IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

THE STATE V ERNEST ABANOBI & 1 OTHER

High Court Ref no	:	**101061**
Magistrate Case no	:	**B1389/09**
Magistrate Serial no	:	**29/10**

REVIEW JUDGMENT DELIVERED THIS 18th DAY OF OCTOBER 2010

RILEY AJ,

The accused Ernest Abanobi, a 27 year old male person and Uchenna Okoro, a 32 year old male person, were convicted by the magistrate at Goodwood on 9 July 2010 of contravening the provisions of section 22A(5)(a) of the Medicines and Related Substances Act 101 of 1965. On 16 July 2010 they were sentenced to 8 years and 7 years imprisonment, respectively, of which 3 years were suspended for a period of 5 years on condition that the accused are not again convicted of contravening s22A(5) of the Medicines and Related Substances Act 101 of 1965 and section 5(a) or (b) of the Drugs & Drug Trafficking Act, 140 of 1992, committed during the period of suspension. Both the accused are Nigerian nationals.

According to the annexure to the charge sheet it is alleged that on 10 June 2009 and at or near Forest Drive Extension, Pinelands, within the magisterial district of Goodwood, the accused unlawfully and intentionally dealt in

Schedule 2 drugs, to wit, antihistamine which contains Diphnylhydramine to a member of the public without the necessary authority to do so.

When the matter came on review the magistrate was requested to respond to the following query by Yekiso J:

> *"I note in the trial of this matter, Mr B C Simeon who appears to be EBO/IBO speaking, was used to interpret for the accused.*
> *In the light thereof, could you kindly advise as follows:*
>
> *a) If Mr Simeon is in the full employ of the Department of Justice and Constitutional Development as a court interpreter.*
>
> *b) If not fully employed by the Department as a court interpreter, whether he was duly sworn in, prior to the commencement of the proceedings, to interpret for the accused.*
>
> *c) Whether the court did make an assessment and satisfied itself with regards to the proficiency to interpret from the English language to EBO/IBO and vice versa."*

The magistrate responded as follows:

> *"I am currently sitting as Magistrate in the Civil Court Goodwood. The Magistrate of B Court Goodwood was on leave for 3 weeks and there was a serious of shortage of Magistrates. The head of office Mrs.Xhallie started this Court in the mornings and on finalizing of my roll in the Civil Court I would take over B Court and finalize all outstanding cases. This placed an enormous burden and case load on*

me. During these three weeks I did various matters involving Ebo speaking accused. In all these matters Mr Simeon was the interpreter in Court.

I have now made the necessary enquiries from the administration staff at Goodwood Court and was informed by Mr A.Ntsingane, head of the interpreters of the following as regards to The Honourable Judges remarks;

a) Mr Simeon is not in the full employ of the Department of Justice and constitutional Development as a court interpreter.

b) He was not duly sworn in as interpreter by the Magistrate separately before commencement of the trial.

c) No assessment was made regarding his proficiency to interpret the Ebo language.

I would like to elaborate as regards to what transpired in Court. As indicated I just assisted in B Court for 3 weeks. As indicated above Mr Simeon was the interpreter in all matters where Accused was Ebo speaking. I accepted that he was an official Court interpreter. I saw on the charge sheet that he appeared as the interpreter on previous occasions with no indication of compliance with rule 68(3). I cannot remember seeing any charge sheet in that period where he was sworn in as interpreter. I concede in hind sight that this assumption was incorrect and that I should have made the necessary enquiries before proceeding. I also concede that I did not comply with the requirements

of swearing n the interpreter in terms of rule 68(3) of the Magistrates Court Rules and the current case law regarding the enquiry of proficiency. I am aware of the finding that this High Court made in S vs. Mpondo 2007(2) SACR 245 (C). I would however respectfully request The Honourable Reviewing Judge to make a finding that despite this oversight that it did not per se render the trial unfair. Unlike that matter there was no difficulty with the proficiency of the interpreter. The only problems I encountered were that Mr Simeon got involved with long discussions with the accused without interpreting all of that. There was never any indication that he was not proficient in the language or any other problem with his ability to correctly interpret. He was the interpreter from earlier in this matter and there was never any indication from accused on their legal representatives that Mr. Simeon was not a suitable interpreter. It needs to be mentioned that both accused seems to be fluent in English and at one stage I asked the accused if he prefers to testify in English without the services of the interpreter as he answered the questions even before they were interpreted to him. Neither of the accused raised any concerns with the ability of the interpreter. Mr Ntsingane further informs me that Mr Simeon is indeed the person being used on recommendation from The Regional Office of the Department of Justice and Constitutional Development as a qualified Ebo interpreter to be used by the Courts in this area as a casual interpreter. It would seem that this was done on the suggestion of the Honourable Judges in the above mentioned case to establish a group of efficient and qualified interpreters to be used by

the Courts for the different languages. He further confirms that Goodwood Court always make use of the services of Mr Simeon for all cases where accused are Ebo speaking. I humbly suggest that my failure to enquire into Mr Simeon's proficiency and failure to formally swear him in should in these circumstances not be found to be an unfair irregularity to a fair trial.

