necessary before the property can be forfeited to the state. Interviews have revealed that the forfeiture being reliant on a conviction has its inherent challenges. For one thing the property can be disposed of before the trial is finalised. In Namibian courts the trial process can be quite lengthy especially in the lower courts (Magistrates Courts) where a matter cannot be set down continuously like in the Regional Court or the High Court. In addition to that defences are most often raised against the forfeiture of property used in the commission of a drug related offence, like a house, or property found in the possession of the offender, such as a car or money. The defence often raised being the “innocent owner” defence. This is where the ownership of the property is claimed by someone other than the drug offender and such persons further claim that they had no knowledge that their property was being used to commit a drug related offence. This person is able to prove such ownership and once such proof is adduced, in addition to the lack of knowledge that such property was used to commit a drug related offence, the property can no longer be the subject of a forfeiture order.

¹³¹Golobinek R, August 2006, *Financial Investigations and Confiscation of Proceeds from Crime: Training Manual for Law Enforcement and Judiciary*, Council of Europe, p25

5.4 Search, Seizure and Forfeiture

Another issue raised by the Drug Law Enforcement officials, defence attorneys and prosecutors alike, is that of search and seizure. This includes the actual drugs as well as any other property, such as money and a motor vehicle. The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, does make provision for the issue of search and seizure in section 11 where it is stated:

(1) If any police officer suspects upon reasonable grounds any dependence-producing drug or a plant from which such drug may be manufactured, to be on or in a place, vessel, vehicle or aircraft, and that a contravention of this Act is being or has been committed by means or in respect of such drug or plant, such police officer may at any time without a warrant enter and search such place, vessel, vehicle or aircraft and seize such drug or plant, or may search and interrogate any person whom he may find or in such place, vessel, vehicle or aircraft with a view to obtaining from such person information concerning the presence of any dependence-producing drug or such plant or the cultivation of such plant on or in that place or elsewhere.

(3) Any article, substance or plant so seized shall be dealt with as if it had been seized under the provisions of the said Criminal Procedure Act or, if seized in the territory, as if it had been seized under the Criminal Procedure Ordinance, 1963 (Ordinance 34 of 1963), of the territory.¹³²

However, the parties mentioned above who were interviewed opined that the provisions of Section 11 of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, are vague and not extensive enough to deal with a complex issue such as search and seizure (an issue that is often a source of legal disputes between the different role players during the course of a criminal trial). As a result thereof the role players often make use of the provisions contained in the Criminal Procedure Act, Act 51 of 1977¹³³ to supplement the provisions of the Abuse of Dependence Producing Substances and

¹³²Section 11 of the Namibian Drug Act

¹³³Hereinafter referred to as the 'CPA', unless the context indicates otherwise

Rehabilitation Centres Act, Act 41 of 1971 in respect of the issue of search and seizure. Let us consider the relevant sections of the Criminal Procedure Act, Act 51 of 1977. Section 20 (State may seize certain articles) reads that:

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;*
- (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or*
- (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.¹³⁴*

Section 21 (Article to be seized under search warrant) goes on to state that:

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued-

- (a) By a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or*
 - (b) By a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.*
- (1) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.*
- (2) (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night.*

¹³⁴Section 20 of the CPA

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person of like authority.

- (3) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.¹³⁵*

The last relevant section dealing with the issue of search and seizure, being section 22 which deals with circumstances in which article may be seized without search warrant, stipulates that:

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20–

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or*
- (b) if he on reasonable grounds believes–*
- (i) that a search warrant will be issued to him under paragraph (a) or section 21 (1) if he applies for such warrant; and*
- (ii) that the delay in obtaining such warrant would defeat the object of the search¹³⁶*

With respect to the forfeiture of a seized article the section relevant to the present study is section 35 (Forfeiture of article to State) which advocates that:

(1) A court which convicts an accused of any offence may, without notice to any person, declare–

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or*
- (b) if the conviction is in respect of an offence referred to in Part I of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence*

¹³⁵Section 21 of the CPA

¹³⁶Section 22 of the CPA

*in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act, forfeited to the State.*¹³⁷

On the one hand the general view of the state prosecutors¹³⁸ was that the issue of search and seizure normally drag out a trial as it is one of the technicalities that defence attorneys focus on and once the challenge to the search and seizure of the property succeeds the whole case of the prosecution falls flat, including the possibility of a conviction and subsequent forfeiture of the property. The investigators of the Drug Law Enforcement Unit¹³⁹ shared the sentiments of the state and advanced that in most cases there is limited time before the drugs are moved from the location where they are kept. Such information of where the drugs are kept is normally provided by informants. The fact that the drugs may be moved makes every second count and necessitates the investigators having to act without first obtaining a search warrant. Thus, in most cases the drug law enforcement officials rely on the afore stated provisions of Section 22 of the CPA.

On the other hand, the argument of the defence attorneys¹⁴⁰ is that the provisions of the CPA dealing with the issue of search and seizure are not properly implemented by the officials of the Drug Law Enforcement Unit. Furthermore, the constitutional rights of their clients are being violated, particularly the right against self incrimination and the right to remain silent. The relevant part of Article 12 (1) (f) of the Namibian Constitution outlines such a right as follows, “No persons shall be compelled to give testimony against themselves.” Thus an accused can never be forced to provide answers that may incriminate himself/herself and the accused always has the right to remain silent. An accused who knows that he or she has drugs in his or her possession is already in a compromised position and by allowing a search will

¹³⁷Section 35 of the CPA

¹³⁸Fieldnote 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20

¹³⁹Fieldnote 32

¹⁴⁰Fieldnote 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30

inevitably incriminate him or herself. Doubt exists as to whether or not the persons are informed of their right to remain silent and not to incriminate themselves. Obviously the contention of the police officers is that they do explain all the relevant rights, including the right against self-incrimination. However, the defence attorneys often attack this particular contention as it is their argument that either the rights are not explained at all or are explained incorrectly to such an extent that an accused is unable to understand such rights and is thus not able to exercise his or her rights effectively. At the end of the day even the CPA is subject to the Namibian Constitution which provides for the right against self-incrimination and the right to remain silent.

These are just some of the problems encountered when making use of the forfeiture provision of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. In my opinion there is merit in the contention of the state, defence attorneys and the members of the Drug Law Enforcement Unit of the Namibian Police. If the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 was to make proper provision for the issue of search and seizure the problems encountered when making use of the provisions of the CPA may be mitigated. The law of search and seizure is complex and the manner in which drugs and property used in the commission of drug offences and the property derived from drugs is searched and seized is an aspect that is of vital importance that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 fails to address properly. The provisions of the Criminal Procedure Act are general, perhaps too general, to properly deal with the issue of search and seizure in relation to drug offences specifically.

5.5 Money Laundering and Forfeiture

Money derived from illegal activities is often referred to as “dirty money”. It is money that needs to be cleaned in order to hide its source of origin (the illegal activity). However, the property derived from illegal activities is not limited to money alone. Simply put the process of “cleaning” property by using it in legal transactions in order to hide its source of origin is referred to as “money laundering”.

What is money laundering in more detail? The term “money laundering” is defined as follows:

Money laundering may be described in fairly general terms as a series of transactions which attempts to conceal the true origin and ownership of property obtained by unlawful means in such a way that it appears to have been derived from legitimate sources. In more detailed and technical language, Article I of the Money Laundering Directive defines money laundering as intentional conduct comprising:

the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.¹⁴¹

¹⁴¹Birks P.B.H (Ed), supra, p 95

Now that we know what the term “money laundering” encompasses let us consider what its relevance is to drug related offences, predominantly drug trafficking. Drug traffickers adopt complex and sophisticated methods in an attempt to hide the proceeds derived from illicit drug trafficking. These methods are as diverse as ingenuity permits. Most drug traffickers will launder their proceeds through the purchase of real estate and luxury vehicles. Therein lies the link between drug trafficking and money laundering. The combating of drug trafficking and money laundering is an international concern. As evidence of that let us consider the following:

Sustained international interest in money laundering and the closely related issue of the confiscation of the proceeds of crime arose in the 1980's primarily within a drug trafficking context. During the early nineties, the prevention of money laundering evolved into an important foreign police and financial management priority in both the major and minor financial centres throughout the world. Many governments have already put controls in place or are in the process of strengthening controls to counter a potential threat to both the integrity and stability of their financial systems, and increasingly for certain countries, the threat to political and social stability in that particular country.¹⁴²

In addition to that The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in its report states that,

Countries within the region have realized the negative effect of drugs and the need for international cooperation in the fight against DT (Drug Trafficking). This is demonstrated by the membership of all ESAAMLG member countries either EAPCCO (Kenya, Tanzania, Uganda) or SARPCCO (Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and

¹⁴²Journal of Contemporary Roman Dutch Law, 1999, Volume 62, No 1-4, P89

Zimbabwe) which are committed to the fight against transnational crimes and in particular DT (Drug Trafficking) and ML (Money Laundering).¹⁴³

Money laundering is similar to drug trafficking insofar as it is also a process that transcends borders and operates on an international scale. In Namibia money laundering is criminalised in the Prevention of Organised Crime Act, Act 29 of 2004 (commonly referred to as “POCA”).¹⁴⁴ This Anti Money Laundering Act came into operation in 2009. In terms of POCA money laundering “means doing any act which constitutes an offence under sections 4 and 6.”¹⁴⁵

The relevant sections with respect to the issue of money laundering in POCA are stipulated as follows:

CHAPTER 3-OFFENCES RELATED TO MONEY LAUNDERING-Disguising unlawful origin of property

4. Any person who knows or ought reasonably to have known that property is or forms part of proceeds of unlawful activities and –

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any act in connection with that property, whether it is performed independently or in concert with any other person,

and that agreement, arrangement, transaction or act has or is likely to have the effect-

(i) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or

¹⁴³The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), *Laundering the Proceeds of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances*, 08 September 2011. Available at <www.esaamlg.org/userfiles/DRUG-Trafficking-REPORT.pdf> Last accessed on 30 April 2013

¹⁴⁴Hereinafter referred to as “POCA”, unless the context indicates otherwise

¹⁴⁵Chapter 1 of the Prevention of Organised Crime Act, Act 29 of 2004

(ii) *of enabling or assisting any person who has committed or commits an offence, whether in Namibia or elsewhere-*

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of the offence,

commits the offence of money laundering.

Assisting another to benefit from proceeds of unlawful activities

5. A person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into an agreement with anyone or engages in any arrangement or transaction whereby –

(a) the retention or the control by or on behalf of that other person of the proceeds of unlawful activities is facilitated; or

(b) the proceeds of unlawful activities are used to make funds available to that other person or to acquire property on his or her behalf or to benefit him or her in any other way,

commits the offence of money laundering.

Acquisition, possession or use of proceeds of unlawful activities

6. Any person who-

(a) acquires;

(b) uses;

(c) has possession of; or

(d) brings into, or takes out of, Namibia,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.¹⁴⁶

¹⁴⁶ Chapter 3 of the Prevention of Organised Crime Act, Act 29 of 2004

When having regard to the definition accorded to money laundering, those persons who act on behalf of drug traffickers to, for example, acquire fixed property, like a house, from the proceeds of the illicit drug trade commit the offence of money laundering. This is all the more so when the objective standard is applied to a person in their position. In other words, if a reasonable person in their position would have known or ought reasonably to have known that the property involved in the transaction was the proceeds of unlawful activities then those acquiring property become criminally liable under POCA. Drug traffickers will often make use of others to acquire property with their ill-gotten money and in most instances those acting on behalf of drug traffickers are then handsomely rewarded for their part. However, if those persons were to become aware of the possible consequences of their involvement they would probably be discouraged to assist those involved in the illicit drug trade for fear of being charged and prosecuted on the strength of the provisions contained in POCA.

With respect to the issue of forfeiture, the prosecutors indicated during interviews¹⁴⁷ that they are encouraged to make use of POCA whenever they seek a forfeiture order, be it a provisional one or a final one. The problem with the forfeiture provisions of the Namibian Drug Act and the CPA is that forfeiture is dependent on a criminal procedure. In contrast section 50 (1) of POCA states that, “For the purposes of this Chapter all proceedings under this Chapter are civil proceedings and not criminal proceedings.” Thus this section expressly provides that the proceedings under POCA are civil and not criminal proceedings. In the context of confiscation and forfeiture it would not be necessary to first secure a conviction before the forfeiture of the instrumentalities and proceeds of illegal activities is sought.

Chapter 1 of POCA, which contains the definitions and interpretations, states that the instrumentality of an offence “means any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this

¹⁴⁷ Held during 18 June 2013 until 21 July 2013

Act, whether committed within Namibia or elsewhere”. Chapter 1 of POCA goes on to state that the proceeds of unlawful activities:

means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity.

The aim of confiscation of the instrumentalities and proceeds of drug offences is to ensure that the drug offender does not profit from his or her unlawful activity. If there are no profits due to the proceeds being taken away it may act as deterrence because the drug offender may realise that the risks involved are not worth committing the offence. Furthermore the means to fund further criminal activity will no longer be there since such means would have been confiscated and forfeited.

With respect to civil forfeiture, mentioned earlier, POCA provides as follows:

PART 2-PRESERVATION OF PROPERTY-Preservation of property orders

51. (1) The Prosecutor-General may apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court must make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is-

(a) an instrumentality of an offence referred to in Schedule 1; or

(b) the proceeds of unlawful activities,

and the court is satisfied that that information shows on the face of it that there are reasonable grounds for that belief.

(3) When the High Court makes a preservation of property order it must at the same time make an order authorising the seizure of the property concerned by a member of the police, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) must be dealt with in accordance with the directions of the High Court.¹⁴⁸

Civil forfeiture can be used to forfeit a criminal benefit obtained by means of unlawful activities, which activities can, when regard is had to the present study, be drug related offences. In addition to that the instrumentality and property that aided the commission of the offence can be forfeited. It was already mentioned that under the CPA and the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 that provides for criminal confiscation the person must first be convicted of an offence before any forfeiture of the property can be affected. In contrast, with POCA no such conviction, much less prosecution, is required for property that is the instrumentality or proceeds of unlawful activities to be forfeited. It is thus clear that POCA makes better provision for the law of forfeiture than the CPA and the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 combined.

However, even POCA is not without its defects. Let us by way of example consider the case of *Martin Shalli v The Prosecutor-General*¹⁴⁹. In this case the applicant (Martin Shalli) was a former High Commissioner of Namibia to the Republic of Zambia between 2005 and 2006. After having served in Zambia he was appointed the Head of the Namibian Defence Force in

¹⁴⁸ Part 2 of the Prevention of Organised Crime Act, Act 29 of 2004

¹⁴⁹ An unreported case of the High Court of Namibia, Main Division, Case No POCA 9/2011, heard on 23 February 2012 and judgement delivered on 02 May 2012 by Van Niekerk, J

2006. He retired with the rank of Lieutenant-General in January 2011. On 30 September 2011 the respondent (The Prosecutor-General) obtained a preservation of property order against the applicant in terms of section 51 of POCA. The preservation order was in relation to an amount of USD359 526.27 held at Standard Chartered Bank in Lusaka Zambia in the name of the applicant and USD 1 389.00 held in the account of another person which the respondent claimed was being held on behalf of the applicant.

The applicant argued that the prosecutor, who had acted on behalf of the respondent during the application for a preservation order, was not an admitted legal practitioner in Namibia. The reason why the appearance of such person was problematic was that the proceedings under section 50 (1) in Part 1 of POCA were civil and not criminal proceedings. The respondent asked the court to ratify or condone the appearance of the public prosecutor who appeared on behalf of the applicant at the hearing of the preservation of property application. The Prosecutor-General (PG) admitted that the public prosecutor who acted on her behalf when the preservation order was obtained was not an admitted legal practitioner. At the time the PG had held the *bona fide* but mistaken belief that such person was empowered by the provisions of Article 88(2)(e) of the Namibian Constitution¹⁵⁰ to delegate authority to a public prosecutor who was not an admitted legal practitioner to appear in court in preservation and forfeiture application under POCA.

