CASE NO. SA 1/93

IN THE SUPREME COURT OF NAMIBIA

In the matter between

b)	TOBIAS KAU	THESTATE SIXTEENTH
c)	AIEL XAO KGAO	FIRST APPELLANT
d)	KLEINBOOI STICHE	SECOND APPELLANT
e)	NC EMSJE XOSJE	THIRD APPELLANT
f)	KGAO TSASCJE	FOURTH APPELLANT
g)	N#AMSHE	FIFTH APPELLANT
h)	XOSJE NEMSJE	SIXTH APPELLANT
i)	N#AN#I CWI	SEVENTH APPELLANT
j)	XGAO CWI	EIGHTH APPELLANT
k)	CWI T#IT#E	NINTH APPELLANT
		TENTH APPELLANT
l)	ASSER N#AO	ELEVENTH APPELLANT
m)	MOSES TSEMKXAO GAO	TWELFTH APPELLANT
n)	CWI XAU	THIRTEENT APPELLANT
o)	XGAU CIUAE	H APPELLANT
p)	CWI N#OUDA	FOURTEENT APPELLANT
q)	XAO CIQAE	H APPELLANT
	versus	FIFTEENTH

CORAM: MAHOMED, C.J
et DUMBUTSHENA, A.J.A,
et CHOMBA, A.J.A.

Heard on: 1993/11/11

Delivered on: 1993/12/09

l : 9
i 3
v 1
e 5 APPEAL JUDGMENT
r /
e 1 DUMBUTSHENA, A.J.A.: All sixteen appellants were charged
d 0
/
o 1
n 9

and convicted by the Magistrates* Court sitting at Tsumkwe of two counts of wrongfully and illegally hunting specially protected game, namely Giraffe, in contravention of section 26(1) as read with section 1, 26(3), 85, 90 and Annexure "3" of the Nature Conservation Ordinance 4 of 1975, as amended. Section 26(1) reads:

> "No person other than the lawful holder of a permit granted by the Executive Committee shall at any time hunt any specially protected game."

All the appellants denied the charges. They were, however, convicted as follows: Appellants numbers 2, 4, 6, 9, 10, 11, 12, 13, 14 and 15 were found guilty of hunting and killing a giraffe on 2 January, 1992 in the Nam Tsoa Region in the district of Grootfontein. Appellants numbers 1, 2, 3, 4, 5, 7, 8, 9, 11, 13, 14 and 16 were found guilty of hunting and killing a giraffe on 7 January 1992 at Nam Tsoa Region. A few of the appellants namely 2, 4, 9, 11, 13 and 14 were convicted on both counts.

They were sentenced as follows: Appellants numbers 1, 3, 5, 6, 7, 8, 10, 19, 15 and 16, who were convicted on count one only, were each sentenced to a fine of Rl 000,00 or in default of payment, one years' imprisonment. In addition each one of them was sentenced to 6 months imprisonment wholly suspended for 4 years on appropriate conditions. Appellants 2, 4, 9, 11, 13 and 14, that is those convicted on both counts, were each sentenced to a fine of R2 000, or in default of payment, 20 months imprisonment. In addition each appellant was sentenced to 9 months' imprisonment wholly suspended for 4 years on appropriate conditions.

They all appealed to the High Court against both conviction and sentence. Their appeals were dismissed. They now appeal to this Court with leave from the Court a quo.

The facts in this case are briefly as follows. On 2 January 1992 a giraffe was hunted and killed at Nam-Tsoa in the district of Grootfontein. On 7 January 1992 another giraffe was killed apparently near the place where the first one was killed. No one saw people killing both giraffes. In the case of the killing charged in count one, no one saw the dead giraffe. Kaece Kxao, an employee of the Ministry of Wildlife and Conservation and two companions saw giraffe hoves and footprints. They followed the footprints and came across a partially skinned giraffe. There was no person there. After a while people arrived. Some of them were interrogated and all of them were ultimately arrested. They were tried and convicted on 23 January 1992.