I would like to respectfully refer the Honourable Reviewing judge to two recent cases where it was found by the High Court that not every irregularity necessarily vitiate the proceedings. I concede that both cases deal with different circumstances, but that the principle and test could have the same effect. In S v Chukwu 2010(2) SACR 29 GNP, the Court dealt with proceedings in which a candidate attorney appeared whose rights to appear had expired, should be vitiated depends on the accused's right to a fair trial. Held that a candidate attorney, who continued to appear after the expiry of the certificate exhibiting his or her right to appear, committed an irregularity. However, not every irregularity vitiated the proceedings during which it had occurred. The question of vitiation-or of how the consequences of an irregularity should be dealt with-must be related to the accused's right to a fair trial. Held, accordingly, that against the background of the factors it could not be said that there would be a miscarriage of justice if the proceedings were allowed to remain intact and the case allowed to reach finality.

In S vs Nnasolu and another 2010(1) SACR 561 KZP it was held, that there was no doubt that the restriction placed by the magistrate on

counsel's cross-examination constituted an irregularity. It was however held that the magistrate's refusal to allow cross-examination on the voice identification evidence did not result in a failure of justice. Although unfair, it did not result in an unfair trial such as to vitiate the trial.

In conclusion I concede that I incorrectly assumed that Mr Simeon is in the full employ of the Department of Justice and Constitutional Development. In the circumstances I did not comply with the requirements to ascertain his proficiency and properly swear him in. In the circumstances that this interpreter is the official casual interpreter used for all cases to be interpreted from the Ebo language in Goodwood Court, it is clear that he was fully proficient and competent to interpret in this case. I humbly suggest that the lack of compliance with rule 68(3) did therefore although irregular not lead to an unfair trial such as for that reason alone to vitiate the trial.

I humbly request that The Honourable Reviewing Judge condone such irregularity and conclude the trail to have been fair and in accordance with the law."

It is necessary to set out the chronological course of the events up until 16 July 2010 when sentence was imposed.

1. The accused were arrested on 10 June 2009.

2. When they appeared in court on 12 June 2009 they were advised of their right to legal representation and in the event of them not being in a position to afford a legal representative, they were advised of the option of the right to legal representation through the Legal Aid Board. It appears that a certain Mr Stevens came on record as legal representative on behalf of the accused. The matter was then postponed to 19 June 2009 for bail information and for EBO interpreter.
3. On 19 June 2009 the accused were represented by Adv Rossouw (presumably standing in for Mr Stevens) and the matter was postponed to 26 June 2009 for a bail application. The state on this occasion requested a seven day postponement as it was alleged that the accused were in the country illegally and the state required follow up investigation. The record does not state whether or not an EBO interpreter was used.
4. On 26 June 2009 the accused were granted bail of R5000 each and the matter was postponed to 15 September 2009 for further investigation. The record shows that a Miss Z Myamba acted as interpreter. It is not clear whether she can speak EBO.
5. On 14 September 2009 the matter was again postponed to 25 September 2009 for a Plea and sentence agreement and an EBO interpreter.
6. On 25 September 2009 the matter was postponed to 30 September 2009 for consideration of a plea and sentence agreement. On this occasion Mr Stevens was on record for the accused again. Accused no.1's bail was extended and accused no 2's bail was reduced to

R2500, as he was still in custody. There is no reference to an EBO interpreter.

7. On 30 September 2009 the matter was again postponed for a plea and sentence agreement to 23 October 2009. Accused no.2 was still in custody. There is no reference to an EBO interpreter.

8. On 23 October 2009 the record reflects that a B C Simeon was present as the EBO interpreter. The matter was then postponed to 3 February 2010 for trial. Accused no.2 was still in custody having not paid his bail.

9. On 3 February 2010 Adv Rossouw appeared for the accused and the record shows that BC Simeon, the IBO interpreter, is absent. Mr Stevens the attorney for the accused was ill and Adv Rossouw then arranged a trial date for 19 March 2010. The record reflects that the date was telephonically arranged with the EBO interpreter. Accused no.2 had by then paid his bail.

10. On 19 March 2010 the record reflects the following: Mr Stevens "The position is as follows. Both accused keep giving me conflicting instructions, in that, different versions of the event given to me by the same accused. I approached the Law Society in this regard as I would not know what version to put to the state witnesses and the Law Society indicated that I am ethically bound to withdraw thus."