On the other hand it was argued on behalf of the applicant that the issue of legal process, specifically in application proceedings, signed by persons not admitted as legal practitioners to be void *ab initio*. It was further submitted that on the basis of the afore stated the short answer to the condonation/ratification application is that the original preservation application is null and void *ex tunc* and not capable of condonation. It was the reasoning of the court that

¹⁵⁰Which reads, "The powers and functions of the Prosecutor-General shall be: to perform all such other functions as may be assigned to him or her in terms of any other law."

although all irregularities do not necessarily have a vitiating effect and that in general the context in which irregularities occur is a relevant consideration, the irregularities under consideration in the present case were fatal. The court held that the fact that the notice of motion was signed by a person not admitted as a legal practitioner was a fatal irregularity which rendered the preservation application null and void *ab initio*. Thus it could not be condoned or ratified. The further result of the court's finding was that the preservation order was set aside as being invalid. It can be said that the finding of the court was based on a mere technicality, which frustrated the important object of the law, considering that the preservation order issued in respect of the property would be to no effect.

What is the lesson learnt from the finding of the court? In order to apply for the preservation order provided for in POCA, in other words, in order to seize and confiscate property used in the commission of an offence or property that forms part of the proceeds of an offence, the person initiating the application proceedings must be an admitted legal practitioner. This is mainly due to the fact that the proceedings are civil, as opposed to criminal, in nature. The fact that the person acting on behalf of the Prosecutor-General was not an admitted legal practitioner in the aforementioned case led to the preservation order being declared invalid and being set aside. From the interviews conducted the indication from the prosecutors was that not only were they urged to make use of POCA when dealing with the issue of forfeiture of property, being instrumentalities and proceeds of offences, but they were also urged to undergo the necessary training in order to be admitted as legal practitioners.

When we consider the findings in respect of the issue of the instrumentalities and proceeds of drug related offences in Namibia, it is submitted that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 does not cater sufficiently for such issue. The laws that are resorted to deal with the issue, the laws being the CPA and POCA, cater generally for criminal offences and are not tailor-made to cater exclusively for

drug related offences. The problem with a law having general application is that it makes itself susceptible to different types of interpretation by all the relevant role players in the criminal justice system. It must be borne in mind that all laws are subject to interpretation. Nonetheless, it is not always the case that there will be consensus with respect to such interpretation. At the time that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 was enacted drug related offences such as drug trafficking and issues such as the instrumentalities and proceeds of drug related offences might not have been a source of concern. However, at present it cannot be denied that drug related offences are on the increase and activities such as drug trafficking as well as issues such as the instrumentalities and proceeds of drug related offences should have a law that deals specifically with them. There should not be a need to look elsewhere in our law in order to deal with issues emanating from drug related offences.

5.6 What is the South African position when it comes specifically to the issue of the instrumentalities and proceeds of drug related offences?

By way of comparison let us consider the South African position specifically on the issue of the instrumentalities and proceeds of drug related offences, which is the subject matter of the chapter under discussion. As was discussed in Chapter 4 South Africa enacted the Drugs and Drug Trafficking Act, Act 140 of 1992 in order to deal with drug related offences. Section 22 of the said Act is titled “Presumption relating to acquisition of proceeds of defined crime” and reads as follows:

If in the prosecution of any person for an offence referred to in section 14 (a) it is proved that the accused was found in possession of any property which was the proceeds of a defined crime, it shall be presumed that the accused knew at the time of the acquisition of such property that it was the proceeds of a defined crime, unless he proves-

(a) that he acquired that property in good faith; and

(b) that the circumstances under which he acquired that property were not of such a nature that he could reasonably have been expected to have suspected that it was the proceeds of a defined crime.¹⁵¹

This section clearly shows that the South African Act makes specific mention of the issue of the proceeds of drug offences. It creates a rebuttable presumption that eases the burden of proving the proceeds of a drug related offence by reversing the onus of prove. The accused must prove that he or she acquired the property in good faith and that he or she could not reasonably have been expected to have suspected that the property was the proceeds of a defined crime. Section 25, titled “Declaration of forfeiture”, deals with the issue of forfeiture and stipulates that:

(1) Whenever any person is convicted of an offence under this Act, the court convicting him shall, in addition to any punishment which that court may impose in respect of the offence, declare-

(a) any scheduled substance, drug or property-

(i) by means of which the offence was committed;

(ii) which was used in the commission of the offence; or

(iii) which was found in the possession of the convicted person;

(b) any animal, vehicle, vessel, aircraft, container, or other article which was used-

(i) for the purpose of or in connection with the commission of the offence; or

(ii) for the storage, conveyance, removal or concealment of any scheduled substance, drug or property by means of which the offence was committed or which was used in the commission of the offence;

(c) in the case of an offence referred to in section 13 (e) or (f), any immovable property which was used in the commission of that offence,

and which was seized under section 11 (1) (g) or is in the possession or custody or under the control of the convicted person, to be forfeited to the state.”¹⁵²

¹⁵¹ Section 22 of the Drugs and Drug Trafficking Act, Act 140 of 1992

¹⁵² Section 25 of the Drugs and Drug Trafficking Act, Act 140 of 1992

When regard is had to the forfeiture provision in the South African Drug Law it is clear that the forfeiture of the instrumentalities and proceeds of drug related offences does not depend on a second or subsequent conviction, unlike the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 that expressly states that property such as money (the form that most instrumentalities and proceeds of drug offences take) can only be forfeited after a second or subsequent conviction of the accused.¹⁵³ With respect to money laundering, the applicable law in South Africa is the Prevention of Organised Crime Act, Act 121 of 1998.¹⁵⁴ The different offences that can be committed are contained in this Act. Similar to the Namibian Act, the South Africa Act provides for civil forfeiture, which is not dependant on a criminal conviction. As is the case with civil forfeiture in Namibia the standard of proof is based on a balance of probabilities as opposed to criminal forfeiture where the guilt of the accused must first be proven beyond a reasonable doubt. Thus for civil forfeiture it must be proven on a balance of probabilities that the property is an instrumentality of an offence or the proceeds of unlawful activities before such property can be forfeited. If for example there is forensic evidence that money found with an accused is physically tainted with drugs such evidence is enough to satisfy the burden of proof and would result in the civil forfeiture of those notes.¹⁵⁵

Similar to the position in Namibia, the South-African POCA also makes provision for a preservation order, which precedes a forfeiture order. The requirement is only to show that there are reasonable grounds to believe that the property is either proceeds of or an instrumentality of a crime. The procedure involved when a preservation order is granted is the same as in Namibia. Having obtained the preservation order the state may apply for a forfeiture order where the burden of proof is on the state to show on a balance of probabilities

¹⁵³ Section 8(1)(d) of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971

¹⁵⁴ Hereinafter referred to as "POCA-South Africa", unless the context indicates otherwise.

¹⁵⁵ <<http://www.iss.org.za/pubs/ASR/9No5And6/Redpath.html>> Accessed on 18 July 2013

that the property (which is the subject matter of the application) is the proceeds of or an instrumentality of a crime.

Added to that, in the same manner that POCA provides for criminal confiscation POCA-South Africa also provides for criminal forfeiture in chapter 5. In respect of chapter 5 the following is of importance:

In terms of chapter five, a 'confiscation order' may be made on conviction of an accused who has benefited from any of the offence(s) of which he or she is being convicted, as well as from any criminal activity sufficiently related to those offences. Such an order is for the payment by the accused of an amount of money. This amount may not exceed the proceeds of his or her criminal activity, or the value of all 'realisable property', whichever is the lesser. Realisable property is property held by the accused plus the value of any 'affected gifts' made by the accused. An affected gift is one made in the seven years preceding prosecution, or which was originally received by the accused in connection with unlawful activities. A confiscation order may be preceded or followed by a 'restraint order'. The purpose of the order is to prevent property from being removed. Chapter five also makes provision for a 'realisation order' for the conversion to money of realisable property. Anyone likely to be affected by the realisation, or who has suffered damages as a result of the offences committed by the accused, can make representations to the court regarding the realisation.¹⁵⁶

When it comes to the issue of forfeiture, the Namibian and South African positions are thus similar.

Let us consider some South African case law to see how the provisions of the South Africa Act were applied practically. In the case of *National Director of Public Prosecutions v Madumela*¹⁵⁷ the applicant, being the National Director of Public Prosecutions, applied for a forfeiture order after a preservation order was granted in respect of certain property. It was the allegation of the applicant that the property was liable for forfeiture as it was used as

¹⁵⁶ Ibid

¹⁵⁷ (13842/10) [2012] ZAGPPHC 232 (29 October 2012)

instrumentalities to facilitate the criminal offences of illegal dealing in and/or possession of prohibited dependence-producing substances in contravention of the provisions of the Drugs and Drug Trafficking Act, 140 of 1992. The applicant had to prove the application on a balance of probabilities. The respondent denied that the property was used as instrumentalities to facilitate the criminal offences referred to or were the proceeds of such offences. The respondent raised the “innocent owner defence” insofar as he claimed that he obtained the property legally and for value and that he neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality of an offence. The court reasoned that in terms of section 37 of the Act proceedings in an application for forfeiture of property were civil in nature and subject to the rules of evidence applicable in civil proceedings. Thus, on a balance of probabilities the respondent had to satisfy the court of his innocent owner defence.

It was the reasoning of the court that the property alleged to be an instrumentality of an offence must play a reasonably direct role in the commission of the offence. This is due to the fact that the term ‘instrumentality’ itself suggests that the property must be instrumental, and not incidental to, the commission of the offence. The court found that there was sufficient evidence to show that the vehicles were used as instrumentalities in committing drug related offences. The respondent’s vehicles were used by family and/or friends of the respondent for the transportation of drugs. Thus the property was directly employed to commit the offences. The respondent failed to offer any explanation as to why his brother or employees had the vehicles at that time of the night (when the police operation was conducted) and what work commitments they were fulfilling. It was the finding of the court that the vehicles facilitated the trafficking of drugs, that they were instrumental in the distribution of the drugs for sale and not merely incidental to the commission of the offences. In respect of the cash money involved the court held that such money was instrumental in committing the offence of

bribery with the purpose of facilitating the distribution of cocaine and in the commission of corruption offences. The court further held that the two stashes of cash found when two of the motor vehicles were seized represented the proceeds of the respondent's unlawful drug activities.

Moreover, in the case of *Sagren Perumal v NDPP*¹⁵⁸ a preservation order was obtained by the respondent (The National Director of Public Prosecutions) and in terms of such order 221 items and some cash were attached. The respondent's case was that the first appellant was one of the biggest, if not the biggest, drug dealers in the greater Durban area, that the assets under preservation belonged to him, that they are the proceeds of his drug dealing activities and were registered in the names of his family members or their businesses in order to falsely create the impression that they do not belong to him. The issue that Appeal Court had to deal with was whether the trial court correctly concluded that the undisputed allegations in the founding affidavit, together with the appellants' allegations in the answering affidavits that are not clearly untenable, established, on a balance of probability, that the first appellant is indeed a drug dealer and that he acquired the assets identified from the proceeds of his drug dealing activities. The first appellant denied being involved in any form of drug dealing and that any of the property of the other appellants was his. The court found that the affidavits relied upon by the respondent when they obtained the preservation order fell short of the basic principle pertaining to evidence on affidavits. The respondent failed to give the source of their information or the grounds of their belief. The court further found that the denial of drug dealing activities was consistent with the appellants' average middle class lifestyle and that nothing pointed to an affluent lifestyle lived off the proceeds of drug dealing. An intensive investigation over almost two decades failed to reveal evidence of the proceeds of

¹⁵⁸(356/11) [2011] ZASCA 37 (29 March 2012)

drug dealing or a level of affluence that could possibly sustain an inference of unlawful activities. The court upheld the appeal and dismissed the order of the trial court with costs.

Like with any law, the South African Act is not without its defects and in the latter case the preservation order obtained in terms of the Act was set aside. Be that as it may, there are more similarities than differences between the Namibian Prevention of Organised Crime Act, Act 29 of 2004 and the South African Organised Crime Act, Act 121 of 1998 as evidenced by the discussion above.

5.7 Summary

In summary let us consider the noteworthy findings in this chapter. We have seen that the illicit drug trade is a billion dollar industry. The proceeds derived from the illicit drug trade are concealed. This is where money laundering becomes relevant to the issue of drug related offences. Money laundering can destabilise the economy of a country and from the perspective of the present research it has the possibility of making the illicit drug trade lucrative to those that are already in it and attract new offenders as well. This is all the more so if the drug offenders hide the true origin of their wealth and are allowed to get away with it. Those involved in the illicit drug trade will continue unabated with their illegal activities if nothing is done to the property used in the commission of the offence and the proceeds of such drug offence. This normally comes at a cost, be it the reputation and integrity of the financial sector, foreign investment in the country, loss of revenue for the state and, most importantly, it comes at a social (human) cost.

In the case of *R v Aramah*¹⁵⁹ it was remarked that the drug addict has to obtain supplies of the drug to satisfy the terrible craving. The only way in which sums large enough to satisfy the craving can be obtained is by resorting to crime. This may in turn be drug trafficking itself

¹⁵⁹1983 Crim LR (CCA) 271

and disseminating the use of drugs even further. The court held that the most horrifying aspect of the drug trade is the degradation, suffering and frequently the death that the drug brings to the addict.

The human cost of drugs was also outlined in the case of *Arias Jimenez v The State*¹⁶⁰ where the judge stated that, “.....the devastating effect the addiction to hard drugs has on the family, relations, employees and friends of the user. Families fall apart, are bankrupted and drained emotionally by the experience of seeing a family member, usually a youth, becoming addicted and changing from the healthy, lovely child to a human wreck. No wonder that in several countries and cultures, the smuggling of hard drugs is punishable by death.”¹⁶¹

The human cost of the illicit drug trade is the reason why full advantage must be taken of the provisions of POCA where the forfeiture of ill-gotten riches is not dependant on a criminal conviction. This is due to the fact that the forfeiture proceedings are civil, as opposed to criminal, in nature. Thus civil forfeiture takes place. The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 only provides for the forfeiture of the property after conviction. This bears the risk of the property being destroyed and hidden. Ultimately the property then just goes back into the illicit drug trade, becoming instrumentalities. We also saw that the South African POCA does not differ materially from the Namibian POCA. There are more similarities than differences between the two. With that said as a point of departure, before forfeiture can even take place there must be a search and seizure of the property. In order for the property to be searched and seized it must be identified and traced first. It was discovered that the Namibian Drug Law does not make provision for the issue of search and seizure. This is, in my opinion, a fatal flaw. In dealing with the issue of search and seizure reference must be made to other laws, such as the CPA.

¹⁶⁰ An unreported judgement of the Supreme Court of Appeal of South Africa, Case No:73/2002, heard on 05 November 2012 and judgement delivered on 21 February 2013 by Lewis AJA. On P 24

¹⁶¹ Ibid, p24

However, the fact is that such a law does not cater specifically for drug related offences and is rather broad in its application. This is problematic because if the generally applicable law is applied incorrectly the whole drug case falls away and a drug offender walks away, not only from punishment in the form of a possible criminal conviction and sentence, but the drug offender also walks away with property that forms part of the instrumentalities and proceeds of drug related offences. Hence, there is a need for the Namibian Act to make specific provision for the issue of search and seizure.