Kaece Kxao was called by the State to testify. He told the Court that on 7 January 1992 he left Nam-Tsoa in the company of two others. As he was driving around he saw vultures. He drove where the vultures were hovering. He observed giraffe hoves and footprints. He followed the footprints and came across a partially skinned giraffe. He did not see anyone at the spot. He, however, observed knives, axes and spears and many other items. Ultimately people who later became accused number 1, 2, 3, 4, 13 and 14 arrived. He testified:

"Accused 1 said he and accused 11 were the persons

> who were riding horses while they were chasing the giraffe. Jafer Katuuo took down the accused 1; 2; 3; 4; 13 and 14 names. Accused 3 was handed over to me for interrogation. He also confirmed that the two horses were used to chase and kill the giraffe. The other two horses were used to transport the meat back and forth from home. From the spot we gave accused 1; 2; 3; 4; 13 and 14 a lift back to Nam-Tsoa where we continued with investigation. With the further investigation we established that accused 2; 4; 6; 9; 10; 11; 12; 13; 14 and 15 ... we had confronted 2; 4; 6; 9; 10; 11; 12; 13; 14 and 15 and they all said they killed the first giraffe. The second giraffe which was half skinned was killed by accused and they said they killed the second Giraffe."

I have reproduced the above evidence in order to show the kind of evidence relied upon by the Magistrate to convict the appellants. Appellants were interrogated by Kaece Kxao, a person in authority in the Ministry of Wildlife and Conservation and in the District of Grootfontein. The trial Magistrate never considered whether the admissions allegedly made to him were made freely and voluntarily. The issue of voluntariness of the admissions was raised and specifically referred to in paragraph 11 of the amended Notice of Appeal. But the trial Magistrate did not comment in his reasons for convicting appellants on what was referred to in paragraph 11 of the amended Notice of Appeal.

The Court a quo came to the view that the admissions narrated above were inadmissible and said:

> "Insofar as the Learned Magistrate relied on so-called 'testimony* consisting of what Mr Kao

> • established' on 'further investigations', such testimony is inadmissible. Insofar as the Learned Magistrate relied on admissions allegedly made to Mr Kao, their admissibility will depend on whether the provisions of sections 217 and 219A of the Criminal Procedure Act were complied with ...
>
> It is clear from the record and the Magistrate's reasons that he paid no attention whatsoever to the question of admissibility. The alleged admissions were not admissions of all the elements of the offence and were not unequivocal admissions of guilt. Section 219 A is thus applicable, which requires proof by the State beyond reasonable doubt that the admissions were freely and voluntarily made - in the sense that it had not been induced by any promise or threat proceeding from a person in authority."

The Court a quo cited R v Barlin 1926 AD 459 at 462.

Mr Kao was a person in authority. The onus was upon the State to prove that the admissions made by the appellants were made freely and voluntarily. This was not done. The Court a quo found that the Magistrate had misdirected himself on this point. And having come to the view that the admissions did not cover all the elements of the offence, it is more than surprising that the Court a quo confirmed the convictions.

The Court a quo erred when it decided the guilt of the appellants "on the remaining admissible evidence." It was common cause in this appeal that there was no credible evidence on the record supporting or justifying the conviction on count one. In my view the Court a quo erred

when it held that appellants[1] plea explanation to the effect that: "(+)hey were instructed by Uijo the headman to hunt and kill the giraffe" was an admission and that " (+)his defence included by the clearest implication, the admissions that they did hunt and did kill the giraffes as alleged. The defence was repeated in cross-examination by various accused when CWIT#IT#E testified but the said witness vehemently denied the allegation."

Was the Court a quo right? It appears to me that the statement that was repeated by all appellants in their plea explanation: "I was instructed by /Uijo to hunt and kill the giraffe." was not an admission of guilt. The appellants were saying they killed the giraffe because they had received the authority to hunt and kill a giraffe from Uijo. In other words they had no mens rea to commit the offence. That was the burden of the appellants' cross-examination. They had no intention to hunt without authority. They approached the headman. He gave them permission. That is the reason, in my view, why appellant number 10, accused 10 at the trial, testified : "Witness said we should go and hunt giraffes and pay his grass and water with meat. We and the witness are all guilty. If he doesn't have money he should go to prison with us. He is the owner of the place -we wouldn't have hunted without his permission." Why did appellant number 10 want the headman to go to prison with them? It was because he had given them permission to hunt and kill the giraffe. The plea explanation is not inconsistent with appellant's pleas of not guilty.