Accused no.1: Nothing to say except I do not agree I gave version different.

Accused no.2: Nothing to say

Accused no.1: I wish to appoint another attorney.

Accused no.2: I need a lawyer.

Mr Stevens withdrew as attorney of record and was accordingly excused..

The prosecutor placed on record that this was the second time the matter had been set down for trial and that the state witnesses were present again.

The matter stood down and on resumption both the accused confirmed that they are able to obtain the services of another private attorney. The matter was then postponed to 26 March 2010 for an attorney to be appointed. The interpreter Mr Simeon was present.

11. On 26 March 2010 a certain Mr Smith appeared on behalf of the accused. It is not clear from the record whether he is an advocate or an attorney. The magistrate then set out the history of the appearances and stated that since the matter had had long delays before the court, that the trial would proceed on the trial date as arranged with the new legal representative. Mr Smith indicated to the court that he had full financial instructions and that he intended to access the contents of the docket. He requested that the matter be postponed to September 2010. This request was refused and a trial date was eventually agreed for 29 June 2010. The record reflects that Mr Simeon acted as an interpreter for the accused. Both accused indicated that they required the services of an interpreter on the trial date.

12. On 29 June 2010 when the trial was to commence Mr Smith the legal representative for the accused asked for leave to withdraw. According to the record he had no financial instructions since March and accused no.2 had allegedly refused to attend on consultations. Both the

accused then indicated to the presiding magistrate that they could not afford an attorney.

Mr Smith accordingly withdrew as an attorney of record and was excused by the court. The matter then stood down so that the accused could be assessed for legal representation through the Legal Aid Board. When the court reconvened later the same day a certain Mr Eden, presumably an attorney or representative from the Legal Aid Board, informed the court that both accused do not qualify for legal aid and that he would not appear for either of them. According to Mr Eden he could in any event not attend to the matter. There is no explanation on the record as to why he could not attend to the matter.

The magistrate further did not enquire from Mr Eden why the accused did not qualify for legal aid. The record reflects that the accused indicated that they would conduct their own defence, but that they were not happy as they did not even know what the charge is.

The record then reads as follows:

"Hof verduidelik dat nie verder gaan uitstel nie. Onnodige vertragings. S.A.gereed en stel aanklag. Hof verduidelik dit. Beide verstaan en pleit onskuldig."

Since the proceedings were not mechanically recorded I am not in a position to ascertain what questions were put to the accused which resulted in their decision to conduct their own defence. Apart from the cryptic note by the trial

magistrate that he had explained to the accused that no further postponement would be allowed, there is no indication on the record, apart from the reference to unnecessary delays, why the magistrate decided to proceed with the trial.

Notwithstanding the fact that the accused expressed the view that they were unhappy as they did not even know what the charge is, the magistrate insisted that the charges be put to the accused and they were requested to plead thereto. Both accused pleaded not guilty and the proceedings in terms of section 115 of the Criminal Procedure Act 51 of 1977 were recorded by the magistrate on the Roneo sheets which are now commonly in use at many magistrate courts.

It is important to mention that in this matter the prosecutor adduced evidence about the use of a trap and/or undercover agent in accordance with the provisions of section 252 A of the Criminal Procedure Act 51 of 1977. In addition thereto the state prosecution relied on and handed in as evidence during the trial, an affidavit in terms of section 212 of the Criminal Procedure Act 51 of 1977 deposed to by a forensic expert, one Siphilo Jeremia Nqavashe, relating to the analysis of the substance alleged to have been the subject matter of the charge.

The prosecutor also called one Matthew Maree Swarts, an inspector employed by the Organised Crime Unit of the South African Police Services,

and Winston Walter Wood, the undercover agent employed by the Organised Crime Unit of the South African Police Services.

Accused no.1 testified in his own defence and called a witness. Accused no.2 elected not to testify and closed his case without calling any witness.

Section 35(3)(f) of the Constitution of the Republic of South Africa, 1996 expressly provides for the right to legal representation by a legal practitioner of one's own choice. In terms of section 35(3)(g) of the Constitution, a legal representative will be provided to a person at state expense if substantial injustice would result. Both these sections, together with section 73 of the Criminal Procedure Act, have entrenched in our law the right of an accused person to legal representation both before and at the trial stage.

It is true that the failure to inform an accused person of the right to legal representation does not per se result in a failure of justice and it is accepted law that it will depend on the facts of each particular case whether or not a failure of justice has occurred. See *S v Khuzwayo* 2002(1) SACR 24 (NC) at 28h-i. In the present matter we are not dealing with a failure to inform the accused of the right to legal representation. The facts of the case, however, illustrate clearly that, even though the accused did previously enjoy the services of legal representatives, they were unable to afford to retain the services of their legal representatives on the day that the trial was to commence.