Added to that, the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 only provides for the forfeiture of property, such as money, only after a second or subsequent conviction. A drug offender should not part ways with the instrumentalities and proceeds of drug related offences only after a second or subsequent conviction. In a way this condones the conduct of the offender. Ideally, immediately upon conviction the offender must be stripped of his or her ill-gotten property, whether it is his or her first offence or not. The instrumentalities and proceeds of the drug related offence must be forfeited as an additional punishment and deterrent, not only for the drug offender but would be drug offenders as well. A person should not be allowed to profit from his or her illegal activities. If such a situation is allowed, drug offences, which are already alarmingly high, will continue unabated. The fact that only after a second or subsequent conviction property, such as money, can be declared forfeited to the state illustrates the need for a change in the current law dealing with drug offences in Namibia, being the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971.

CHAPTER 6: THE UNITED NATIONS CONVENTION AGAINST THE ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES OF 1988: INTERNATIONAL CO-OPERATION WITH SPECIFIC FOCUS ON NAMIBIA

6.1 Background

Barry¹⁶² observes that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 is very old and does not comply with the obligations provided by the United Nations Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988,¹⁶³ to which Namibia is a signatory. Brown elaborates on the Convention by stating that, “The 1988 UN Drugs Convention was, however, the product of work intended specifically to address drug trafficking and that is reflected in its contents.”¹⁶⁴ He further asserts that the Parties to the Convention recognize that links exist between illicit drug trafficking and other organized crime. This international criminal activity (illicit drug trafficking) undermines the stability, sovereignty, security and economy of the States. Bearing that in mind a study needs to be carried out to determine whether the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 is in compliance with the obligations created in the UN Drugs Convention.

Narcotics’ trafficking is international in nature and transcends national borders. Those involved in the illicit drug trade often have extensive ties in foreign countries.¹⁶⁵ With that in mind the 1988 UN Drugs Convention was adopted in order to promote cooperation amongst state parties in order for such state parties to effectively address the various aspects of the

¹⁶² Barry Z.B, supra, p1

¹⁶³ Hereinafter referred to as the “1988 UN Drugs Convention”, unless otherwise indicated.

¹⁶⁴ Brown, A.N.1996, *Proceeds of Crime: Money Laundering, Confiscation & Forfeiture*, W. Green/Sweet & Maxwell

¹⁶⁵ Gurule, J.1998 “The 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances-A Ten Year Perspective: Is International Cooperation merely Illusory?”, Volume 22, Article 2, *Fordham International Law Journal* ; available at <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1586&context=ilj> Accessed on 18 September 2013

illicit drug trade having an international dimension. An escalation in the war on drugs is represented by the 1988 UN Drugs Convention whose principle goal is to deal with the increase in international drug trafficking.

This can be ascertained from the following:

The 1988 Convention complements the other drug control treaties, both of which were primarily directed at the control of illicit activities. It was formulated specifically to deal with the growing problem of international trafficking which had only been dealt with marginally by earlier international instruments. The Convention includes money-laundering and illicit traffic in precursor and essential chemicals within the ambit of drug trafficking activities and calls on parties to introduce these as criminal offences in their national legislation. Its objective is to create and consolidate international cooperation between law enforcement bodies such as customs, police and judicial authorities and to provide them with the legal guidelines a) to interdict illicit trafficking effectively, b) to arrest and try drug traffickers, and c) to deprive them of their ill-gotten gains. It also intensifies efforts against the illicit production and manufacture of narcotic and psychotropic drugs by calling for strict monitoring of the chemicals often used in illicit production.¹⁶⁶

The urgent need to address the issue of the international narcotics trade is outlined in the Preamble to the UN Drugs Convention. The Parties to the 1988 UN Drugs Convention were concerned by the magnitude and rise in the illicit production of narcotic and psychotropic substances and the demand for these substances which not only posed a threat to the health and welfare of the human population, but also affected the economic, cultural and political foundations of society. The State Parties were further deeply concerned by the fact that children were consumers of these illicit substances and recognised that this fact entailed danger of incalculable gravity to these children. Recognition was further given to the link that exists between the illicit trafficking of narcotics and other related organized criminal activities. It was also acknowledged by the state parties that illicit traffic is an international

¹⁶⁶ <<http://www.unodc.org/unodc/en/illicit-drugs/definitions/>> Accessed on 14 August 2013

criminal activity that generates large financial profits and wealth. This, in turn, enabled transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business and society at all levels.

In a quest to root out the causes of the problem of the abuse of narcotic and psychotropic substances the State Parties realised the importance of depriving persons engaged in illicit traffic of the proceeds of their criminal activities, thereby eliminating their main incentive for so doing. By adopting the 1988 UN Drugs Convention the parties were determined to improve international co-operation in the suppression of the illicit trafficking of drugs. In conclusion the State Parties had the desire to have a comprehensive, effective and operative international convention that was specifically directed against illicit traffic, an international convention that considered the various aspect of the problem as a whole, especially those aspects which were not catered for in the existing treaties dealing with narcotic drugs and psychotropic substances.

With these objectives of the UN Drugs Convention in mind we will examine whether Namibia in general, and the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 specifically, are in compliance with the obligations created in the UN Drugs Convention. However, prior to investigating the afore-mentioned let us first briefly consider the obligations created in the UN Drugs Convention.

6.2 Obligations and duties created in the 1988 Convention

Article 3 of the United Nations Drugs Convention outlines drug offences and resultant sanctions. In a nutshell, the offences created include trafficking, dealing in and possession of any narcotic drug or any psychotropic substance-

Article 3 (1) Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;*
- ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;*
- iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;¹⁶⁷*

The instrumentalities of drug offences as stated in Article 1 (a) are as follows:

- (iv)-The manufacture, transport or distribution of equipment, materials or of substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances*
- v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above;¹⁶⁸*

The offence of money laundering is created in Article 3 (b) which reads:

- b) i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for*

¹⁶⁷ Article 3 (1) of the 1988 UN Drugs Convention

¹⁶⁸ Article 1 (a) of the 1988 UN Drugs Convention

the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;¹⁶⁹

The Convention goes on to apparently criminalise possession of drugs for one's own use, stating in Article 3 (2):

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.¹⁷⁰

By criminalising the possession of drugs for personal use the UN Convention did what its predecessors did not do, which was to target the drug manufacturers, drug traffickers as well as the drug users. The aim was to reach a political balance between the producer and consumer countries with the producing countries expected to suppress the illicit supply of drugs and in the same vein for the consumer countries to suppress the demand for drugs.

¹⁶⁹ Article 3 (b) of the 1988 UN Drugs Convention

¹⁷⁰ Article 3 (2) of the 1988 UN Drugs Convention

A further reading of the United Nations Drugs Convention shows that it is mostly devoted to fighting organised crime in relation to drug offences, such as drug trafficking, and mandates cooperation amongst the member states in tracing and seizing drug-related assets. Article 5 of the Convention deals with the issue of confiscation in terms of which parties are required to confiscate the instrumentalities and proceeds of drug offences. The relevant part of Article 5 (titled “Confiscation”) provides as follows:

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.¹⁷¹

Thus the Parties are required to empower their courts or other competent authorities to order that bank, financial, or commercial records be made available or be seized. In terms of this provision a party may not decline to act on the ground of bank secrecy.

Article 6 of the Convention provides a legal basis for extradition in drug related offences. It is titled “Extradition” and the relevant subsections stipulate as follows:

¹⁷¹Article 5 of the 1988 UN Drugs Convention

1. *This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.*
2. *Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.*
3. *If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.*
4. *The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.*
5. *Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.*
6. *In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.*
7. *The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*
8. *Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the*

*requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his presence at extradition proceedings.*¹⁷²

The legal basis mentioned earlier on is also in relation to countries which have no other extradition treaty. Thus in the absence of another extradition treaty the provisions of Section 6 of the UN Drugs Convention provides the legal basis for extradition in drug related offences. Furthermore the 1988 Convention requires the parties, upon request, to provide mutual legal assistance. Such assistance may be for purposes such as search, seizure and so forth. The issue of mutual legal assistance is further expounded in Article 7 where the relevant subsections read:

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

2. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

a) Taking evidence or statements from persons;

b) Effecting service of judicial documents;

c) Executing searches and seizures;

d) Examining objects and sites;

e) Providing information and evidentiary items;

f) Providing originals or certified copies of relevant documents and records, including

bank, financial, corporate or business records;

g) Identifying or tracing proceeds, property, instrumentalities or other things for

¹⁷²Article 6 of the 1988 UN Drugs Convention

evidentiary purposes.

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.¹⁷³

Since Namibia is a developing country Article 10 titled “INTERNATIONAL CO-OPERATION AND ASSISTANCE FOR TRANSIT STATES” is relevant and states as follows:

1. The Parties shall co-operate, directly or through competent international or regional organizations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical co-operation on interdiction and other related activities.

2. The Parties may undertake, directly or through competent international or regional organizations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.

3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.¹⁷⁴

¹⁷³ Article 7 of the 1988 UN Drugs Convention

¹⁷⁴ Article 10 of the 1988 UN Drugs Convention

Article 11 of the Convention deals with the issue of controlled delivery and since a later chapter will focus on traps and undercover operation (where the role of control delivery will become apparent) it is worth noting the provision of the Convention which provides that:

1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.

3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.¹⁷⁵

A pertinent question which should now be considered is whether or not Namibia is in compliance with its international obligations.

6.3 Namibia and the UN Drugs Convention

Namibia is a signatory to the UN Drugs Convention of 1988.¹⁷⁶ In terms of this 1988 UN Drugs Convention certain duties and obligations are created which bind the signatories. As previously stated the offences created include trafficking, dealing in and possession of any narcotic drug or any psychotropic substance. The Convention goes on to ban possession of drugs for personal use. Namibia does criminalise the possession, use or dealing in drugs.

¹⁷⁵ Article 11 of the 1988 UN Drugs Convention

¹⁷⁶ Particular reference can be made to the ASAAMLG Drug Report, supra, p57

Section 2 of the Namibian Drug Legislation states as follows:

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 substance 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*

who has in his possession or uses any dependence-producing drug or plant referred to in paragraph (c), shall be guilty of an offence as follows.¹⁷⁷

Thus, in the context of criminalising the use, possession and dealing in drugs Namibia is in compliance with that part of the UN Drugs Convention of 1988. However, we have already established that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 does not specifically criminalise drug trafficking. In fact it only criminalises the possession, use of or dealing in drugs. Due to the fact that Namibia is used as a transit country drugs are inevitably trafficked throughout the country. Since drug offences in Namibia are statutory offences created under the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 such law prescribes the offences that persons must be charged with when they have committed a drug related offence. Thus, the accused are charged with either dealing in or being in possession of a dependence-producing substance, be it prohibited, dangerous or potentially dangerous. Those found trafficking drugs are charged with either having used, possessed or dealt in such drug. Usually those that benefit from the drug trade, the so-called drug dealers, make use of others

¹⁷⁷Section 2 of the Namibian Drugs Legislation

to smuggle the drugs on their behalf. Persons who are found trafficking drugs are in fact hired by the drug dealers to act on their behalf.

When the person trafficking drugs is caught the actual drug dealer, who benefits the most financially from the illicit drug trade, remains free. This is in direct contrast to what is envisaged by the UN Drugs Convention which is devoted to fighting organised crime in relation to drug offences, such as drug trafficking. After all, “The 1988 UN Drugs Convention was, however, the product of work intended specifically to address drug trafficking and that is reflected in its contents.”¹⁷⁸ The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 is also relatively old when considering the fact that it was enacted in 1971. By contrast the UN Drugs Convention was adopted in 1988. Granted, the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 does deal with some aspects that are general to drug related offences, such as drug dealing, drug use and drug possession. These are aspects that one can reasonably expect to be contained in any instrument dealing with the issue of drug related offences.

However, logically Namibia cannot comply with all the obligations contained in the UN Drugs Convention, simply because the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 was enacted before the UN Drugs Convention was adopted. Thus, since Namibia still relies on an Act enacted before the UN Convention was adopted, it does not comply with some of the obligations contained in the UN Drugs Convention, obligations such as the criminalisation of drug trafficking, an offence which may not have been rife at the time that the Namibian Act was enacted, but an offence that has become so rife that it is perceived as an international crime in need of an international

¹⁷⁸Brown, AN, *supra*, p 61

solution). By not criminalising drug trafficking Namibia falls foul of what is expected of it as a signatory to the UN Drugs Convention.

Article 5 of the Convention deals with the issue of confiscation in terms of which parties are required to confiscate the instrumentalities and proceeds of drug offences. The process of confiscation involves the identification of the property, the tracing of the property and thereafter the freezing or seizure of such property. The Namibian Act provides in Section 8 for criminal confiscation where the confiscation of the instrumentalities and proceeds of drug related offences is reliant on a criminal conviction. Thus, before a drug offender is found guilty in a court of law there can be no order made pertaining to the confiscation of the instrumentalities and proceeds of drug offences. Prior to a drug related matter being finalised the instrumentalities and proceeds of that drug related matter can be disposed of or concealed. In fact before a confiscation order can be made in respect of property such as money the drug offender must be a repeat offender. Thus, a confiscation order in respect of money used for the commission of a drug related offence or derived from drug related activities cannot be made if the drug offender is a first time offender. In order for a drug offender to be deprived of the instrumentalities and proceeds of his or her illegal activity such an offender must be a repeat offender.

With the Namibian Act failing to deal sufficiently with the forfeiture of the instrumentalities and proceeds of drug related offences reliance is made on POCA. POCA makes provision for civil forfeiture where the forfeiture of the instrumentalities and proceeds of unlawful activities does not rely on a criminal conviction. POCA can be seen as a progressive law especially in the sphere of money laundering. Drug traffickers use sophisticated and complex methods to disguise the proceeds that they derive from the illicit drug trade by laundering such proceeds with the aim of disguising the said proceeds. POCA provides for the prohibition of money laundering and provides for the forfeiture of assets forming part of the

instrumentalities and proceeds of unlawful activities. Apart from criminalising activities that constitute money laundering, POCA also criminalises persons and bodies that do not comply with its provisions, thereby extending its fights against money laundering.

However, POCA is mainly an anti-money laundering law and its provisions are general and do not specifically cater for drug related offences. Besides, according to an ESAAMLG Drug Trafficking Report dated 08 September 2011¹⁷⁹ most countries that have criminalised money laundering fall short of criminalising it as per the international requirements. As a result, gaps exist which can easily be exploited by drug traffickers to avoid legal consequences. The 1988 UN Drugs Convention focuses specifically on money laundering and its association solely with drug trafficking. By failing to deal sufficiently with the issue of forfeiture the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 does thus not provide for an effective anti-drug strategy which, “deprive drug traffickers of their illicit drug profits through the enforcement of tough asset forfeiture laws...traffickers can defeat domestic forfeiture laws simply by removing their illicit wealth from the jurisdiction in which it is generated.”¹⁸⁰

The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 cannot be perceived to be a tough asset forfeiture law, especially since it relies on a criminal conviction before it can be implemented and also because it requires a drug offender to be a repeat offender before he or she can be deprived of his/her illicit wealth. Consequently, the failure of the Namibian Drug Law in dealing sufficiently with the issue of the forfeiture of the proceeds and instrumentalities of drug related offences means that in respect of the issue of forfeiture as envisaged by the UN Drugs Convention, Namibia has failed to comply with that particular obligation.

¹⁷⁹Supra, p57

¹⁸⁰Gurule, J, supra, p 77

6.4 Summary

As previously stated it is a fact that modern crime, such as drug trafficking is international in nature and thus transcends national borders. Raw materials such as the coca plant (a raw material for cocaine) will be sourced in one country; cocaine will be manufactured in another country, the product (cocaine) will then be transported through yet another country (a transit country like Namibia) before reaching the country that it is destined for. Inevitably the drug will infiltrate the different countries from its source to its destination. Since enormous profits are involved in the illicit drug trade the vicious cycle will continue if the international community does not stand together and fight together against the global illicit drug trade. In its fights against the illicit drug trade the global community adopted the UN Drugs Convention. Under this Convention certain duties and obligations were placed on member states, including Namibia.