I agree with Mr Kuny in his submission that the appellants pleaded not guilty and in support of their pleas indicated that the headman had instructed them "to hunt and kill giraffe." This plea explanation certainly suggests that they believed that, by reason of the instructions, they might have been legally permitted to hunt the giraffe, having been authorised and instructed to do so by the headman (and therefore, that they had no mens rea) .

If there was a doubt in the mind of the trial Magistrate as to whether the plea explanation meant that the appellants were merely admitting the offence, he should, in my view, have cleared that up by asking appropriate questions. He did not. In view of the fact that appellants were not legally represented, failure to reconcile appellants' pleas with their plea explanations must have created some doubt in the mind of the Magistrate. The Magistrate should have satisfied himself as to what they meant instead of concluding that the plea explanation was an admission. See S v Daniels en Ander 1983(3) SA 275 (A) at 300 B.

It is clear from the evidence on the record that there was no evidence justifying the conviction of appellants on count one.

The appellants were each charged individually. There was no common purpose alleged or proved. The evidence did not establish what each appellant did or what act each had carried out in the commission of the offences. And in view of what has been said above with regard to admissions

there

was equally not sufficient evidence to prove that appellants, that is, on the merits, hunted a specially protected giraffe without a permit or the authority of the headman.

I have dealt above with the conviction of the appellants based, as it was, on the merits or evidence adduced by the State. It is clear that there is very little or no evidence on the record to sustain the convictions.

The main contention in this appeal was that because the appellants were unrepresented accused the trial Magistrate had failed in his judicial duty to inform the appellants of their right to legal representation and the many other rights they should have been informed about and that he failed to exercise that duty. The Magistrate's failure to explain or inform appellants of their rights is clearly tabulated in the Notice of Application for Leave to Appeal settled by Mr Kuny who appeared for the appellants with Mr Botes. The grounds of appeal on irregularities were set out as follows:

> "That the Learned Judge erred in law and/or on the facts in not finding;
>
> (a) that the Magistrate's failure to inform the aforesaid 16 Applicants that they were entitled to legal representation, was an irregularity of such a nature as to constitute a fatal irregularity which warranted the upholding of the appeal for the setting aside of the conviction and sentences imposed;

r) that the learned Magistrate's failure to explain fully to the 16 Applicants their rights in terms of Section 114 of Act 51 of 1977, was an irregularity of such a nature as to warrant the setting aside of the convictions and sentence imposed;

s) that the trial Magistrate failed to explain to the Applicants the existence and implication of the presumption created by Section 85 of the Ordinance 4 of 1975, as amended, was an irregularity of such a nature as to warrant the setting aside of the conviction and sentence imposed;

t) that the Magistrate's failure to explain the Applicants right of cross-examination fully to them constituted an irregularity of such a nature as to warrant the setting aside of the convictions and sentence imposed.

Before dealing with the argument of counsel it is important to set out the approach adopted by the trial Magistrate when he dealt with appellants' rights. He did not inform the appellants of their right to legal representation. I shall deal with this ground of appeal later in this judgment. After the appellants had pleaded he said to them: "You may reveal the basis of your defence or remain silent if you wish." Section 115 of 51 of 1977 obliges the Presiding Officer to ask questions if it is not clear from accused's

plea explanation to what extent he denies or admits the issues raised in his plea and which issues are or are not in

dispute. The accused should be informed that he is not obliged to answer questions. In the instant case the appellants were not asked questions nor were they informed that they were not obliged to answer questions. There was

a bare assertion: "You may reveal the basis of your defence

or remain silent if you wish". The appellants were told what to do and the Magistrate recorded his instructions without sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation. See S v Daniels 1983(3) SA 275 (A) at 299 G.