In *S v B* [2003] 3 All SA 274 (EC) the court held that in determining whether a trial is fair when there has been non-compliance with the right to legal representation, a court should use a three pronged test examining the following aspects:

i. the complexity of the case;

ii. the general ability of the accused to fend for himself; and

iii. the severity of the consequences flowing from a conviction.

See also A Kruger: *Hiemstra's Criminal Procedure* par.11.3

Our courts have repeatedly held that a trial with the clear potential for substantial injustice cannot continue in the absence of a legal representative assisting the accused, except where the accused has made an informed and voluntary election not to avail himself or herself of the right to such legal representation.

It is so that if one looks at the record of the proceedings in this matter, that the impression may be formed that there have been unnecessary delays in the finalisation of the matter. I am not persuaded that these delays can necessarily be attributed to any fault on the part of the accused. The matter was postponed on several occasions for the EBO/IBO interpreter and on one occasion the attorney Mr Stevens was ill. On another occasion he withdrew due to conflicting instructions. On a further occasion Mr Smith came on record and expressly indicated that he had "full financial instructions". He later withdrew on the trial date due to, inter alia, lack of financial instructions. Based on the sparse information as it appears from the record I am not

persuaded that the trial magistrate had conducted a proper inquiry to determine who was responsible for the delay as is envisaged by section 342A of the Criminal Procedure Act 51 of 1977. All that the record reflects is that there were unnecessary delays. There is no indication of who is to blame for these delays. I conclude that the magistrate was of the view that the accused were responsible for the delay and hence his decision to proceed with the trial.

Even though the magistrate had referred the accused to the Legal Aid Board on the day of the trial, the record once again does not show on what basis the accused did not qualify for legal aid. I must accordingly accept that the magistrate did not properly investigate the issue regarding the failure of the accused to qualify for legal aid.

After the legal aid attorney had advised the court that the accused did not qualify for legal aid, the magistrate failed and neglected to advise the accused that they had the right to appeal against the decision of the Legal Aid Board. The magistrate further failed and neglected to consider or to direct in terms of section 3B of the Legal Aid Act 22 of 1969 that the two accused be provided with alternative legal aid at state expense. In *S v Du Toit and Others* 2005(2) SACR 411 (T) the court held that a blank reliance on the Legal Aid Board Guide, irrespective of the infringement of basic fundamental rights and irrespective of the consequences, cannot be allowed. It is now commonly accepted that a refusal by the Legal Aid Board to provide legal representation does not in all cases absolve the state of its constitutional duty. If "the duty

exists in a particular case, refusal by the Legal Aid Board to provide legal representation does not put an end to the corresponding right." See *Hiemstra's Criminal Procedure (supra)* at par 11-5 and *S v Ambros* 2005 (2) SACR 211 (C) at 216f-g

The accused were Nigerian nationals and our legal system was clearly foreign to them. Accordingly there was a duty on the magistrate to properly explain to them what the charge was all about and the allegations therein set out and had to ensure that they understood it. Although the record indicates that he explained the charge to them, it is not clear what it is that he explained to them since that part of the proceedings was not mechanically recorded. The accused were not furnished with a copy of the charge sheet and the magistrate did not ensure that the accused had access to the witness statements and/or the contents of the docket prior to the commencement of the trial. The magistrate further did not ensure that the interpreter or someone suitably qualified discussed and explained to the accused the contents of the witness statements and the other evidential material to be used in the trial against them. The accused were at the very least entitled to have access to the contents of the docket and they ought to have been given the opportunity to study its contents prior to commencement of the trial. Access to the docket is a basic right of an accused, the denial of which can result in an unfair trial. See: *Shabalala and others v Attorney-General of Transvaal and Another* 1995(12) BCLR 1593.

The accused were entitled to the witness statements and the other evidentiary material which the State intended to use against them even though they were

undefended. Prior to the commencement of the trial the magistrate should have ensured that the accused had access to the witness statements and other evidentiary material contained in the police docket. He should further have allowed them a reasonable opportunity to study the information so provided and he should have ensured that a suitably qualified person interprets the contents of the docket to the accused. This, in my view, is what the basic notion of fairness and justice is all about.

I am satisfied, on the reading of the record of the proceedings, that the failure on the part of the magistrate to ensure that the accused had legal representation resulted in substantial injustice and that a failure of justice did indeed occur. I pause to mention that the issues dealt with in this trial were complex, technical and involved issues of a constitutional nature. In addition to this the magistrate's conduct during the trial leaves much to be desired. I refer only to the following:

1. The accused were charged under the provisions of the Medicines and Related Substances Act 101 of 1965 for unlawfully and intentionally dealing in Schedule 2 drugs, to wit, antihistamine which contains Diphenylhydramine with a member of the public without the necessary authority to do so. I am satisfied that many lawyers, professionals in the pharmaceutical field and even presiding magistrates in the lower courts grapple with an understanding of the provisions of this Act. I am further satisfied that the accused persons would have had similar difficulties in understanding the charge they were facing. They made it clear at the outset that they did not know what the charge was. In my

view even seasoned attorneys would have had difficulty in defending persons on a charge of this nature.