In this chapter, after outlining the duties and obligations placed on member states under the 1988 UN Drugs Convention I continued to consider whether Namibia fulfilled its duties and obligations. My examination of the local Act established that in respect of the issue of forfeiture of the instrumentalities and proceeds of drug related offences Namibia does, as a matter of fact, have a very good law in the form of POCA. However, this law does not specifically focus on drug related offences, its prime focus is rather on the offence of money laundering. In respect of money laundering POCA is also not specifically focused on money laundering in relation to drug related offences such as drug trafficking. In addition to that the Namibian Drug Law does not even criminalise conduct such as drug trafficking. The use and possession of as well as the dealing in drugs are criminalised by the Namibian Drug Law. If Namibia does not even criminalise drug trafficking how can it be said to be in compliance with the provisions of the UN Drugs Convention? The UN Drugs Convention was after all adopted to specifically tackle the issue of drug trafficking, as noted by Gurule, J where he

states, “Deeply concerned by the magnitude of and rising trend in the illicit production of and trafficking in narcotic drugs, and cognizant that that trend could only be reversed through cooperation, the UN Commission on Narcotic Drugs convened a conference in Vienna, Austria from November 25 to December 20, 1988, to consider the adoption of a multilateral treaty to combat international drug trafficking.”¹⁸¹

It may be reasonably possible that at the time that the Act dealing with drug offences in Namibia was enacted drug trafficking *per se* was not a concern, much less an international concern. Thus the focus was more on the usage, possession and dealing of drugs. Namibia initially only had a problem with drugs such as cannabis and mandrax, but hard drugs such as cocaine and heroin have been introduced in the country by syndicates. With Namibia being a transit country these drugs inevitably infiltrated Namibian society in the process of being trafficked through the country. Thus it is a fact that drug trafficking does occur within Namibia but the act of trafficking in drugs is not criminalised despite the occurrence of the offence. By still relying on an Act that is out-dated Namibia has failed and continues to fail to fulfil its duties and obligations under the UN Drugs Convention.

¹⁸¹Ibid, p79

CHAPTER 7: COMBATING OF THE ABUSE OF DRUGS BILL

7.1 Introduction

The Combating of the Abuse of Drugs Bill 4 of 2006¹⁸² was initially introduced in 2006 in order to replace the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971. The purpose of the Bill as contained in its preamble is set forth as follows,

*To provide for the prohibition of the consuming in drugs, possession of, and the trafficking of drugs, to provide for acts relating to equipment and chemicals useful for the manufacture of drugs; to provide for the additional powers of the Police; to provide for matters incidental thereto.*¹⁸³

This chapter will focus on how the Namibian Drugs Bill differs from the Namibian Drugs Act. In addition to that there will be a discussion on whether the Namibian Drugs Bill complies with the duties and responsibilities contained in the UN Drugs Convention. A critique of the Namibian Drugs Bill, with particular emphasis being on the mandatory sentences prescribed by the Bill, will also form part of this chapter.

7.2 The Namibian Drugs Bill and the Namibian Drugs Act

The Namibian Drugs Bill is intended to take over as the Act governing drug related offences in Namibia should it be passed as an Act of Parliament. Thus drug related offences would no longer be dealt with in terms of the Namibian Drugs Act, but instead in terms of the Bill. Although the Bill was introduced in the Namibian Parliament in 2006 it has not been passed as an Act of Parliament to date. What are the most significant differences between the Act and the Bill? To begin with, the Bill specifically criminalises drug trafficking. The research conducted for the present study has shown that although drug trafficking does occur within

¹⁸² Hereinafter referred to as the "Namibian Drugs Bill", unless the context indicates otherwise.

¹⁸³ Preamble to the Namibian Drug Bill

Namibia the current Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 fails to criminalise such conduct. Instead the conduct criminalised by the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 is the use, possession of and dealing in drugs. There appears to be an attempt to rectify this situation by criminalising the drug related conduct of trafficking in the Bill.

In this regard clause 4 of the Bill outlines the offence of “trafficking” as follows:

(1) Any person who traffics in any drug, unless the possession of that drug is lawful in terms of section 3(2), 3(3), 3(4), 3(5) or 3(6) for both the buyer and the seller, commits an offence and is on conviction liable to the penalties set out in subsection 2.

(2) Subject to section 38 a person who contravenes subsection (1) or section 5 is liable to-

(a) in case of a first conviction to imprisonment of not less than 30 years without the option of a fine;

(b) in the case of a subsequent conviction, for a period not less than 40 years without the option of a fine.

5. Any person who-

(a) imports from Namibia;

(b) exports from Namibia;

(c) transports through Namibia for the purpose of export or import;

(d) causes any consignment of drugs to be diverted to or from Namibia,

Unless the import or export in question is lawful under the Medicines Act, commits an offence and is on conviction liable to the penalties specified in section 4(2)¹⁸⁴

Added to that, in the definitions contained in the Bill trafficking means, “being involved directly or indirectly in the buying, selling or supplying of drugs and includes the commission of the offence under this act in circumstances suggesting that the person concerned has performed an act referred to in this definition.”¹⁸⁵ Thus those who sell drugs as well as those

¹⁸⁴ Clause 4 of the Combating of the Abuse of Drugs Bill

¹⁸⁵ Clause 1 of the Combating of the Abuse of Drugs Bill

who supply those drugs to those that sell, all commit the offence of drug trafficking. As previously stated, criminalising drug trafficking will result in the issue of proving possession or dealing, where in actual fact drug trafficking had taken place, being rendered unnecessary without doing away with the offences of dealing and possession altogether.

The Bill appears to do away with the term “dealing” and instead primarily criminalises trafficking, selling, consumption and possession. The term “possession” is basically accorded the same meaning in the Bill as in the Act as can be seen from the following definition, “possess in relation to a drug, includes to keep or to store the drug, or to have it in custody or under control.”¹⁸⁶ Whereas the Namibian Drugs Act uses the term “use” to criminalise the use of drugs and does not attach a meaning to such term, the Bill makes reference to the term “consume” and attaches the following meaning to it, “consume includes to inhale, inject into the human body, masticate, smoke, snuff, chew, drink, swallow, apply to the human body or perform any other action which will or may have the effect that any chemical is absorbed into the human body.”¹⁸⁷ Thus the Bill clearly sets out what it means if an offender has consumed a drug and which conduct constitutes consumption (the act that is criminalised). The term “sell” in the Bill encompasses some of the definitional components of “dealing” in the Act insofar as the term “sell” includes:

(a) to import, offer, advertise, keep, expose, transmit, consign, convey or deliver for sale;

(b) authorise, direct or allow a sale or prepare or possess for the purposes of a sale;

(c) barter, exchange, supply or dispose of to any person whether for consideration or

Otherwise; and

(d) distribute (whether or not the distribution is made for consideration,

And “sale” and “sold” have corresponding meanings.¹⁸⁸

¹⁸⁶ Ibid

¹⁸⁷ Ibid

¹⁸⁸ Ibid

What is more, the Namibian Drugs Bill appears to criminalise other drug related conduct that is not criminalised in the Act. This can be confirmed by the following sections. Clause 6 of the Namibian Drugs Bill is titled “Sale of controlled matter” and states as follows:

Any person who sells or otherwise provides any controlled matter while he or she knows or believes or ought reasonably to have known or suspected that the matter in question is used in relation to the unlawful manufacture of any drug or in relation to any other process relating to a drug, commits an offence and is on conviction liable to the minimum sentences specified in section 3(7).¹⁸⁹

Clause 7 is titled “Instruments and literature for illegal consumption of drugs” and stipulates that:

Any person who imports, exports, manufactures, promotes, sells or in any other manner provides instruments or literature for illegal consumption of drugs, commits an offence and is on conviction liable to a fine not exceeding N\$500 000 or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.¹⁹⁰

Clause 8, titled “Cultivation of plants”, states the following: “Any person who cultivates any plant that is a drug or from which a drug can be extracted, commits an offence and is on conviction liable to the minimum sentences specified in section 3(7).”¹⁹¹

Furthermore, the Act makes no provision for attempts or any other forms of secondary liability¹⁹². Thus, unless the drug related offence is complete, the person cannot be held liable for his or her conduct. In contrast the Bill specifically makes provision for attempts and other forms of secondary liability by providing in clause 9 as follows:

¹⁸⁹ Clause 6 of the Combating of the Abuse of Drugs Bill

¹⁹⁰ Clause 7 of the Combating of the Abuse of Drugs Bill

¹⁹¹ Clause 8 of the Combating of the Abuse of Drugs Bill

¹⁹² Secondary liability will present itself where a party, who materially contributes to acts carried out by another party, is held responsible for the actions of that other party.

*Any person who attempts to commit, or who aids, abets, solicits, incites, compounds, urges, encourages or does any act preparatory directly or indirectly to, or in furtherance of, the commission of, an offence under this Act, or who conspires with any other person to commit such offence, commits an offence and is on conviction liable to the penalty prescribed for the offence in question by this Act.*¹⁹³

This is a significant provision as not all offences are completed, but just because a criminal act is incomplete does not mean that an offender cannot be held liable. Our law recognises two types of attempts. These are complete and incomplete attempts. The former attempts are, “those in which the wrongdoer, intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise.”¹⁹⁴ The latter attempts are described as, “those in which the wrongdoer has not completed all that he set out to do, because the completion of his unlawful act has been prevented by the intervention of some outside agency.”¹⁹⁵ Thus the fact that these attempts are recognised and do exist in our criminal law forms the basis for their inclusion in the Drug Bill. It is illustrative of the fact that attempts to commit a drug related offence do exist and the fact that the Namibian Drug Act makes no provision for this particular aspect shows that in that context the Act is failing to properly criminalise drug related conduct where such conduct is not complete.

Further, the Bill makes it a criminal offence for a person to facilitate the abuse of drugs via computer data networks by stipulating as follows in clause 13:

Any person who enters, or causes to be entered into a computerised data exchange network accessible in Namibia any data while he or she knows or on reasonable grounds ought to know or

¹⁹³ Clause 9 of the Combating of the Abuse of Drugs Bill

¹⁹⁴ Burchell, J and Milton, J, *supra*, p430

¹⁹⁵ *Ibid*

suspect that its effect will be to permit, incite, facilitate or promote the unlawful cultivation, manufacture, supply or consumption of any drug, commits an offence and is on conviction liable to a fine not exceeding N\$500 000-00 or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.¹⁹⁶

The Namibian Drugs Act does not contain the same or similar provision. This may yet again be an indication of how out-dated the Act is that deals with drug related offences in Namibia. It goes without say that the world is more computerised nowadays than it might have been when the Namibian Drug Act was enacted. The fact that the Bill contains this particular provision shows that it is in tune with the fact that times have changed and that different mechanisms should be used to facilitate and promote the use of drugs. Again, the Act dismally fails to recognise this fact by not making any similar provision for this particular aspect.

In addition to that, the investigation and prosecution of drug related offences are accorded more protection by the Bill where the interference with seized substances and samples is criminalised. Granted, the Act also criminalises the obstruction or interference with a police officer in the exercise of his or her duties as can be seen in Section 4 of the Act which provides that:

Any person who obstructs or interferes with any police officer in the exercise of any powers or the performance of any duty under this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.¹⁹⁷

¹⁹⁶ Clause 13 of the Combating of the Abuse of Drugs Bill

¹⁹⁷ Section 4 of the Namibian Drugs Act

However, in contrast to the provision contained in the Act the Bill contains a more detailed and inclusive provision. To show what I mean let us consider clause 14 of the Bill which states as follows:

Any person who-

(a) interferes with the taking, handling or any process connected with any seized substance or any sample thereof: or

(b) interferes with, or falsifies the results of any analysis,

with the intention of unlawfully interfering with the investigation or prosecution of an offence under this Act, commits an offence and is on conviction liable to a fine not exceeding N\$300 000 or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.¹⁹⁸

Whereas the provision in the Act is quite general the provision of the Bill is very specific which leaves less room for any ambiguity. The Bill not only criminalises the interference with the seizing of the substances as the Act does, but goes on to criminalise any conduct that interferes with the analysis of the sample and the falsification of the accompanying results of such analysis.

The Bill also grants additional powers to the police and after we consider the relevant section granting such additional powers we will consider why such additional powers may be necessary in light of what the research has discovered in respect of the issue of how drugs are concealed and trafficked through Namibia. Clause 21 of the Bill provides as follows:

(1) A search of a person in relation to an offence under this Act may extend to a medical examination by a medical practitioner that is not a member of the Police and which may include an examination inside any orifice of the person concerned or examining the person with x-rays or any other medical imaging system.

¹⁹⁸ Clause 14 of the Combating of the Abuse of Drugs Bill

- (2) *If a member of the police has reason to believe that a person is transporting any drug by concealing it inside his or her body and the person refuses to submit to a medical examination, that member may detain the person for a period not exceeding 48 hours, pending the obtaining of an order from a judge in chambers in terms of subsection (3)*
- (3) *Where a judge in chambers is satisfied, from the information under oath, that there are reasonable grounds to believe that a person is transporting any drug by concealing it inside his or her body and the person has refused without reasonable cause to submit to a medical examination, he or she may issue an order-*
- (a) *Directing the person to submit forthwith to such medical examination including X-Ray or other tests as may be reasonably necessary to establish whether the person is transporting a drug inside his or her body;*
- (b) *Authorising the person to be taken in custody by a member of the police to any place stated in the order for the purpose of having the medical examination carried out; and*
- (c) *Authorising any medical practitioner to carry out such examination and to provide such medical treatment and to administer such medication or substance including anaesthesia as specified in the order or to take such steps as he or she may deem reasonable and appropriate in order to achieve such purpose as may be specified in the order.*
- (4) *Any person who without reasonable excuse refuses or fails to submit to a medical examination as directed by an order referred to in subsection (3), commits an offence and is on conviction liable to a fine not exceeding N\$500 000-00 or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.¹⁹⁹*

It would appear that the preferred method of transporting drugs, if the empirical research is anything to go by, is by swallowing the drug and thus transporting the drug inside the body.²⁰⁰ In a recent newspaper article, a cocaine “mule” was sentenced to an effective prison term of 7 years for smuggling into the country a consignment of cocaine, which she had

¹⁹⁹ Clause 21 of the Combating of the Abuse of Drugs Bill

²⁰⁰ Reference can be made to what was narrated by the officers of the Drug Law Enforcement of the Namibian Police as outlined on P21 and P22 of the present study.

swallowed.²⁰¹ Thus it is not uncommon for police officers to come across drug smugglers having swallowed bullet like tubes containing drugs. Our current drug law is not alive to this reality and as such does not make provision for a drug suspect to be subjected to a medical examination. Thus there is no legal basis on which a medical examination can be conducted, unless the suspect concerned consents to such medical examination. The Bill is in line with what is happening in reality pertaining to the issue of drug trafficking and makes appropriate provision for instances where a medical examination may be the only way to determine if a drug related offence has been committed or not. By failing to keep in line with the practical reality as far as drug related conduct, such as drug trafficking, is concerned the Namibian Drug Act again shows just how out dated it is.