This was irregular. The principle, in cases of this nature, is that any irregularity which prevents the evidence from being comprehensively and reliably placed before the Court, thereby raising doubt as to the correctness of the conviction, leads to a failure of justice. The failure to follow the procedures laid down in section 115 of Act 51 of 1977 as amended in this case resulted in a failure of justice because the Magistrate did not explain the implications of section 115 and/or the consequences flowing from the appellants revealing the foundation of their defence. See S v Evans 1981 (4) SA 52 (C); English Headnote part of which reads:

> "The Court has a duty to inform the accused at the stage when he indicates the basis of his defence that he is not obliged to answer questions. Failure to comply therewith is an irregularity in the proceedings. The exact manner in which this explanation is made to the accused is not important. However, it must appear from the record that his rights were explained.to him; in such a manner and with sufficient particularity that it can be judged whether the explanation was sufficient. The annotation "rights explained" would not be sufficient.
>
> An explanation which would suffice in most circumstances would be: "Do you wish to make a

> statement which indicates the basis of your defence? You do not have to make a declaration. The court is in any event entitled to question you to establish what the points of dispute are, but you do not have to reply thereto."

This was not done. The trial of appellants was not for this reason alone fair. In this appeal Mr Kuny contended that

the Magistrate's failure to inform the appellants that they were entitled to legal representation was an irregularity which vitiates the conviction.

In Namibia the duty of Judicial Officers to inform an unrepresented accused is placed upon them by the Constitution. Article 12(1)(e) provides:

> "All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and <u>shall be entitled to be defended by a legal practitioner of their choice</u>. (The underlining is mine).

Article 12(1) of the Constitution embodies all the principles which make it possible to hold fair trials, these principles are: All persons are entitled to a fair and public hearing. They must be tried by an independent and impartial and competent Tribunal or Court. The trial has to take place within a reasonable time. If *it does not the accused should be released. Judgments in criminal cases are to be given in public. Persons charged with offences are presumed innocent until they are proven guilty according to law after calling witnesses and cross-examining those called against them. Section 12(1)(e)

above. And what is more

people are entitled to be defended by a legal practitioner of their choice. And accused are not to be compelled to give testimony against themselves or their spouses.

These rights and provisions are there to ensure that people charged with offences are tried fairly.

In Namibia the right to be defended by a lawyer of one's choice is a constitutional right. When the trial Magistrate failed to inform the appellants of this right he deprived them of their constitutional right. Because the right is given to the people by the Constitution it is the duty of judicial officers to inform those that appear before them of their right to representation. There, of course, will be exceptional cases. A lawyer who appears before a judicial officer is expected to know his right to legal representation. There are many such other people, educated and knowledgeable who need not be informed. If they do not know, they must be informed,

It is also important to note what the Learned Judge President, Mr Justice Strydom, said in S v Bruwer 1993(2) SACR 306 (Nm) at 309 b:

> "... I agree with Mr Smuts that the legal basis of the concept of a "fair trial" in Namibian law differs from that of the law in South Africa. I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal interpretation. However, I fail to see how it can be said, even against this

> background, that a trial will be less fair if a person who knows that it is his right to be legally represented, is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice, is, as in most other instances where a failure of justice is alleged, a question of fact."

The legal basis of the concept of a fair trial in Namibian law differs from that of South Africa. For instance the right to inform unrepresented accused persons of their right to legal representation has its foundation in the Constitution of Namibia. It has no such foundation in South Africa. In this respect Strydom, J.P. remarked as follows in S v Bruwer, supra, at 309b;

> "I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal interpretation. However, I fail to see how it can be said, even against this background, that a trial will be less fair if a person who knows that it is his right to be legally represented, is not informed of that fact."

But in the exercise of his discretion the judicial officer may decide not to inform a lawyer who appears before him of his right to legal representation because he ought to know it. In this respect there is no difference in the practice used in Namibia and in South Africa. See S v Rudman 1992(1) SA 434 (AD) and S v Mabaso and Another 1990 (3) SA 185 (A).

