IN THE HIGH COURT OF SOUTH AFRICA

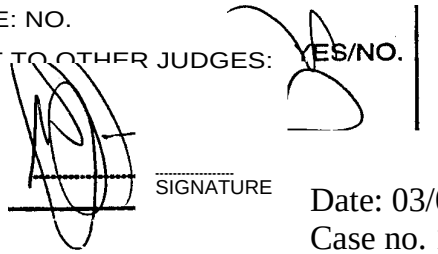
(TRANSVAAL PROVINCIAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.



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Date: 03/05/2005
Case no. 12802/2004

In the application of

CHARLESUNAKERE — Applicant

v

THE STATE — Respondent.

JUDGMENT

HARTZENBERG ADJP:

[1] This is a review of criminal proceedings in the magistrate's court of Klerksdorp. On 13 November 2003 the applicant was found guilty of contravening section 5(b) of Act 140 of 1992. The relevant allegation in the charge sheet was that on 11 November 2003 he was dealing in a prohibited substance and more in particular 100 Ecstacy tablets. On 20 November 2003 he was sentenced to five years imprisonment of which two years were suspended on the usual conditions of suspension. It is the applicant's case that a material irregularity

occurred, that he did not have a fair trial and the conviction and sentence are to be set aside. He asks for the matter to be remitted to the court *a quo* so that a plea of not guilty can be entered and that the matter is to proceed normally from that point.

[2] The applicant together with four other persons, including his wife. was arrested on 11 November 2003 after 100 Ecstacy tablets have been found in their possession. An attorney, one Kennedy Kgomongwe, was instructed to defend the applicant. The applicant and Kgomongwe conversed in English. It is not clear whether they have had the benefit also of an interpreter. Whatever communication took place the result thereof was that the applicant, represented by Kgomongwe, tendered a statement in terms of section 112 (2) of Act 51 of 1977. The case against the other four members of the group that was arrested was withdrawn. The statement indicated that the applicant voluntarily pleaded guilty to the charge, that on 11 November 2003 at Shell Ultra City in Klerksdorp he dealt in a dependence producing substance to wit 100 Ecstacy tablets, that he did not have a permit or licence to do so and that he was aware that his conduct was wrongful and punishable and a contravention of the relevant sections of the relevant act. According to a pro forma sheet which forms part of the record he was asked whether he admitted the contents of his statement and he admitted it. The very same sheet

indicates that the matter was remanded to 19 November 2003 and that the date was arranged with the Iqbu interpreter. The record further indicates that not only on 13 November 2003 but also on 20 November 2003, when the matter was resumed, there were two interpreters in court, S Mpendukane and Chris Oguala. The latter was the Iqbu interpreter. On 20 November 2003 his wife gave evidence in mitigation.

[3] The applicant, in his affidavit, states that he was born in Nigeria. He claims to have a limited understanding of English and that he does not understand Afrikaans at all. He states that the English that he can understand did not enable him to understand the English used in court. He says that he explained his predicament to Kgomongwe in English, to the best of his ability, and in particular that he did not know what the contents of the parcel was (the parcel containing the 100 Ecstacy tablets) but that Kgomongwe explained to him that he would be found guilty of trafficking in Ecstacy. According to him Kgomongwe informed him that that if he pleaded guilty the State would not proceed against his wife and he would be sentenced to a fine of R2 000 and would be released upon payment thereof whereas he would be kept in custody for a very long time if he did not plead guilty. He also says that he did not think that he was to plead guilty of trading in Ecstacy but only of being in possession thereof. He mentions a further objection against the State case

I.e. that the banned chemical element contained in Ecstacy is not mentioned by name (MDMA) in the charge sheet and that the tablets in question had not been subjected to a forensic analysis.

[4] He furthermore states that had he been aware that it was a requirement for the offence that he was to have known that the tablets contained a prohibited substance he would not have pleaded guilty. According to his affidavit Kgomongwe placed the section 112 statement before him and ordered him to sign it. He was unaware of the contents thereof as it had never been interpreted to him in Iqbu. In his application he states that he was unable to get a confirmatory affidavit from the Iqbu interpreter as the latter had been arrested for corruption. He states that his wife gave evidence in a language that he did not understand and it was translated into what he believes was Afrikaans, which he similarly did not understand. He says that it was only explained to him that he had to go to gaol for five years. He says that he was never asked whether he confirms the contents of the section 112 statement or whether he understands the proceedings. He asks for the conviction and sentence to be set aside and for a plea of not guilty to be entered in terms of section 113 of Act 51 of 1977.

[5] The State opposes the application and relies on the affidavits of the magistrate, the prosecutor, the attorney Kgomongwe and the Iqbu

interpreter Oguala. The State indicated that it intended also to file an affidavit by the other interpreter Mpendukane. It failed to do so.