With that said the Bill also makes reference to the Prevention of Organised Crime Act²⁰² insofar as clause 35 (a) of the Bill provides that, “For purposes of imposing an appropriate sentence in respect of an offence under this Act, a court must consider as an aggravating factor the fact that-

- (a) The convicted person belongs or has belonged to a criminal gang as defined in the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004);²⁰³

The Bill recognises the fact that drug related conduct such as drug trafficking is a transnational organised crime. It involves different individuals who all have a role to play. When the Bill was initially tabled in Parliament, the then Safety and Security Minister, Peter Sheehama, made the following comments, “This new Bill, the Prevention of Organised Crime Act of 2005 and the Financial Intelligence Bill, which has already been tabled, will

²⁰¹ Werner Menges 2013 ‘Cocaine mule jailed for seven years’ *The Namibian* (18 November 2013)

²⁰² Act 29 of 2004

²⁰³ Clause 35 (a) of the Combating of the Abuse of Drugs Bill

function as one unit against drug trafficking, proceeds of crime and money laundering.”²⁰⁴ The Minister went on to state that Namibia had international obligations to prevent and detect drug abuse and trafficking. The Minister further stated that drug trafficking, combined with organised crime, presented a threat to public order and safety and economic stability, as it created an economy outside official markets, destabilising economies while tax and revenue collection was avoided.²⁰⁵ The fact that the Namibian Drugs Act does not recognise certain conduct related to drug offences, such as the fact that drug trafficking is considered an organised crime, may again be illustrative of the fact that the Namibian Drug Act is not up to date when it comes to the different dynamics at play as far as drug related offences are concerned.

Another issue that the Bill makes provision for which is not provided for in the Act is the issue of monitoring where the police suspect a person has committed a drug related offence or for the police to prevent the commission of a drug offence. This issue is dealt with in clause 24 which provides as follows:

(1) A judge in chambers may if he or she believes on information provided under oath by a member of the Police-

- (a) That there are reasonable grounds to believe that any person has committed an offence under this Act or is about to commit an offence; and*
- (b) That the monitoring of a specified person would probably yield information that is useful in order to successfully prosecute any person for an offence under this Act or to prevent the commission of an offence under this Act.*

*that judge may issue an order authorising such monitoring*²⁰⁶

²⁰⁴ <www.namibian.com.na/index.php?archive_id=27452&page> Last accessed on 16 October 2013

²⁰⁵ Ibid

²⁰⁶ Clause 24 (1) of the Combating of the Abuse of Drugs Bill

The Bill proceeds to outline the scope of what monitoring entails in clause 24(2) by stating as follows:

Monitoring referred to in subsection (1) may include-

- (a) Installing any device on any premises where the person to be monitored resides or performs an activity specified in the order;*
- (b) Installing any equipment or performing any action that enables the interception or recording of any telecommunications of the person to be monitored;*
- (c) Installing any software or any equipment on or with relation to a computer system that will probably be used by the person to be monitored in order to any activity performed by that person with relation to that system, or in order to obtain any key or password or other information that may be necessary to retrieve or decrypt any information stored or available to that system; and*
- (d) Intercepting and examining any or specified items that are sent by mail to, or by the person to be monitored (including the opening, re-sealing and seizure of such items).²⁰⁷*

The Bill makes provision for how the evidence obtained by means of the monitoring should be dealt with, with clause 24(5) outlining as follows:

Notwithstanding any law to the contrary, evidence obtained by means of monitoring performed in accordance with an order made under subsection (1)-

- (a) is admissible in any proceedings relating to an offence under this Act;*
- (b) may be communicated to any institution inside or outside Namibia involved with the prosecution or prevention of crime.*
- (5) Evidence obtained by means of monitoring authorised under subsection (1), may not be excluded only by virtue of the fact that it is not covered by the order made under subsection (1).²⁰⁸*

Monitoring is an important investigative and evidentiary tool that the Namibian Drugs Act fails to make specific provision for, yet another illustration of just how out-dated the Act is that deals with drug offences in Namibia.

²⁰⁷ Clause 24 (2) of the Combating of the Abuse of Drugs Bill

²⁰⁸ Clause 24(5) of the Combating of the Abuse of Drugs Bill

In addition to the above the Bill grants Investigators the power to seize computers and electronic data related to drug abuse by providing in clause 25 as follows:

(1) Where it appears to a magistrate, from information on oath that a computer system in the custody of any person contains data which may be relevant to proving an offence under this Act, that magistrate may order the person having custody or control of that system to give to a member of the Police access to that data.

(2) Any person who without reasonable excuse-

(a) fails to give access as ordered;

(b) fails to provide reasonable assistance to enable the data to be retrieved and recorded;

or;

(c) deliberately erases such data,

commits an offence and is on conviction liable to a fine not exceeding N\$300 000 or imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.²⁰⁹

This particular provision recognises the fact that computers are used in the commission of modern drug-related offences and the fact that the Drugs Act does not recognise same is another indication of how out-dated such Act is.

The Bill also rectifies an omission in the Namibian Drugs Act by making specific mention of the drug “mandrax”, much like in Part III of Schedule 2 of the South African Drugs Act. Mandrax is listed as an undesirable dependence-producing substance in Part 3 of the Bill. As previously stated under the Namibian Drugs Law the drug called methaqualone is prohibited and the state must prove, ordinarily through scientific evidence, that the mandrax contained methaqualone. It is clear from the cases of *S v Iipumbu*²¹⁰ and *S v Maniping; S v Thwala*²¹¹ that the state erred in charging the accused with dealing in or being in possession of mandrax, whilst such is not a prohibited dependence-producing drug unless it is scientifically proven

²⁰⁹ Clause 25 of the Combating of the Abuse of Drugs Bill

²¹⁰ 2009 (2) NR 546 (HC)

²¹¹ 1994 NR 69 (HC)

that it contained methaqualone, and the result of such error was that the convictions and sentences were set aside in all these cases. In the *Ipumbu* case Liebenberg AJ (as he then was) commented as follows,

*The word 'Mandrax' does not appear under Part II of the Schedule to Act 41 of 1971 and prosecutors should refrain from referring thereto as if it is the dangerous dependence-producing drug. What is prohibited is the drug called methaqualone and where an accused is charged with dealing in, use or being in possession of Mandrax, the onus is on the State to prove that what the accused was dealing in, used or had in his possession, contained methaqualone. Ordinarily, this will require scientific evidence.*²¹²

Although the drug “Mandrax” also ordinarily requires scientific proof the fact that it is a listed drug means that it will be recognised as a drug on its own without being associated with another drug in order for a person to be charged in relation thereto. Thus the risk of the prosecution making a mistake and charging a person who has committed an offence in respect of the drug “Mandrax” is eradicated as the offence committed will be specifically in respect of the mandrax and the charge will aver as much. Furthermore what one sees from the specific inclusion of the drug mandrax which is classified as an undesirable dependence-producing substance is the fact that the Bill categorises three classes of drugs essentially, namely dangerous dependence-producing substances, dependence-producing substances and undesirable dependence-producing substances. This is in contrast to the Act that categorises drugs as being prohibited dependence-producing substances, dangerous dependence-producing substances as well as potentially dangerous dependence-producing substances.

It is also noteworthy that the Bill makes no provision for presumptions relating to dealing and possession of drugs. Thus it does away with the provisions contained in Section 10 of the

²¹²Paragraph 6 of the judgment

Drug Act. The doing away with the Section 10 presumptions in the Bill is in line with the finding of the present study in relation to the constitutionality of such presumptions insofar as the study concluded that the presumptions contained in Section 10 of the Namibian Drugs Act are clearly in conflict with the presumption of innocence entrenched in Article 12 (1) (d) of the Namibian Constitution.²¹³ What is also worth noting is that the Bill makes no mention of the forfeiture of the instrumentalities and proceeds of drug offences. In contrast, in its own way the Act makes provision for forfeiture even though such forfeiture is dependent on a criminal conviction (thus the Act provides for criminal forfeiture) and the forfeiture of the instrumentalities and proceeds such as money is dependent on the offender being a repeat offender. The failure to deal with the question of forfeiture can be perceived to be a weakness in the Bill.

Let us conclude by discussing what the comparative analysis between the provisions of the Namibian Drugs Act and the Namibian Drugs Bill has brought to light. In more ways than one we have seen that the Act dealing with drug offences in Namibia is out dated. The most important aspect of the Bill is the fact that it criminalises drug trafficking. It is recognised that drug trafficking does take place in Namibia. Conversely, the Drugs Act fails to criminalise conduct such as drug trafficking and fails to set out mechanisms for conduct associated with drug trafficking, such as the manner in which the drug is transported. Since the bodily integrity of a person is involved it is vital that the manner in which a drug can be confirmed to be in the body of a person is clearly set out in law and that is exactly what is done in the Bill. With respect to certain issues such as the issue of search and seizure the Act is vague if compared to the Bill that makes detailed provisions for such issues, specifically criminalising the interference with seized substances and samples. The methodology of the

²¹³ This can be seen in Chapter 3 of the present study

Act to effectively deal with drug related offences is out dated and fails to comply with international obligations such as the 1988 UN Drugs Convention as was established in the preceding chapter.

Added to that, the Act as it stands is also in violation of the constitutionally protected presumption of innocence. This is in contrast with the Bill where the infringement is rectified by excluding presumptions that reverse the onus of proof to such an extent that an accused is essentially required to prove his or her innocence whilst in terms of the Constitution an accused person is presumed innocent until proven guilty in a court of law. The Bill also recognises the fact that not all drug related offences are complete and thus criminalise incomplete drug related offences. Contrary to this the Act makes no such provision and makes it possible for someone who attempted to commit a drug related offence not to be held criminally liable. It is clear from the comparative analysis that the Drugs Act is out dated and does not recognise the fact that drug related offences and matters incidental thereto have changed with time and need to be addressed by a law that is up to date with each and every aspect related to drug offences.

7.3 The Bill and the UN Drugs Convention

Let us proceed to consider whether the Bill is in compliance with the duties and obligations created in the UN Drugs Convention as set out in the preceding chapter. The Republic of Namibia is a signatory to the 1988 UN Drugs Convention. Thus the obligations created in that Convention are also binding on Namibia. As stated previously, the Bill criminalises Drug Trafficking and in respect of that particular aspect is in compliance with the Convention. The UN Drugs Convention was formulated to deal with the increase in international drug trafficking. Thus the focus is on drug trafficking and the fact that the bill criminalises drug

trafficking similar to the offence of drug trafficking contained in the UN Drugs Convention shows compliance on the part of the Drugs Bill with the provisions of the UN Drugs Convention.

The Convention also makes it an offence for one to use drugs for one's own benefit. Thus the use of drugs is criminalised. In the same way the Bill, like the Namibian Drug Act, also criminalises the use of drugs. The only difference is that the Bill makes use of the term "consume" but this term carries the same meaning as use when one has regard to the definition accorded to "consume" as previously outlined. Thus in respect of criminalising the use or consumption of drugs the Bill is in compliance with the obligation created by the UN Drugs Convention. The United Nations Drugs Convention is mostly devoted to fighting organised crime in relation to drug offences, such as drug trafficking, and mandates cooperation amongst the member states in tracing and seizing drug-related assets. The Bill also recognises the fact that there is a link between drug related offences, such as drug trafficking, and organised crime. In respect of that link the Bill specifically makes it an aggravating factor for a drug offender to have been part of a gang as defined in the Prevention of Organised Crime Act, Act 29 of 2004. The Bill also provides in Schedule I for equipment and substances used for the manufacture of drugs, clearly outlining these.

The Bill thus complies with what is provided for in the Convention in respect of this issue if regard is had to Article 1 (a) of the Convention where the following is criminalised:

"(iv)-The manufacture, transport or distribution of equipment, materials or of substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances."²¹⁴

²¹⁴Article 1 (a) (iv) of the UN Drugs Convention

In spite of being in compliance with most of the duties and obligations of the UN Drugs Convention as mentioned above, the Bill still falls short in respect of some aspects. These are aspects such as money laundering and forfeiture of the instrumentalities and proceeds of drug offences. In fact a careful perusal of the Bill shows that no mention whatsoever is made of these two aspects. The argument is that the Bill will work together with POCA. POCA does provide for civil forfeiture and being an anti-money laundering law deals extensively with the issue of money laundering. Thus viewed from that angle Namibia as a state party to the Convention can be said to have complied with its duties and obligations when it comes to the issue of money laundering in relation to drug offences as well as the issue of forfeiture.

However, one should not lose sight of the fact that POCA makes provision generally for all types of offences and not drug related offences specifically, be it in connection with money laundering or in connection with the issue of the forfeiture of the instrumentalities and proceeds of drug offences. In fact, POCA does not specifically focus on drug related offences, rather its prime focus is on the offence of money laundering. In respect of money laundering POCA is also not specifically focused on money laundering in relation to drug related offences such as drug trafficking, but rather only on money laundering as an offence on its own. It can be said that by failing to make provision for money laundering in respect of drug offences as well as forfeiture of the instrumentalities and proceeds of drug offences the Bill falls short of the duties and obligations created by the 1988 UN Drugs Convention.

As the Bill stands now it is in compliance with most of the duties and obligations under the UN Drugs Convention, but in the same breath the Bill is also not in compliance with some of the duties and obligations of the Convention for the reasons stated above.

7.4 A critique of the Namibian Drugs Bill

Up until this point most of the provisions of the Bill can be deemed to be an improvement if compared to the provisions of the Namibian Drug Act. However, the Bill is not without fault and we will now proceed to explore this particular aspect. When the Bill was initially tabled in Parliament and thus became public it attracted a lot of attention due to the severe mandatory sentences contained therein. Various newspaper articles attest to that fact.²¹⁵ When regard is had to the sentencing provisions of the Bill in comparison to the sentencing provisions of the Act it can clearly be seen that the sentences proposed in the Bill are harsh. To show what I mean let us consider the sentences to be imposed in the event of a conviction for consumption, possession of drugs and the trafficking of drugs. In terms of section 3 (1)(c) and section 3(7) of the Bill, the sentences to be imposed for acts of consumption or possession of dangerous dependence-producing and undesirable dependence-producing substances are in the case of a first conviction imprisonment of not less than 20 years without the option of a fine and in the case of a subsequent conviction a period of not less than 30 years imprisonment without the option of a fine. The sentence to be imposed in respect of a dependence-producing substance is a fine not exceeding N\$500 000-00 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment. In respect of a drug trafficking conviction the following minimum sentences are to be imposed in terms of section 4(2): in the case of a first conviction imprisonment for a period of not less than 30 years without the option of a fine and in the case of a subsequent conviction, a period of not less than 40 years without the option of a fine.

²¹⁵The following articles are a point of reference:

Weidlich, Brigitte 'Tough new law on drugs tabled in parliament' *The Namibian* (19 October 2006);

Anon 'Drug Bill not about fighting crime' *The Namibian* (08 December 2006);

Isaacs, Denver 'Public gets on high horse over New Drug law' *The Namibian* (06 February 2007)

Isaacs, Denver 'Tik, gafief, rock...Namibia's drug scene exposed' *The Namibian* (26 October 2007)

The articles are available at: <www.namibian.com.na/index.php?archive_id=27452&page> Last accessed on 16 October 2013

The sentences are mandatory, thus they must be imposed by the court upon conviction. Essentially there is no sentencing discretion vested in the court. It is only in respect of dependence-producing substance convictions that a minimum mandatory prison term is not prescribed. In respect of these types of sentences there is an option of the payment of a fine. However, in respect of dangerous and undesirable dependence-producing substances, regardless of whether they are consumed, possessed or trafficked, there are mandatory minimum terms of imprisonment without the option of a fine prescribed. The quantity of the substance is not disclosed in these prescribed sentences, meaning that a person who is found guilty of consuming, possessing or trafficking a bigger consignment and a person who has only a small quantity of the substance must be sentenced in the same manner to the prescribed minimum mandatory sentences. In terms of Section 38 it is only in the event that substantial and compelling circumstances exist that the court can impose a lesser sentence, in which event the court will have some sentencing discretion. However, the sentencing discretion is limited as it (sentencing discretion) will only be available to the court in the event that compelling and substantial circumstances exist.