2. During the course of the trial, evidence relating to section 252A of the Criminal Procedure Act 51 of 1977 i.e. the authority to make use of traps and undercover operations and the admissibility of evidence so obtained, was presented. We are all aware of the moral and jurisprudential problems associated with the use of traps and undercover agents in the fight against crime in our country. The issue relating to traps and undercover agents have been the subject of much debate and discussions by our courts and writers both pre and post Constitution. See *Amod v S* [2001] 4 All SA 13 (EC); *Bronstein "Unconstitutionally obtained evidence: A study of entrapment* "1997 114 SALJ 108 at 127ff. I am satisfied that this area of the law is complex and difficult even for the courts and lawyers to understand and interpret.

The accused were foreign nationals who clearly did not understand the concepts involved and the record clearly illustrates that they did not know how to approach the evidence of the witnesses in this regard. Their failure to understand the constitutional implications of the evidence and the impact of the evidence is illustrated by the following exchange between the magistrate and accused no.1 at page 8 line 2 to page 9 line 18:

"'Court: Just a moment, gentlemen you understand this charge and the state is now leading evidence in terms of Section 252 of the Criminal Procedure Act. They are entitled to hold this kind of operation. If you

want to inform the Court at this stage that they have acted unlawfully that they did not have the necessary permission that they did something wrong in obtaining this permission then you must tell me now so that we can have a trial within a trial. If not then we are simply going to proceed with the evidence and the Court will accept the evidence as it is given and then make a finding whether I am satisfied with their evidence.

Accused 1: Your Worship, I believe they are not authorised to carry out such an operation.

Court: And that belief is based on what sir?

Accused 1: I told him on that day what I sold to him was salt and that on no condition could he arrest me on selling salt to him.

Court: Sir, we are not dealing with whether you sold salt or what you sold, we are dealing with whether they had authority to do the operation which he is starting to testify about. If you want to tell me that that was unlawful or unconstitutional give me your grounds why you say it is unconstitutional and we will have a hearing on that. On what do you say it is unlawful or unconstitutional, what is the facts you say that for because I have not heard anything from him yet. So I do not know what you base it on but maybe you know something that you can tell me.

Accused 1: Your Worship, I believe they did not have the right the authority to carry out such an operation.

Court: Yes, that is all we are dealing with now whether they had the lawful authority to do it and he was just starting to explain that, now you

jump in and say but he did not have the authority it is unlawful. Now you shake your head, I am losing you now sir. Are you saying now you do not dispute the authority?

Accused 1: I am not disputing that Your Worship.

Court: The Court will in any event then make a finding once the evidence has been led because you are undefended but the state can proceed.

Prosecutor: Is that with regard of both accused Your Worship . .

Court: Yes."

It is not clear to me how the magistrate could have expected the accused persons, foreign nationals as they were, to understand the issues relating to the authority to carry out the trap or undercover operation and/or constitutional implications of admitting such evidence. He certainly did not explain to the accused what the provisions of section 252A of the Criminal Procedure Act were about, nor did he properly explain to them how they should go about challenging evidence of this nature. He further did not explain to them what a trial within a trial is. He also did not ask accused no.2 whether he wanted to comment on the issue. The cross-examination of the witness Swart by the accused or the lack thereof highlights the inability of the accused to deal with the very complex evidence surrounding the application of the provisions of section 252A. The magistrate was not very helpful and did not show a proper understanding of the difficulties that the accused were experiencing. My impression is that he showed an impatience

and that he failed to assist them in circumstances where they desperately needed him to assist them, particularly since they were undefended.

3. A further illustration of the accused's inability and lack of understanding of how to deal with the very technical nature of the evidence presented itself when the state prosecutor intended to hand in a section 212 statement of the expert witness. This part of the trial is a further illustration of the magistrate's failure to deal with the issue fairly and properly as appears from the following passages in the record at page 20 line 15 to page 22 line 19:

"*Prosecutor:* Your Worship, the state is in possession of a lab report that corresponds with the seal number and the CAS number of this case. The state would like to hand it up as an exhibit. Shall I read it into the record.