In the instant case it was important for the appellants to

be informed of their right to legal representation. It is common cause that they were more or less illiterate, uneducated and lacked previous exposure to the legal system. From a reading of the record it is clear that they did not appreciate what was going on around them. Many of them did not give evidence. They must have thought that those who did, spoke on their behalf. It is clear from the record that they did not understand how to cross-examine and what cross-examination was all about.

The question is not whether an indigent accused is entitled to be provided by the State through a system of legal aid at his trial with legal representation. We are concerned here with the right to legal representation - the right to be informed. However the ideal should be that every person appearing in Criminal courts should be represented by a lawyer. This assures a large measure of fairness. It is an ideal we should all aim to attain. Indigent accused would then be entitled to legal representation provided by the State. I agree with the sentiments expressed by Didcott, J. in S v Khanvile 1988(3) 795 (N) at 801 to 818. I appreciate why people charged with criminal offences should be represented by lawyers. I appreciate why in Canada legal aid is available to those facing complex cases, people without competence in the conduct of their defences and the poor. But Canada has a well funded Legal Aid Society.

Canada has lawyers to do the work. And if a judge decides that he cannot conduct a fair trial if the accused is not represented by a lawyer, legal and is granted.

I wish if one would say:

> "Not only these precedents but also reason and reflection require us to recognise that, in our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute, and defendants who have the money hire lawyers to defence, are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Per Black, J in Gideon v Wainwright (1963) 372 US 335.

(See also S v Khanvile 1988 (3) SA 795 at 807 I - 808.

But, the United States is an affluent Society. It's Bill of

Rights entitles indigent accused to be assisted with their defences.

In the less prosperous states legal aid schemes are not well funded. Only those accused persons charged with serious offences can hope to receive legal aid. However, the response from those who want to see equality and fairness in criminal trials should not be that legal aid for all accused is impossible. They should strive to work for entitlement to legal representation for all perhaps not now but in the future.

More often than not indigent accused are rushed to courts because the police have obtained confessions before going to Court. It may be there that the unfair trial started. When these people are in the custody of the police more often than not determines whether an unrepresented accused pleads guilty or not guilty.

Legal representation for all is still a far off dream not because it is not the right thing to do but because those who control the purse strings of State tell us there is no money, governments cannot afford it. They may be right but the ideal remains.

I agree with Mr Kuny in his contention that in Namibia both in terms of the letter and spirit of the law, an accused, being entitled to a fair trial, must be afforded the opportunity to obtain legal representation of his choice. See Article 12 (l)(e) of the Constitution, supra. This

requires that the judicial officer hearing the trial must inform an accused of his right to representation unless it is apparent to him and for good reason, that the accused, as stated above, is aware of his right. See S v Bruwer, supra, at 308 - 309 and S v Mabaso, 1990(3) S.A. 185 at 204 C - J.

> In this case the failure to inform appellants of their right to legal representation resulted in an irregularity which in the peculiar circumstances of this case resulted in the appellants being unable to lead evidence and to cross-examine effectively state witnesses. They could not be expected to understand the presumption in section 85 of Act 4 of 1977. They were ignorant of court procedures. That was apparent from the failure of most of the appellants to give evidence in their own defence, to address the court at the end of defence evidence and to submit or lead evidence in mitigation of sentence. The failure by the Magistrate to inform appellants of their rights to a lawyer was an irregularity which, in my view, led to a failure of justice. In view of the manner in which the trial was conducted this irregularity, standing by itself, is sufficient for purposes of vitiating proceedings.

One of the irregularities relied upon by the appellants to vitiate the proceedings is that the trial Magistrate failed to explain to the appellants the existence and implications of the presumption created by section 85(2) of the Nature Conservation Ordinance 4 of 1975, as

amended. Section 85(2) reads:

> "Whenever any person performs an act and he would commit or have committed an offence by performing that act if he had not been the holder of a licence, registration permit, exemption, document, written permission or written or other authority or power (hereinafter in this section called the necessary authority) to perform such act, he shall, if charged with the commission of such offence, be deemed not to have been the holder of the necessary authority, unless the contrary is proved."