What is meant by compelling and substantial circumstances? In the case of *S v Malgas*²¹⁶ the court explained as follows in respect of why substantial and compelling circumstances must not be defined in greater detail by stating as follows:

[That] the legislature has refrained from giving such guidance as was done in Minnesota from whence the concept of 'substantial and compelling circumstances' was derived is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for

²¹⁶2001 (1) SACR 469 (SCA), 2001 (2) SA 1222 (SCA)

*the crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.*²¹⁷

The significance of this case is that specified sentences should not easily be departed from and that such sentences should ordinarily be imposed. However, the court should not hesitate to depart from such sentences if the circumstances of the case calls for such departure. In this respect Terblanche elaborates as follows,

*In the process of determining whether a departure is called for, the court should weigh all considerations traditionally relevant to sentencing. The sentencing court should then have regard to its sense of unease with the prescribed sentence. When this unease is such that the Court becomes convinced that the prescribed sentence would amount to an injustice, an alternative sentence should be imposed.*²¹⁸

What the afore stated has illustrated is the fact there is no hard and fast rule when it comes to defining and categorising what amounts to compelling and substantial circumstances. A consideration such as the proportionality of the prescribed sentence to the seriousness of the offence will have weight. Another factor that would present a substantial and compelling circumstance would be where the mandatory minimum sentence is substantially higher than the punishment which would otherwise have been a reflection of the offender's blameworthiness.²¹⁹ In a nutshell these circumstances will depend on the circumstances of each and every case. What is important is the fact that these circumstances must be somewhat extraordinary in order for the sentencing court to deviate from the prescribed minimum sentence. The fact is that the sentencing discretion of the court is limited by the prescribed mandatory sentences provided for in the Bill.

²¹⁷ Ibid, ad para 18

²¹⁸ Terblanche S.S, 2007, *Guide to Sentencing in South Africa*, 2nd Edition, LexisNexis

²¹⁹ Ibid

One of the possible effects of a mandatory sentence may be that the court is reduced to being a rubber stamp insofar as it has no choice but to impose that which is prescribed by the Legislature. The other worrying fact, as mentioned before, is that the sentences outlined in the Bill, do not include the quantity of drugs. In other words, a person caught with a negligible amount of the drug will be treated in the same way and sentenced to the same mandatory sentences as someone caught with a large consignment of the drug. It is not practical to provide for a blanket punishment to cover every possible offence. The unfairness that will result is best illustrated as follows:

Picture an 18 year old boy, still at school, whose youthful curiosity led to one zol[sic] too many. By the time that he breathes free air again, he will be 38. He won't have a grade 12 degree or tertiary education, with zero understanding of society and its inner workings. He will have an extremely well-honed insight into all things criminal instead. After costing the taxpayer money for 20 years, without contributing a blue cent to the economy, such as a person will be without the necessary skills and means to earn an honest living. So chances are that he will continue doing what he was taught best.²²⁰

And what he was taught best is to commit further offences. Thus an innocent school boy, who is not a career offender, would then become a seasoned criminal. This shows the injustice which can arise from mandatory sentences due to their severity and gross disproportionality. At the end of the day the punishment imposed will not fit the crime committed.

7.5 Summary

In a nutshell we have seen that the Bill is an improvement in many aspects if compared to the Act dealing with drug offences in Namibia. The key aspect is the fact that the Bill specifically criminalises drug trafficking, something which the Namibian Drug Act fails to do. And by criminalising drug trafficking the Bill is in conformity with the international duties and

²²⁰ Anon 'Drug Bill not about fighting crime' *The Namibian* (08 December 2006)

obligations created in the UN Drug Convention. The Bill also criminalises other drug related conduct and makes provision for matters that are associated with drug related offences. These are matters such as the use of the computer to facilitate the abuse of drugs, the detection of the drug in the human body by means of an extensive medical examination, the prohibition against the interference with the seizing of a drug, analysis of the sample as well as falsifying the results of such analysis as well as providing for the issue of monitoring for when a person is suspected to have committed a drug offence or for the police to prevent a drug offence from being committed. Added to that the Bill makes provision for attempts, showing that it recognises that not all drug offences are completed and even if a drug offence is not completed the drug offender can still be held criminally liable for his or her conduct. The Bill does away with the Section 10 presumptions contained in the Namibian Drug Act, thereby recognising the fact that these presumptions, which reverse the burden of proof, are in conflict with the constitutionally protected presumption of innocence. The Bill also lists the substance “Mandrax” and recognises it as a drug unlike under the Act where such recognition does not exist.

However, the Bill is not without fault and fails in dealing with the issue of the forfeiture of the instrumentalities and proceeds of drug offences as well as the issue of money laundering in relation to drug offences. It can be argued that in respect of these issues the Bill is complemented by POCA, which does deal with these issues, albeit generally for all types of offences as opposed to drug related offences specifically. What is perhaps the most troubling part of the Bill are the prescribed mandatory sentences. We have seen that such sentences have the effect of limiting the sentencing discretion of the court. The Bill also fails to set out the quantity of drug in respect of which the mandatory sentences must be imposed. A drug offender caught with a small quantity of the drug will be sentenced to the same prescribed mandatory sentence as a drug offender caught with a bigger quantity of the drug. This, in

turn, has the effect of the prescribed mandatory sentence being unjust, severe and disproportionate. The punishment will simply not fit the crime.

With that said the negative aspects of the Bill are far less than the positive aspects. The positive aspects are already a big improvement on the Act and also show just how out-dated this Act is. Should the negative aspects of the Bill be properly addressed it will be a more effective tool, compared to the Act, in addressing the ever increasing incidents of drug related offences.

CHAPTER 8: DRUGS AND THE COMMISSION OF OTHER OFFENCES

8.1 Introduction

The primary aim of this chapter is to establish whether drugs play any role in the commission of other serious offences. The incidental issue of traps and undercover operations will also be dealt with in this chapter. The issue of traps and undercover operations was raised by the participants in the field research conducted which in turn necessitated its inclusion in the present study although the issue was not initially a focal point. This chapter will thus also be dedicated to discussing traps and undercover operations (and matters incidental thereto) in relation to drug offences. These issues are of relevance due to the fact that they form part of the Namibian drug law and are commonly employed where drug related offences are committed. Different participants raised different issues in relation to traps and undercover operations. These issues will be discussed during the course of this chapter.

By way of an introduction let us briefly consider how the issue of drugs and the subsequent commission of an offence will practically present itself. In this context we will need to consider the defence of intoxication. In our criminal law the defence of intoxication is raised by an accused person in order to exclude criminal capacity, where the use or consumption of drugs preceded the commission of an offence. What is meant by the term “intoxication”? Intoxication occurs where the accused voluntarily or involuntarily consumes drugs, such as alcohol or any other drug having a narcotic effect, prior to the commission of an offence. The effect of intoxication is described in detail as follows:

Intoxication, whether induced by the consumption of alcohol or the intake of drugs, may deprive a person of the capacity to appreciate the wrongfulness of his conduct or the capacity to act in accordance with such appreciation. Intoxication removes or weakens the restraints and inhibitions which normally govern conduct and impairs the capacity to distinguish right from wrong or to act in accordance with that appreciation. It may also conduce to crimes of negligence by impairing powers

of perception, delaying reaction time, and rendering movement clumsy. Intoxication is usually brought about by the consumption of alcoholic liquor but the legal position is the same where it is caused by the taking, injection or inhalation of (mood-altering) drugs.²²¹

Thus an accused will raise the defence of intoxication in order to escape criminal liability for the commission of an offence, in the event that the accused had used drugs prior to the commission of the offence.

8.2 Drugs and the commission of other serious offences

Let us proceed to discuss whether drugs play any role in the commission of other offences. The empirical research conducted supports the contention that the use of drugs plays a role in the commission of other more serious offences, especially violent offences. In fact the state advocates interviewed indicated that they often encounter a case where the person that they are prosecuting for crimes such as murder, rape and robbery with aggravating circumstances in the High Court will indicate that the use of drugs prior to the commission of the offence contributed to the commission of the offence.²²²In addition to that in the case of *R v De Vos*²²³ the learned judge made the following finding:

From its experience and the evidence in cases the Court has no doubt that the use of dagga adversely affects members of the public who make use thereof...the use of dagga may lead to the use of stronger and more harmful drugs, but it is true in respect of dagga per se. In addition we are convinced that it plays a part either per se or in conjunction with the use of liquor in the commission of other offences and especially crimes of violence. In the third place, we are of the opinion that it adversely influences the ability of those who use it to perform their work properly...it is our opinion that it is the duty of our courts, in order to protect the public, to impose sentences which will play a part in combating the offence and here we deal more particularly with the deterrent effect of sentences of imprisonment.²²⁴

²²¹Burchell, J and Milton, J, supra, p261

²²²Fieldnotes 11, 18 and 20

²²³1970 (2) SA 590 (C) at P 593

²²⁴Ibid, p593

Our case law will further show the role played by drugs in the commission of serious offences. In the case of *The State vs Laizer Kuhlewind*²²⁵ the accused was charged with raping a 7 year old girl by inserting his finger into her vagina in contravention of section 2(1)(a) read with Sections 1 and 2(2) of the Combating of Rape Act, Act 8 of 2000. At the time that the offence was committed the accused was 20 years old. The court found the accused guilty of the crime of rape. At the time that the offence was committed the prisoner was more than 3 years older than the complainant and this was a statutorily aggravating circumstance attracting a minimum sentence of 15 years imprisonment, unless the court was to find that there were substantial and compelling circumstances. In the absence of substantial and compelling circumstances the court was under a statutory obligation to impose the minimum sentence of 15 years. In deciding on the sentence to be imposed the following factors were considered by the court: On the day that the offence was committed the prisoner went out on a casual job and partook of cannabis and crack cocaine. He returned to the house and grabbed the complainant by force, placed her on his lap and proceeded to insert his finger into her vagina. According to the testimony of the complainant she experienced pain and bled from her private part.

The attorney for the prisoner asked the court to consider as a potentially substantial and compelling circumstance the fact that the prisoner was under the influence of intoxicating drugs (cannabis and crack cocaine) and as a result thereof acted with a diminished capacity to exhibit good judgment. The court reasoned that age was an important mitigating factor, the younger the offender the greater the need to give him another chance in life. Youthfulness coupled with intoxication was regarded as a strong mitigating factor. The court found that this was all the more so where, as in the present case, the consumption of the intoxicating substance was not done as an inducement for the offence. The court further found that the

²²⁵An unreported case of the High Court of Namibia, case no: CC13/2010, heard by Damaseb, JP on 27 October 2011 and judgment delivered on 26 July 2012

version of the prisoner, that he had never before experimented with drugs and partook of a very dangerous drug (crack cocaine) under peer pressure and was under its influence when the offence was committed, remained undisputed. The court ruled that the factors placed before it cumulatively constituted substantial and compelling circumstances that justified a departure from the statutorily prescribed minimum sentence of 15 years. Consequently the prisoner was sentenced to 7 years imprisonment of which 4 years were suspended for a period of 5 years on condition that during the period of suspension the prisoner is not convicted of the offence of rape read with the provisions of the Combating of Rape Act, Act 8 of 2000.

Furthermore, in the case of *The State vs Natangwe Ipinge Ngatjizeko*²²⁶ the accused was charged with the murder and robbery with aggravating circumstances of his mother. The accused is the biological son of the deceased. The accused had travelled from Walvisbay to Windhoek with the intention to kill the deceased. At the residence of the deceased the accused poured boiling water over the body of the deceased and he fractured some of her ribs. He also stabbed her several times with at least two knives. The deceased died at the scene due to the injuries sustained. The accused took N\$20-00 belonging to the deceased before he left the scene. At the close of the state's case the accused did not testify in his defence but stated in his plea explanation at the start of the trial that he was suffering from a mental defect caused by many years of substance abuse, particularly marijuana, and that he believed that he was psychotic when he committed the alleged offences. However, a psychiatrist who conducted a psychiatric observation of the accused and compiled a mental health report in terms of Section 79 of the Criminal Procedure Act, Act 51 of 1977, made the finding that the accused was fit to stand trial as he was capable of adequately following court proceedings and postulating a defence. However, the psychiatrist did find that at the time of

²²⁶(CC 23/2008) [2013] NAHCMD 108 (18 April 2013)

the commission of the alleged crime the accused suffered from a mental disorder supported by a history of using psychoactive substances. Although the accused understood the nature of what he was doing, his intention was the consequence of a delusion and thus his ability to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation was diminished.

The court held that the diminished responsibility was in itself not a defence but relevant in respect of the sentence because it reduces culpability. The court agreed with the psychiatrist's finding that at the time of the commission of the crimes the accused was suffering from some form of mental defect as a result of the abuse of marijuana. Thus although the accused understood the nature of the crimes his ability to appreciate the wrongfulness of the crimes and act in accordance with such appreciation was diminished. The court convicted the accused of murder with *dolus directus* (with the direct intent to kill). As previously stated, the court found that the accused acted with diminished criminal responsibility which was accepted to be a mitigating factor. However, the court also found the fact that the accused did not show any remorse as well as the fact that the accused was the son of the deceased aggravating. The accused was sentenced to 40 years imprisonment.

From the above stated cases it is clear that the use of drugs played a role in the commission of the crimes that the accused were convicted of. Both cases are serious in nature, being rape and murder. There is also a degree of violence used in the commission of the crimes, especially the crime of murder.

8.3 Traps and undercover operations

Now that we have established the role played by drugs in the commission of other serious offences let us proceed to discuss the issue of traps and undercover operations. It was indicated by the police officials interviewed that they make use of traps and undercover

operations mostly after receiving information from an informant about a drug offence being committed or about to be committed.²²⁷ Any law enforcement official can make use of traps and undercover operations.²²⁸ Thus it is a tool employed by law enforcement officials to detect the commission of an offence, to investigate the commission of an offence, to uncover the commission of an offence or to prevent the commission of an offence. Generally the trap or undercover operation must not go beyond providing an opportunity to commit an offence. It is the argument of the defence attorneys that police traps and undercover operations often go beyond the opportunity to commit an offence and that had it not been for that particular conduct the accused would not have committed the offence.²²⁹ This is the challenge that they bring to court when evidence is obtained by means of traps or undercover operations. This is where and when the defence of entrapment comes into play. What is the rationale for a defence of entrapment?

Entrapment is to the effect that, “an ordinary citizen should not be criminally liable for committing an offence where, in fact, a government agent has induced him to commit the offence.”²³⁰ Thus, in essence, the argument is that had it not been for the conduct of the officer and the conceptualisation and planning of the offence such an offence might not have been perpetrated by an accused person. The theoretical basis for the defence of entrapment have been identified as, “Firstly, entrapment can be seen as a situation where official inducement renders the accused’s act not entirely voluntary and, therefore, excusable.... Secondly, the defence of entrapment can be seen as a method of deterring

²²⁷Field note 32

²²⁸As stated in *S vs Dube* 2000 (2) SA 583 (N)

²²⁹Field note 21, 22, 23, 27, 28 and 29

²³⁰Burchell, J and Milton, J, *supra*, p216

official misconduct or abuse of power, even if it means that a culpable person may go free in the process.”²³¹

Let us consider how the courts have dealt with the issue of traps and undercover operations and the issue of entrapment. In the case of *S v Naidoo*²³² the accused appealed the conviction and the sentence imposed by the magistrate’s court where he had been found guilty on three counts of dealing in heroin. A member of the police received information about heroine dealing and as a result of such information established that the accused was involved in illegal trading. An operation was set up and two controlled purchases of heroin were made with the third heroin purchase meant to be a busting operation. The accused maintained that he was framed because he had laid a charge against another police officer. He denied selling any drugs to the undercover police officer. However, the court found that the version of the accused changed as the trial went by. The court further found that the court *a quo* carefully dealt with the defence of the accused, namely that he was framed and that the police conspired against him. In the view of the appeal court the magistrate’s court carefully considered all the evidence, critically analysed all the probabilities and convincingly showed why the evidence of the accused was not credible and in accord with the probabilities. The appeal against the conviction and sentence was accordingly dismissed.