Court: Gentlemen, the state prosecutor has handed me up the report stating that it is an affidavit in terms of section 212 of the Criminal Procedure Act. What section 212 says especially a)that an employer of state does not have to come and testify he can make an affidavit like this setting out what his experience is what work he has done and what finding he has made. That then becomes prima facie evidence. What that means is it becomes evidence unless you can provide evidence to prove that that is in fact incorrect or prove evidence that would justify that he would need to come and testify otherwise the Court will accept this. What it refers here, it refers to on 19 August he

received one bag with unique number FSB1700125. now if you listened earlier – if I can go back to my evidence - that is in fact the same number that the person who just testified read out – that he received that that he opened the bag.

It contained 48.3 grams of solid material in the plastic bag. The seal was intact he – this person who made the affidavit broke the seal and he then analysed it and then he set out here all the strange technical terms which neither you or me understand very much of – but the work that he was doing the machine the used. How he compared it and then his conclusion is as a result of that the exhibit material contained diffonol hydrofonine. And it says diffonol hydorfonine is an antihistamine.

An antihistamine is listed in schedule 2 of Act 101 of Section 60 of 1965. That is in fact the exact wording that is on the charge sheet and it refers to the same articles of the act. So what it means he says this stuff that he received in that sealed envelope is in fact the stuff that is set out on this charge sheet and it is a schedule 2 offence.

It is according in what you then say in normal terms drugs it is not salt. That is what this is.

Accused 1: Your Worship, we are actually insisting that the person who carried out the tests has to actually bring the substance that we handed over to them that day so that we can actually take a look if it was what we sold to them.

Court: Unfortunately that is not going to happen unless you can give this Court valid grounds to say that this person is lying under oath. To

simply say you want to see the stuff is not going to happen. That is what I explained to you what Section 212 of the Criminal Procedure Act means.

This is prima facie evidence the state does not have to prove anything else. The burden now is on you to prove that this person who made this affidavit is lying that he did not do his work and you unfortunately have to bring evidence to court. The state does not have to prove that. I have just explained this issue to you because you are undefended. I am not going to enter into a debate with you now, you have all the right in the world to prove whatever you can when I make my final finding in this case."

It is quite clear from the above that accused no.1 disputed the substance that was analysed by the expert as set out in the section 212 affidavit. He insisted that the witness come and produce the substance which would require that the witness testify about the substance that he had allegedly analysed. It is clear that accused no.1 was challenging the *prima facie* proof proffered by the state. It is necessary to note that the magistrate once again failed to give accused no.2 the right to comment on the admissibility of the section 212 affidavit. It is further clear from the record that the magistrate did not explain to the accused in detail what requirements the section 212 statement had to comply with before any reliance could be placed on it. It is unnecessary to deal with the requirements at this stage. What is however clear is that the nature of the substance

analysed was disputed by the accused and the magistrate ought to have insisted that the witness be called to testify about it. The accused had contended and accused no.1 testified that the substance that they had sold was in fact salt. The state had produced no additional evidence to support the certificate of the expert.

See *S v Veldthuizen* 1982(3) SA 413 (A);

S v Armstrong en 'n Ander 1988(1) SACR 698 (SEC)

The magistrate dealt with the objection of accused no.1 in a dismissive and unhelpful manner and in my view misdirected himself where he finds that the *prima facie* evidence presented, places an onus on the accused to prove that the person who made the affidavit is lying and that he did not do his work. It is further not clear what he intended to convey when he said to the accused that:". . . you have all the right in the world to prove whatever you can when I make my final finding within this case." Surely the accused are entitled to challenge all evidence presented at trial before the magistrate makes his final finding and it was the magistrate's duty to assist them in doing so.

The magistrate completely lost sight of the fact that he was dealing with undefended accused persons who were unsophisticated foreign nationals who needed his guidance and assistance. The magistrate should also not have allowed the expert to become the eyes of the court. In circumstances such as in the matter before me, the magistrate must be satisfied by his own observations that the conclusions are

correct, with the aid and guidance as may be appropriate, of the expert. See *S v Armstrong en 'n Ander (supra)* at 703a-c. In the circumstances the court accordingly erred in not calling the expert.

4. The magistrate's impatience and failure to assist the accused with the cross-examination of the witnesses is again illustrated with reference to the following passages record at page 28 line18 to page 30 line 19.

"Court: Sir, did you pester the person did you keep on phoning him?--- No your Honour.

Sir, I do not know what you are arguing about now but you have asked the questions quite a few times now and the person has answered. You can move along you will get your chance to prove if you can prove that he persisted. It does not help to ask him the same question twenty times. He has denied it four or five times already. So move along is there anything else you would like to dispute?

Accused 1: Your Worship, I have no further questions to ask him.

CROSS-EXAMINATION BY ACCUSED 2:

You said the moment the cops arrived the two of us started running. How come the inspector that testified earlier on said that I stood at a particular distance away from where accused 1 was but you say the two of us run at the same time?---(intervention)

Court: He did not say he stood away from him sir. You should have listened to the evidence. He said you stood at the window right next to him. You are the one who said you stood a distance away from him. He did not testify that. He denied what you said.