[6] The magistrate in one sentence states that Oguala was used as an Iqbu interpreter when the applicant pleaded and when he was sentenced. She states that that can be seen from the record. The prosecutor's affidavit is virtually identical except that she adds that neither the applicant nor the defence (?) objected to the Iqbu interpreter. Kgomongwe states:

> *"4. I through the middle(sic) of an Igbu interpreter a Mr. Chris Cquda*[1] *consulted with Charlie Uwakwe whereupon he instructed me that he wants me enter into a Plea Bargaining process to ensure the immediate release of his wife, Mapula Uwakwe as she was very sickly.*
>
> *5. I did carry out such a mandate whereupon the accused unconditionally pleaded and charges against his wife and her relative were withdrawn. During the Plea and sentence an Iqbu interpreter was present and Mr. Uwakwe at no stage gave an indication that he does not follow nor understand the proceedings. He further on some occasions directly communicated with me English"*

[1] The name of the person that I have spelled as "Oguala" has been spelled in various ways. I think that it can safely be accepted that there was only one Iqbu interpreter and find it convenient to spell his name as "Oguala". Likewise there are a number of different ways in which the language which I have spelled "Iqbu" has been spelled. The spelling of the applicant's name is also not consistent

6. He pleaded guilty on the charge of dealing in 100 ecstacy tablets and was sentenced to Five years imprisonment Two years of which has been suspended for a period of Five years with conditions. "

[7] The affidavit of the interpreter does not fall into place with the other three affidavits. He states:

"3. I remember that I was not afforded the opportunity to interpret for the accused properly in that the case was conducted in Afrikaans, a language I do not know how to speak nor understand" 4. During the proceedings the Magistrate openly said in court that she was angry or crossed and that when she is angry she does not speak English, that was the only she said in English and continued in Afrikaans. I could not say anything because it was not up to me to do so. I was working for the state and the accused was legally represented, but his lawyer did not say anything in relation to the language used.

5. I at a time went close to the local language interpreter who interpreted what was happening and that was how I was able to translate to the accused that he was sentenced thus and thus. That is the much I can remember on the case. "

[8] It is not necessary to analyse the applicant's case in fine detail. It is sufficient to indicate that he states

(a) that he did not know what the parcel contained;

(b) that he did not know that the state had to prove that the tablets contained a prohibited substance;

(c) that he was told that he would be sentenced to pay a fine;

(d) that he did not know what was contained in the section 112 statement;

(e) that he was never told what the statement contained and asked to confirm it in court, and

(f) that the proceedings in court were not translated to him.

[9] It is clear that the person who drafted the State's opposing papers did not explain to the relevant people all the allegations made by the applicant. For example, in the Heads of Argument filed on behalf of the State the submission is made that everything was translated from Afrikaans to English and then from English to Iqbu. Neither the magistrate nor the prosecutor stated that in their affidavits. To compound the problem the Afrikaans/English interpreter did not make an affidavit and the English/Iqbu interpreter emphatically stated that he could not translate because the proceedings were done in Afrikaans. Kgomongwe only stated that the Iqbu interpreter was present when the plea was recorded and when the applicant was sentenced. On the papers before the court it cannot be said that the applicant fully understood what was going on. When it comes to the question whether the applicant knew what was set out in the section 112 statement the position is that he says that he did

not understand what was really going on. He thought that he was arranging that he could pay a fine and that the case against his wife be withdrawn. It is so that he says that he spoke to Kgomongwe in English and that the latter says that he was assisted by Oguala. What is interesting though is that Kgomongwe states that he also spoke to the applicant in English and that Oguala's affidavit is silent about that consultation. What is even more serious is that Kgomongwe does not dispute that the applicant was led to believe that he was arranging for the payment of a fine. Again on the papers before the court it cannot be found that the applicant was properly informed about the case against him and about the contents of the section 112 statement. In my view it is unnecessary to deal with the applicant's attack about the question whether he was aware of the contents of the parcel and whether the State had proved that he had the necessary intent to deal in MDMA or for that matter that the tablets contained MDMA.

[10] The position simply is that it cannot be said that the applicant fully understood that he was trading in :NIDIV!A, that he wanted to plead guilty to such an allegation and that he understood what was going on in court both on 13 November 2003 and on 20 November 2003. In the circumstances it cannot be said that the applicant had a fair trial. After all section 35(3)(k) of the Constitution enshrines as one of the requirements of a fair trial that it must be done in a language which the accused

understands or that it must be translated to him into a language that he understands. See also S v *Ndala,* 1996 (3) All SA LR 65 (C) in which Van Reenen J held that implicit in the right to be tried in a language which an accused person understands is the right to have, what is translated to him in court, correctly translated and S v *Abrahams,* 1997 (2) SACR 47 (C) in which Traverso J held that a deaf mute to whom the proceedings were not properly interpreted did not have a fair trial.

The conviction and sentence cannot stand. The following order is made:

1. The conviction and sentence are set aside.
2. The matter is remitted to the magistrate to enter a plea of not guilty in terms of section 113 of Act 51 of 1977, and to follow the normal procedure as if the applicant has pleaded not guilty .

W J HARTZENBERG
JUDGE OF THE HIGH COURT

I agree.

C PRETORIUS
ACTING JUDGE OF THE HIGH COURT