In the matter of *Russel Robert Reeding and Another vs The State*²³³ the appellants were convicted in the district court at Somerset West on 11 November 2002 on a charge of contravening section 5(b) of Act 140 of 1992 in that they dealt in undesirable dependence-producing drugs, namely 10 packets of dagga and a methaqualone (mandrax) tablet. They were both sentenced to eight years imprisonment upon conviction and it was against such

²³¹ Ibid

²³² 2010 (1) SACR 369 (KZP)

²³³ An unreported case of the High Court of the Cape of Good Hope Provincial Division, Case No: A648/2004, judgment delivered on 04/02/2005

sentence and conviction that they appealed. The first appellant was a police officer who worked as a court orderly at the Somerset West Magistrate's Court at the time that the offence was allegedly committed. The second appellant was a volunteer worker assisting the first appellant with his duties. The police received a report from an informer that the first appellant was selling drugs to prisoners in the holding cells. Acting on that report the police set up a trap operation in the cells. The person used in the trap approached the first appellant asking him to buy him mandrax and dagga. R200-00 was tendered for that purpose. The first appellant procured and handed over 10 small packets of dagga and a mandrax tablet to the person used in the trap, who in turn gave a signal to the police who came, seized the drugs and arrested the appellants.

Both appellants pleaded guilty and on behalf of the first appellant it was averred that he had been enticed to commit the offence through repeated importuning on the part of the trap and an attempt to play on his sympathy. It was contended that the State had come to court with "dirty hands". The State's action in trapping both appellants was said to have infringed on their right to a fair trial and was thus challenged as unconstitutional. A different defence was raised on behalf of the second appellant, namely that he had merely been an instrument of the first appellant and had at no time been aware that he was handling or delivering drugs to the trap. The court found that the trap was lawful when it considered the trap procedure. In considering whether the trap went beyond providing an opportunity to commit an offence the court held that there was no evidence to suggest that the person used in the trap bore any ill-will or malice towards the first appellant or that he was doing anything other than playing his part in a *bona fide* trap.

In evaluating the proportionality aspect the court considered the fact that the first appellant first accepted the money, left the cells, went home, procured the dagga and mandrax tablet, returned to the cells and arranged with the second appellant for the drugs to be handed to the

trap. The court found that although the action of the trap was the catalyst for the commission of the offence, the first appellant was a far more active partner in the conduct which made up the elements thereof. The court concluded that after having considered all the factors the conduct of the trap did not go beyond an opportunity to commit an offence with the result that the ensuing evidence was automatically admissible. The end result was that the appeal against the conviction was dismissed and the appeal against sentence was upheld.

In *Mavis Xaba and Another vs The State*²³⁴ the appellants were a brother and sister duo described as wholesale cannabis merchants. They were caught after an entrapment operation and the first appellant pleaded guilty on five charges of dealing, whereas the second appellant pleaded guilty on three charges of dealing. They were convicted and sentenced in the Regional Court, the first appellant to twenty and the second appellant to eighteen years imprisonment. Both appellants appealed their sentences in the High Court. However, the appeals were dismissed. The facts of the case briefly are as follows. A large consignment of cannabis was delivered to the homes of the appellants at the request of the first appellant. The delivery was part of a trap after the size and audacity of the appellants' dagga operation attracted the attention of the organised crime and narcotics division of the police in their area. Both appellants received these consignments from the police inspector who took part in the trap. The main reason why the first appellant pleaded guilty to the charges of dealing was because she was the one who had arranged for the trap to transport the cannabis.

The court held that there was not authority in law at that point in time in terms of which a cannabis dealer had been sentenced to twenty years imprisonment. The appeal against sentence was upheld with the first appellant's sentence being replaced by one of fourteen

²³⁴ An unreported judgment of the Supreme Court of Appeal of South Africa, Case Number 211/04, heard on 03 March 2005 and judgment delivered on 18 March 2005

years imprisonment and the second appellant's being replaced by one of twelve years imprisonment.

The case law shows that courts do accept and place weight on evidence obtained by means of traps and undercover operations (including controlled delivery). However, in the same vein the courts do consider the defence of entrapment and in so doing place emphasis on the fact that the trap must be lawful and must not go beyond an opportunity to commit an offence.

8.4 The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, the Combating of the Abuse of Drugs Bill and the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

Let us proceed to consider whether the issue of traps and undercover operations is dealt with in the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 and the Combating of the Abuse of Drugs Bill 4 of 2006. The importance of this issue being considered lies in the fact that in most drug related offences the law enforcement officials act on information received from informants and the setting of traps to capture perpetrators.²³⁵ A reading of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 shows that no provision is made for traps and undercover operations or matters incidental thereto under the Act. In the same way the Namibian Combating of the Abuse of Drugs Bill also makes no provision for traps and undercover operations or matters incidental thereto.

What is the position in terms of Namibia's international obligations under the 1988 UN Drugs Convention? Article 11 of the Convention deals with the issue of controlled delivery and provides that:

²³⁵ As per the information of the members of the Drug Law Enforcement Unit of the Namibian Police, Field note 32

1. *If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.*
2. *Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.*
3. *Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.*²³⁶

Controlled delivery is relevant to the discussion on the issue of traps and undercover operations as it is the tool used to set up a trap. For example, the law enforcement officials will receive information about a consignment of drugs in transit from an informant. Before the drugs reach their intended destination the police will intervene and an undercover officer will form part of the persons who are to deliver the drugs. These drugs will either be the ones which were originally intercepted or may be replaced in whole or in part with another substance. That is what is referred to as controlled delivery.²³⁷

The provision of the UN Drugs Convention shows that it takes cognisance of the fact that the illicit drug trade is international in scope and context. Since the Namibian Drug Legislation does not even criminalise drug trafficking it comes as no surprise that the same Act does not at all deal with the issue of controlled delivery. There are no mechanisms in place in the Namibian Act to regulate how controlled delivery must be done. Thus there is no recognised uniform practice that can be used by drug enforcement officials. This may lead to an abuse of

²³⁶ Article 11 of the 1988 UN Drugs Convention

²³⁷ Ibid

power on the part of the drug law enforcement officials as there is nothing in the drug legislation guiding their decisions and subsequent actions. The lack of provision for controlled delivery in the Namibian Act may also lead to more evidential and procedural issues being raised in the ensuing trial by the defence questioning the conduct of and the procedure used by the law enforcement officials. Furthermore, there may also be no point of reference for the presiding officers to utilise in deciding on issues related to controlled delivery.

The fact that there is no provision made for traps and undercover operations and matters incidental thereto, such as the issue of controlled delivery, is another indication that the Namibian Drug Legislation fails to comply with its duties and obligations in terms of the UN Drugs Convention.

8.5 Summary

The Deputy Inspector General of the Namibian Police, Major-General Vilho Hifindaka, recently stated that, “There has been an increase in violent crimes fuelled by narcotic drugs and the abuse of alcohol. The Namibian Police arrested more suspects venturing into serious crimes as per the E-Policing databases.”²³⁸ His remarks show the link between drugs and the commission of serious offences. In addition, by way of further illustrating the role played by drugs in the commission of other serious crimes let us consider the following, “the tik epidemic (the local name for crystal methamphetamine)²³⁹ has driven a violent crime surge that includes serious assaults, robberies, murders, rapes and even a growing number of bestiality cases. The drug is associated with extremely violent behaviour and a hyper sex

²³⁸These comments were made at the annual Magistrate’s Conference (held at the Seaside Hotel and Spa, Swakopmund) on 26 November 2013

²³⁹My own insertion

drive.”²⁴⁰In respect of the role played by drugs in the commission of other serious offences this chapter has shown that there is no doubt that the abuse of drugs inevitably leads to the commission of other more serious offences which are more often than not accompanied by a degree of violence.

This chapter is also alive to the fact that traps and undercover operations, which include controlled delivery, are used where drug related offences are concerned. However, different individuals are affected in different ways by its use. By way of illustration the law enforcement officials have to ensure that the use of the tools under discussion is not unlawful and does not go beyond the opportunity to commit an offence. The accused (and defence attorneys on behalf of the accused) on the other hand, may argue that had it not been for the law enforcement officials making use of these tools the accused would not have committed the offence in the first place, bringing into play the defence of entrapment. Ultimately, it is an issue for the court to decide. This chapter has shown that the Namibian Act and the Combating of the Abuse of Drugs Bill make no provision for the issue of traps and undercover operation and matters incidental thereto. A discussion of this situation in light of the provisions dealing with this particular issue in the 1988 UN Convention, went on to show that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 has failed to fulfil its international duties and obligations in this regard.

²⁴⁰ <<http://sun.com.na/content/national-news/sa-cops-tik-drug-warning-namibia>> Last accessed on 25 February 2014

CHAPTER 9: CONCLUSION AND RECOMMENDATIONS

9.1 Introduction

This chapter summarises the main findings of the study and will make recommendations where the problems have been found with the effectiveness of the Namibian Drugs Legislation.

9.2 Summation of the main findings and recommendations

In chapter 2 we established that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 does not criminalise drug trafficking. Thus drug trafficking is not a recognised offence in the current Namibian Drugs Legislation. Persons who engage in drug related activities are charged either with possession/use or dealing in drugs. This is the position regardless of the drug related conduct of the offender, even if such conduct amounts to drug trafficking. Criminalising drug trafficking is recommended based on the reasoning that it will cast the net wider and target those at the centre of the drug trade, namely the actual drug dealers.

Consequently, drug trafficking will not be limited to the person found with the drugs, but will include other role players as well. As previously stated the offence of drug trafficking will be a continuing offence insofar as the offence will continue as long as the illicit drugs are in the possession of the person trafficking them or of someone who was a party to the drug trafficking or even of a person acting on behalf of or in the interests of the original drug trafficker or party to the drug trafficking. Much like in the case of theft being a ‘continuing crime’²⁴¹ two significant consequences will flow from drug trafficking being a continuing crime. Firstly, regardless of where the drug trafficking originally took place, the drug

²⁴¹ Jonathan Burchell and John Milton, *supra*

trafficker may be tried at the place where he or she is found with the drugs. This will be the situation regardless of whether or not the conduct of the perpetrator is regarded as drug trafficking by the law of the place where it occurred. Secondly, those who render assistance to the drug trafficker whilst the drug trafficking continues will be guilty not merely as accessories after the fact, but of the offence of drug trafficking itself.

Added to that, it must be recognised that drug trafficking operates on an international level. It is a global illicit trade that involves the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws. Further it must be noted that drug trafficking is a transnational organised crime which threatens peace and human security, violates human rights and undermines economic, social, cultural, political and civil development of societies around the world.²⁴² Due to the diversification of organised crime in the sense that illicit drugs may be sourced from one continent, trafficked across another and marketed in yet another it is imperative that the Namibian Drug Legislation keeps up with these developments and creates greater leverage against drug traffickers. One way in which such greater leverage can be created is by specifically criminalising drug trafficking.

In chapter 3 the probability of the presumptions contained in section 10 of the Namibian Drug Law being in contravention of the constitutionally protected presumption of innocence was examined. The presumptions in section 10 have the effect that the onus is on the accused to prove his or her innocence. This is clearly in contrast to what is accepted in our criminal law and procedure. In criminal proceedings the burden is on the state to prove the guilt of an accused beyond a reasonable doubt. It will be a state of anarchy if a person accused of having

²⁴²As asserted by the United Nations Office on Drugs and Crime <<http://www.unodc.org/unodc/en/drug-trafficking/>>Accessed on 14 August 2013

committed an offence is found guilty without the state proving the guilt of such an accused beyond a reasonable doubt in a court of law. Accused persons who are not legally guilty will be convicted whilst they are innocent. Such a situation cannot be allowed in a state governed by the rule of law. It is based on this reasoning that the state bears the onus to prove the guilt of an accused beyond a reasonable doubt in criminal proceedings.

What is perhaps the most important consideration is the fact that all laws are subject to the Namibian Constitution due to the fact that that is the supreme law of the land. The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 is subject to the Namibian Constitution and its provision. The Namibian Constitution provides for the presumption of innocence insofar as all accused are presumed innocent until proven guilty in a court of law. An accused cannot be expected to prove his or her innocence due to a burden being placed on him or her to do so by a legislative enactment. Such a reversal of proof is inconsistent with the constitutional presumption of innocence. It is thus concluded that the presumptions contained in section 10 of the Namibian Act are in conflict with the presumption of innocence entrenched in Article 12(1)(d) of the Namibian Constitution and by virtue of that the section is rendered unconstitutional. The only solution for this problem will be for the constitutionality of the section 10 presumptions to be challenged in a competent court of law. The Namibian High Court, in the case of *S v Rooi*, expressed itself on the possibility that the section 10 presumptions may be unconstitutional as seen in chapter 3 of the present study.²⁴³

In chapter 4 there was a comparison drawn between the South African Drugs and Drug Trafficking Act, Act 140 of 1992 and the Namibian Abuse of Dependence Producing

²⁴³ Please see the case of *S v Rooi* CR 64/07 [2007] NACH 16 (13 April 2007) as discussed in the present study on P44

Substances and Rehabilitation Centres Act, Act 41 of 1971. This was especially with regard to the issue of the constitutionality of the section 10 presumptions. Although South African case law is no longer binding in Namibia, it is still persuasive and as such it was found that the cases where the South African Courts pronounced themselves on the constitutionality of the presumptions in section 10 of the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, do have persuasive force in Namibia. A further aspect where Namibia can emulate South Africa is with respect to the obligations contained in the United Nations Convention. Practical lessons can also be learnt from South Africa such as permanently stationing members of the Drug Law Enforcement Unit at as many ports of entry into Namibia as possible which, in turn, will assist in the fight against offences involving drugs, especially drug trafficking.

In chapter 5 we have seen that the illicit drug trade is a billion-dollar industry. We also established that the proceeds derived from the illicit drug trade are concealed and that this is where money laundering becomes relevant to the issue of drug related offences. Money laundering can destabilise the economy of a country and from the perspective of the present research it has the possibility to make the illicit drug trade lucrative to those that are already in it and attract new offenders as well. This is all the more so if the drug offenders hide the true origin of their wealth and are allowed to get away with it. Those involved in the illicit drug trade will continue unabated with their illegal activities if nothing is done to the property used in the commission of the offence and the proceeds of such drug offence. This normally comes at a cost, be it the reputation and integrity of the financial sector, foreign investment in the country, loss of revenue for the state and perhaps most importantly it comes at a social (human) cost.

The human cost of the illicit drug trade is the reason why full advantage must be taken of the provisions of the Prevention of Organised Crime Act where the forfeiture of ill-gotten riches is not dependant on a criminal conviction. This is due to the fact that the forfeiture proceedings are civil, as opposed to criminal, in nature. Thus civil forfeiture takes place. The Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 only provides for the forfeiture of the property after conviction. This bears the risk of the property being destroyed or hidden. Ultimately the property then just goes back into the illicit drug trade, becoming instrumentalities. We also saw that the South African POCA does not differ materially from the Namibian POCA. There are more similarities than differences between the two. With that said as a point of departure, before forfeiture can even take place there must be a search and seizure of the property. In order for the property to be searched and seized it must be identified and traced first. It was discovered that the Namibian Act does not make provision for the issue of search and seizure. This is, in my opinion, a fatal flaw. In dealing with the issue of search and seizure reference must be made to other laws, such as the Criminal Procedure Act, Act 51 of 1977. However, the fact is that such a law does not cater specifically for drug related offences and is rather broad in its application. This is problematic because if the generally applicable law is applied incorrectly the whole drug case falls away and a drug offender walks away, not only from punishment in the form of a possible criminal conviction and sentence, but the drug offender also walks away with property that forms part of the instrumentalities and proceeds of drug related offences. Hence, the recommendation is for the Namibian Act to be amended so as to make specific provision for the issue of search and seizure.