Accused 2: I am saying I never run (indistinct) the moment appeared on the scene?---You did run you just moved across the road. But the witness who testified earlier on said I did not run and I stood close to the vehicle…(intervention)

Court: Sir I will evaluate the evidence that was not what he said. You must listen what he said and when he said it. What he testified he said you stood at the vehicle when the dealing took place. He testified afterwards when they approached that number 1 started running away and he followed him and they arrested him and when they came back they had already arrested you there. He did not testify whether you ran or did not run. Number 1, stop shaking you head. I do not know why you are shaking your head. What are you trying to tell me? Just ask number 1 why is he keeping shaking his head at me when I am talking.

Accused 1: Your Worship, I was not shaking my head because the witness inspector.

Court: Why are you shaking your head that is what I am trying to ascertain because every time I speak you shake your head and I do not know what you are trying to do. I am just trying to ascertain what is going on. Apparently the accused does not want to tell me what he is doing. Okay accused 2 I have told you now what the witness said. Is there anything you would like to ask this witness now about whether you ran or not ran or anything else? Sir it does not help just to look at the table is there any questions you wish to ask?

Accused 2: I have no further questions.

Court: Are you sure both of you done?"

It appears that the conduct of the magistrate with his continued interruption of the cross-examination of the accused seems to have caused them great frustration and probably dissuaded them from continuing with the cross-examination of the witness. This is unacceptable since the accused are undefended and it was the magistrate who insisted that the trial proceed without the accused being legally represented. He should have assisted and guided them.

5. A further critical issue which arose in the trial is that after the prosecution decided to close the state's case the magistrate seemingly refused to allow this as is apparent from the following passages of the record at page 30 line 23 to page 31 line 11.

"Prosecutor: That is the state case Your Worship.

Hof: Ek weet nie hoe jy jou saak kan sluit nie die Hof het nog nie Bewysstuk A aanvaar as 'n bewysstuk – ag as Bewysstuk B nie. Die artikel 212 verklaring is 'n afskrif dit is nie net 'n afskrif nie dit is 'n faks of 'n afskrif van 'n faks. Waar is die oorspronklike verklaring?

Aanklaer: Agbare die oorsponklik is blykbaar gepos en dit het in die pos verlore geraak. Hulle het toe die lab genader vir 'n duplikaat verklaring en dit is wat hull deur gefaks het.

Hof: Nee juffrou 'n duplikaat verklaring is nie 'n ding wat gefaks word nie. Die Hof gaan verseker nie hierdie stuk dokument aanvaar soos dit is nie. Ek sal vir u kans gee om vir my 'n behoorlike verklaring te bring andersins sit u met 'n massiewe groot probleem."

6. The magistrate then allowed the state prosecutor to recall inspector Swart on a later date to testify about the absence of the original section 212 affidavit. The matter was postponed for this purpose. His evidence was to the effect that the state forensic laboratory had not handed him an original laboratory report, but only a certified copy of the original. He testified further that they had refused to give him the original but that the analyst could come and testify if called and then produce the original if requested to do so. The faxed copy of the original which was earlier handed in was then replaced by the magistrate with a copy of the original section 212 affidavit of the expert witness. The expert who was seemingly available to testify was not called by the magistrate or the prosecution to explain the situation.

The magistrate further fails to explain the impact of the further evidence in regard to the section 212 affidavit and the effect that it may have against the accused. For the sake of completeness I quote the relevant passage dealing with this aspect as at page 34 line 10 to page 35 line 5 of the record.

"*Court:* Gentlemen, any questions you want to ask the inspector regarding this copy that he wants to hand in now number 1? That is the affidavit I explained to you last time that in terms of the Criminal Procedure Act the state can hand in. The issue was just a copy they handed in was a fax which I did not accept. So now they brought the original – a copy of the original. Any question you would like to ask on that? Mr Simeon last time I had the same problem I do not want you to get into discussions with the accused and they say something and you

say something and the Court does not know what is going on. Just ask them the question and answer what they answer. If they do not understand they must tell me but they must stop playing games with you and with the Court.

Accused 1: Your Worship, we do not have any questions to ask because we do not have sufficient knowledge about the copy of the original as such.

Court: That is fine we will deal with the content with it we are dealing with the copy itself now. Anything further?

Prosecutor: Your Worship, the state would like to hand it up as an exhibit Your Worship.

Court: It will be Exhibit B then.

FORENSIC REPORT ACCEPTED AS EXHIBIT B"

It is not clear on what basis the magistrate comes to the conclusion that the accused were playing games. Instead of trying to determine whether there was a problem with the interpretation and whether the accused had difficulty communicating through the interpreter he unfairly concludes that the accused are playing games.