Added to that, the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 only provides for the forfeiture of property, such as money, only after a second or subsequent conviction. A drug offender should not part ways with the

instrumentalities and proceeds of drug related offences only after a second or subsequent conviction. In a way this condones the conduct of the offender. Ideally, immediately upon conviction the offender must be stripped of his or her ill-gotten property, whether it is his or her first offence or not. The instrumentalities and proceeds of the drug related offence must be forfeited as an additional punishment and deterrent, not only for the drug offender but would-be drug offenders as well. A person should not be allowed to profit from his or her illegal activities. If such a situation is allowed, drug offences, which are already alarmingly high, will continue unabated. Therefore, there is a need for a change in the Namibian Act when it comes to this issue (the fact that only after a second or subsequent conviction property, such as money, can be declared forfeited to the state).

In chapter 6 we found that the crime of drug trafficking is international in nature and thus transcends national borders. Raw materials such as the coca plant (a raw material for cocaine) will be sourced in one country; cocaine will be manufactured in another country, the product (cocaine) will then be transported through yet another country (a transit country like Namibia) before reaching the country that it is destined for. Inevitably the drug will infiltrate the different countries from its source to its place of destination. Since enormous profits are involved in the illicit drug trade the vicious cycle will continue if the international community does not stand together and fight together against the global illicit drug trade. In its fight against the illicit drug trade the global community adopted the United Nations Convention against the illicit traffic in narcotic drugs and psychotropic substances of 1988. Under this Convention certain duties and obligations were placed on member states, including Namibia.

After outlining the duties and obligations placed on member states under the UN Convention, I went on to consider whether Namibia has fulfilled its duties and obligations. Under the Convention it was found that in respect of the issue of forfeiture of the instrumentalities and proceeds of drug related offences Namibia does, as a matter of fact, have a very good law in

the form of POCA. However, as outlined above this law does not specifically focus on drug related offences, its prime focus is rather on the offence of money laundering. In respect of money laundering POCA is also not specifically focused on money laundering in relation to drug related offences such as drug trafficking, but rather the focus is on the offence of money laundering itself. In addition to that the Namibian Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 does not even criminalise conduct such as drug trafficking. The use and possession of as well as the dealing in drugs are criminalised by the said Act. If Namibia does not even criminalise drug trafficking how can it be said to be in compliance with the provisions of the UN Drugs Convention? The UN Drugs Convention was, after all, adopted to specifically tackle the issue of drug trafficking.

It may be reasonably possible that at the time that the Act dealing with drug offences in Namibia was enacted, drug trafficking *per se* was not a concern, much less an international concern. Thus the focus was more on the usage, possession and dealing of drugs. Namibia initially only had a problem with drugs such as cannabis and mandrax, but hard drugs such as cocaine and heroin have been introduced in the country by syndicates. With Namibia being a transit country these drugs inevitably infiltrated Namibian society in the process of being trafficked through the country. Thus, it is a fact that drug trafficking does occur within Namibia but the act of trafficking in drugs is not criminalised despite the occurrence of the offence. By still relying on an Act that is out-dated Namibia has failed and continues to fail to fulfil its duties and obligations under the United Nations Convention against the illicit traffic in narcotic drugs and psychotropic substances of 1988. The recommendation in this regard is for the Namibian Legislature to amend or replace the current Namibian Drugs Legislation in order for the Legislation to be in compliance with the provisions of the UN Drugs Convention, to which Namibia is a signatory. The prominent issue that must be incorporated and reflected in the Namibian Drugs Legislation is the criminalisation of drug trafficking.

In chapter 7 we discussed the Namibian Drugs Bill. We saw that the Namibian Bill is an improvement in many aspects if compared to the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, which deals with drug offences in Namibia. The key aspect is the fact that the Bill specifically criminalises drug trafficking, something which the Namibian Drug Act fails to do. And by criminalising drug trafficking the Bill is in conformity with the international duties and obligations created in the UN Drug Convention. The Bill also criminalises other drug related conduct and makes provision for matters that are associated with drug related offences. These are matters such as the use of the computer to facilitate the abuse of drugs, the detection of the drug in the human body by means of an extensive medical examination, the prohibition against the interference with the seizing of a drug, analysis of the sample as well as falsifying the results of such analysis as well as providing for the issue of the monitoring of a person who is suspected to have committed a drug offence or for the police to prevent a drug offence from being committed.

Added to that the Bill makes provision for attempts, showing that it recognises that not all drug offences are completed and even if a drug offence is not completed the drug offender can still be held criminally liable for his or her conduct. The Bill does away with the section 10 presumptions contained in the Namibian Drug Act, thereby recognising the fact that these presumptions, which reverse the burden of proof, are in conflict with the constitutionally protected presumption of innocence. The Bill also lists the substance “Mandrax” and recognises it as a drug as opposed to the Namibian Drug Act where such recognition does not exist.

However, we also established that the Bill is not without fault in that it fails in dealing with the issue of the forfeiture of the instrumentalities and proceeds of drug offences as well as the issue of money laundering in relation to drug offences. It can be argued that in respect of these issues the Bill is complemented by POCA, which does deal with these issues, albeit

generally for all types of offences as opposed to drug related offences specifically. What is perhaps the most troubling part of the Bill is the provision of prescribed mandatory sentences. We have seen that such sentences have the effect of limiting the sentencing discretion of the court. The Bill also fails to set out the quantity of drugs in respect of which the mandatory sentences must be imposed. A drug offender caught with a small quantity of the drug will be sentenced to the same prescribed mandatory sentence as a drug offender caught with a bigger quantity of the drug. This, in turn, has the effect of the prescribed mandatory sentence being unjust, severe and disproportional. The punishment will simply not fit the crime. These are the issues that must be addressed before the Namibian Drugs Bill can be considered to replace the current Namibian Drugs Act.

At this juncture it must be conceded that the negative aspects of the Namibian Drugs Bill are fewer than the positive aspects. The positive aspects are already a big improvement of the Namibian Drug Act and also show just how out-dated this Namibian Drugs Act is. Should the negative aspects of the Bill be properly addressed it will be a more effective tool, compared to the Namibian Drug Act, in addressing the ever increasing incidents of drug related offences.

In chapter 8 we set out to show the link between drugs and the commission of other serious offences. It was established that the abuse of drugs inevitably leads to the commission of other more serious offences, offences that are more often than not accompanied by a degree of violence. Two cases, one of rape and the other of murder, were studied. It was clear from these cases that the use of drugs played a role in the commission of the crimes that the accused were convicted of. Both cases were serious in nature, being rape and murder. There was also a degree of violence used in the commission of the crimes, especially the crime of murder.

Furthermore, in chapter 8 the study also revealed the fact that traps and undercover operations, which include controlled delivery, are used where drug related offences are concerned. However, different individuals are affected in different ways by its use. By way of illustration the law enforcement officials have to ensure that the use of the tools under discussion is not unlawful and does not go beyond the opportunity to commit an offence. The accused (and defence attorneys) on the other hand, may argue that had it not been for the law enforcement officials making use of these tools the accused would not have committed the offence in the first place, bringing into play the defence of entrapment. Ultimately, it is an issue for the court to decide. This chapter has shown that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 and the Namibian Drugs Bill make no provision for the issue of traps and undercover operation and matters incidental thereto. A discussion of this situation in light of the provisions dealing with this particular issue in the UN Drugs Convention, went on to show that the Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971 has failed to fulfil its international duties and obligations in this regard.

In conclusion the study has shown that in order to combat the importation and distribution of drugs co-operation on an international scale is required. In order for international drug offenders to be apprehended and prosecuted successfully, it is required of law enforcement officials to abandon traditional techniques, now known by these drug offenders, in favour of bold and innovative counter-narcotics strategies.²⁴⁴

In addition to that, the following recommendations made by Steyn AJ are worthy of consideration:

Effective policing, control over ports of entry, training of police and other protective services, expertise in investigation and control, and the education of our youth were some of the important

²⁴⁴Gurule J, *supra*

*components of a protective shield against the destructive impact of the illegal trade in dependence-producing substances. However, the courts had their role to play in imposing sentences which spoke clearly of society's determination to fight this danger with all the weapons at its disposal.*²⁴⁵

Thus not only must our drug law enforcement officials be trained to expertly deal with the investigation of drug related offences and our ports of entry be controlled but we must also educate our youth about the dangers associated with drug use and in doing so eradicate the social (human) cost of drug offences.

Based on the main findings of this study it must be acknowledged that as the situation stands at present Namibia relies on an out-dated Act to deal with drug related offences. There is a need for the present Act to be replaced by Legislation that is more in line with reality and encompasses all aspects of drug related offences. The issues to be addressed by the new Legislation must include not only aspects related to the offences themselves but also issues associated with such offences, including but not limited to issues such as search and seizure as well as the issue of the instrumentalities and proceeds of drug related offences.

²⁴⁵S v Randall 1995 (1) SACR 559 (C) p 560

ANNEXURE “A”**List of Fieldnotes**

1. **Nuule T**, Magistrate, Windhoek
2. **Asino J**, Magistrate, Windhoek
3. **Anonymous 1**, Magistrate, Windhoek
4. **Anonymous 2**, Magistrate, Windhoek
5. **Anonymous 3**, Regional Court Magistrate, Windhoek
6. **Anonymous 4**, Regional Court Magistrate, Windhoek
7. **Jagger, J**, Relief Magistrate, Windhoek
8. **Anonymous 5**, Magistrate, Windhoek
9. **Anonymous 6**, Magistrate, Windhoek
10. **Anonymous 7**, Magistrate, Windhoek
11. **Nyambe R**, State Advocate, Windhoek
12. **Gaweseb T**, Regional Court Prosecutor, Windhoek
13. **Diergaardt S**, Prosecutor, Windhoek
14. **Anonymous 1**, Prosecutor, Windhoek
15. **Anonymous 2**, Prosecutor, Windhoek
16. **Witbooi R**, Prosecutor, Windhoek
17. **Jacobs S**, Regional Court Prosecutor, Windhoek
18. **Anonymous 3**, State Advocate, Windhoek
19. **Anonymous 4**, State Advocate, Windhoek
20. **Anonymous 5**, State Advocate, Windhoek
21. **Nambahu, C**, Legal Practitioner, Windhoek
22. **Kenaruzo, M**, Legal Aid Attorney, Windhoek
23. **Shipopyeni, F**, Legal Practitioner, Windhoek

24. **Uirab, B**, Legal Aid Attorney, Windhoek
25. **Anonymous 1**, Legal Practitioner, Windhoek
26. **Anonymous 2**, Legal Practitioner, Windhoek
27. **Anonymous 3**, Legal Practitioner, Windhoek
28. **Coleman, T**, Legal Aid Attorney, Windhoek
29. **Anonymous 4**, Legal Practitioner, Windhoek
30. **Anonymous 5**, Legal Practitioner, Windhoek
31. **Basson, F**, Unit Commander, Drug Law Enforcement Unit, Namibian Police,
Windhoek
32. **Group Interview**: 9 members of the Drug Law Enforcement Unit, Namibian Police,
Windhoek

ANNEXURE “B”**RESEARCH INSTRUMENT: INTERVIEW QUESTIONS****JUDGES AND MAGISTRATES**

In your opinion does our current drug law specifically criminalise drug trafficking?

Have you presided in a case where the accused was specifically charged with drug trafficking?

What are the different kinds of offences created by the law dealing with drug offences in Namibia?

On average how long do drug related cases take to be finalized?

In your opinion what is the cause for the cases taking that period of time to be finalized?

Do you encounter problems and/or limitations when having to make use of the current drug law?

What are the types of problems and/or limitations that you encounter?

As a presiding officer do you feel that the current drug law sufficiently deals with drug related matters?

Is there any part of the law that you feel needs to be reviewed and possibly amended?

Do the provisions of Section 10 of the Namibian Drugs Legislation in any manner violate Article 12 (1) (d) of the Namibian Constitution?

In serious cases that you preside over, such as murder, rape and robbery, do drugs play any role in the commission of such offences?

When dealing with the instrumentalities and proceeds of drug offences what law do you employ?

Does this law help you deal sufficiently with the issue of the instrumentalities and proceeds of drug offences?

Do you encounter any limitations and or problems when making use of that law dealing with the instrumentalities and proceeds of drug offences?

PROSECUTORS

In your opinion does our current drug law specifically criminalise drug trafficking?

Have you prosecuted any case where the accused was specifically charged with drug trafficking?

What are the charges normally preferred against the accused as opposed to a charge of drug trafficking?

Why are accused not charged with drug trafficking?

On average how long do drug related cases take to finalise?

In your opinion what is the cause for the cases taking that period of time to finalise?

Do you encounter problems and or limitations when having to make use of the current drug law in prosecuting accused persons facing drug related offences?

What are the types of problems and or limitations that you encounter?

As a prosecutor do you feel that the current drug law sufficiently deals with drug related matters?

Is there any part of the law that you feel needs to be reviewed and possibly amended from a prosecutorial point of view?

In serious cases that you prosecute, such as murder, rape and robbery, do drugs play any role in the commission of such offences?

When dealing with the instrumentalities and proceeds of drug offences what law do you employ?

Does this law help you deal sufficiently with the issue of the instrumentalities and proceeds of drug offences?

Do you encounter any limitations and or problems when making use of that law dealing with the instrumentalities and proceeds of drug offences?

DEFENCE ATTORNEYS

Have you defended an accused in any case where the accused was specifically charged with drug trafficking?

On average how long do drug related cases take to be finalized?

In your opinion what is the cause for the cases taking that period of time to be finalized?

Do you encounter problems and/or limitations when having to make use of the current drug law in prosecuting accused persons facing drug related offences?

What are the types of problems and/or limitations that you encounter?

As a defence attorney do you feel that the current drug law sufficiently deals with drug related matters?

Is there any part of the law that you feel needs to be reviewed and possibly amended from a defence attorney point of view?

In serious cases that you defend, such as murder, rape and robbery, are drugs raised as a defence?

Are you aware of any law dealing with the issue of the instrumentalities and proceeds of drug offences?

As a defence attorney what are the limitations and/or problems you encounter with respect to the law dealing with the issue of the instrumentalities and proceeds of drug offences?

Do the provisions of Section 10 in any manner violate Article 12 (1) (d) of the Namibian Constitution?

DRUG LAW ENFORCEMENT OFFICERS

In your opinion does our current drug law specifically criminalise drug trafficking?

Have you investigated any case where the accused was specifically charged with drug trafficking?

What are the charges normally preferred against the accused as opposed to a charge of drug trafficking?

Why are accused not charged with drug trafficking?

On average how long do drug related cases take to finalise?

In your opinion what is the cause for the cases taking that period of time to finalise?

Do you encounter problems and or limitations when having to make use of the current drug law in investigating accused persons facing drug related offences?

What are the types of problems and or limitations that you encounter?

As an investigator do you feel that the current drug law sufficiently deals with drug related matters?

Is there any part of the law that you feel needs to be reviewed and possibly amended from a prosecutorial point of view?

How are drugs normally smuggled into Namibia?

What are the different types of methods used to smuggle drugs?

What types of drugs are normally involved in the drug related cases that you investigate?

Where do these drugs normally originate from?

Would you say that Namibia is a drug producing country?

What types of drugs are produced in Namibia?

Do you find it easy or difficult to trace the proceeds of drug offences?

What do these proceeds normally comprise of?

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Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971

Combating of the Abuse of Drugs Bill 4 of 2006 (**BILL**)

Criminal Procedure Act, Act 51 of 1977

Drugs and Drug Trafficking Act, Act 140 of 1992

Prevention of Organised Crime Act, Act 121 of 1998 (South African)

Prevention of Organised Crime Act, Act 29 of 2004 (Namibian)

(e) International Instruments

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005

United Nations Convention Against the Illicit Trafficking in Narcotic Drugs and Psychotropic Substances of 1988