Bearing in mind their lack of knowledge of the law and their failure to appreciate what was going on it is not surprising that accused no.1 responded in the manner that he did.

What is of course disturbing is the fact that the magistrate had clearly entered into the arena and unfairly assisted the state in proving its case against these undefended accused whom he had denied the right to legal

representation and whom he had effectively refused to assist in their defence in this very serious case which was abound with complex and difficult issues with which even a seasoned legal practitioner would have experienced difficulties with.

Our courts have repeatedly held that it is important that the presiding officer in a criminal trial is not only an umpire but that he/she is obliged to see to it that justice is done and he or she must bear in mind that *bona fide* attempts to see that justice is done may be perceived as impartiality.

Hiemstra's Criminal Procedure (supra) at 22-62.

In my view the magistrate failed to maintain a careful balance between interference and detachment.

See *S v Gerbers* 1997(2) SACR 601 SCA at 607a-c

In the present case the magistrate erred and misdirected himself by failing to have regard to the fact that the right to legal representation and legal advice is fundamental to our criminal justice system. He failed to properly take into account the totality of the circumstances and the seriousness of the charge the accused faced. He further did not give proper consideration to their education; sophistication; intelligence; age and their standing when deciding to proceed with the trial without affording the accused the opportunity of having legal representation. In his undue haste to finalise the matter, the magistrate effectively denied the accused their constitutional right to legal representation by not following the basic precepts of fairness and justice and the sound principles as laid down in the cases hereinbefore mentioned. In my

view the magistrate, in refusing to properly consider their right to legal representation as hereinbefore set out, committed a gross irregularity which is of such a nature that justice was not done.

On consideration of the record of the proceedings at trial it is common cause that the services of a casual interpreter were utilised to interpret the evidence of the accused into the record. In his reply to the query of Yekiso J the magistrate conceded that Mr Simeon, who acted as the interpreter during the trial, is not in full employ of the Department of Justice and Constitutional Development as a court interpreter. He further conceded that Mr Simeon was not duly sworn in as an interpreter by him separately before commencement of the trial as is required by rule 86(3) of the Magistrates Court Rules and the case law relating to the issue of proficiency. No assessment was made of Mr Simeon's proficiency to interpret or translate the EBO/IBO language. Considering his own concerns about the lengthy discussions the interpreter had with the accused without interpreting what was being discussed, the magistrate should have been alerted to possible problems in regard to the proficiency of the interpreter. The magistrate failed to investigate this issue.

In his reasons the magistrate request that his failure to enquire into Mr Simeon's proficiency and his failure to formally swear him in should in the circumstances not be found to be an irregularity which renders the trial unfair. In *S v Saidi* 2007(2) SACR 637 following the approach in *S v Mponda* 2007(2) SACR 245 (C) [2004] 4 All SA 229 [par 34] Yekiso J held that section 6(2) of the Magistrates Court Act 32 of 1944 placed a duty on the magistrate to call a

competent interpreter, if he or she was not sufficiently conversant in the language in which the evidence was given to translate such evidence into a language with which an accused person professed to be sufficiently conversant. This position is entrenched in s 35(3)(c) of the Constitution which confers upon every accused person the right to be tried in a language that he or she understands or, if that is not practicable, to have the proceedings interpreted in that language.

Yekiso J held further (at par[14] at 643e-f) that when the services of an ad hoc interpreter are used, it is essential for the presiding officer to formally satisfy himself as to the expertise of the interpreter. The interpreter must be sworn in, in an open court during the proceedings and questioned to establish his/her linguistic competence. The enquiry and swearing in of the interpreter should be formally recorded in the record of the proceedings.

I agree with the dictum of Yekiso J in *Saidi (supra)* that evidence through an unsworn interpreter constitutes unsworn evidence, which is inadmissible and that since s 35(3)(i) of the Constitution confers on every accused person a right to adduce and challenge evidence, the consequence of placing unsworn testimony, through the interpreter, not only violated the accused's right to adduce and challenge evidence but also negated the very right to a fair trial.

Following the principles enunciated and so clearly set out in *Saidi (supra)* I am satisfied that in the present case the accuseds' rights had been thus violated

and in the absence of any other admissible evidence implicating the accused, the proceedings before the magistrate were not in accordance with justice.

The magistrate's failure to adhere to the sound principles as set out in *S v Saidi (supra)* cannot be condoned.

I am satisfied that the violations of the accuseds' constitutional rights as hereinbefore set out are of such a nature that the conviction and the sentence imposed upon each of the accused cannot stand.

Accordingly I propose the following order:

"The conviction and the sentence imposed on each of the accused are hereby set aside."

RILEY AJ

I agree. It is so ordered.

YEKISO J