The presumption referred to above appears in the charge sheet where it is stated as follows:

> "That the accused is guilty of contravention of section 26(1) read with section 1, 26(3), 85, 90 and annexure 3 of the Ordinance of Nature Conservation 4/1975 as amended."

One has to read section 85(2) to discover what the presumption is. The appellants who, it is generally agreed, are unsophisticated, illiterate and uneducated could not be expected to know of its existence by a mere mention of section 85 on the chargesheet. And even if they had been shown section 85(2) it would have meant nothing to them. Appellants of this kind would need proper explanation of the import of the presumption. And only a lawyer or the Magistrate could have given that explanation. In this case the Magistrate did not explain to the appellants the implications of the presumption. He did not tell them what they had to do in order to meet the requirements of section 85(2).

Mr Kuny submitted that a presumption of this nature was a sophisticated concept not normally appreciated or understood by a lay person. It could in a criminal case operate harshly against an accused who is unrepresented. The magistrate ought to have fully explained it to the appellants. He did not do it. I agree with Mr Kuny. In *S* v Ntuli and Another 1967(3) SA 721 (N) at 722 F - G - James, J, as he then was, appreciating the danger of unexplained presumptions said this:

> "Mr Combrink, who appeared for the appellant, referred us to two cases, S v Langa, 1962 (1) SA 107 (N), and S v Moeketsi, 1965 (2) P.H. H157, in both which it was said that it was desirable for the court to warn an accused person who was undefended of the existence of presumption set out in sec. 90 bis of the Act, so that the accused person would not fail to give evidence to rebut that presumption if he wished to do so. It is clear that both to the desirability of a warning, but there is no fixed rule laying down that this is an essential prerequisite to a conviction. It seems to me that in cases where an accused has not been warned of the presumption, it is the duty of the court to look at the evidence with particular care to satisfy itself that the accused has not been prejudiced by the fact that no warning has been given."

The appellants in this case were unrepresented. It was the duty of the Magistrate to explain to them the meaning and import of the presumption and the shifting of the onus. Subsection (2) of section 85 places on the appellants the onus of showing that they' hunted the giraffe because they had a permit. How were appellants expected to know when the

Magistrate did not draw appellants' attention to the presumption and its attendant consequences. See S v Khumalo 1979 (4) SA 480 (TPD) at 483 H. Failure to draw the attention of the appellants to the presumption and to explain its implication is an irregularity. In the circumstances of this case failure to explain the presumption leads to the conclusion that the trial was not fair. And since there were other rights about which appellants were never informed, it is safe to conclude that failure to draw the attention of unrepresented appellants to the presumption and its implications resulted in a failure of justice. See S v Brown 1984 (3) SA 399 (KPA) at 401 H - I.

S v Shanaase 1972 (2) SA 410 (N) at 432 E.

S v Kekwana 1978 (2) SA 172 (NKA).

S v Cross, 1971 (2) SA 356 (RA) at 358 D - E.

It is not wise in cases of this nature to assume that the accused did not suffer any prejudice because the trial Magistrate did not rely on the presumption and therefore his not warning the appellants could not have prejudiced them. In this case the State did not produce or adduce any evidence to prove that the appellants did not have the necessary permit to hunt the giraffe. It is therefore proper to assume that the State must have relied upon the operation of the presumption to prove that the appellants were guilty. See S v Khumalo, 1979 (4) SA 480 (T) at 483 H., S v Mkhize, 1966 (4) SA 280 (N) at 282 A - C.

Mr Kuny contended that the irregularity arising from failure

by the Magistrate to draw the attention of appellants to the presumption in section 85(2) of the Ordinance was most material so as to taint the proceedings and to militate against the appellants having a fair trial. Therefore such an irregularity would result in setting aside the proceedings. I agree. See S v Andrews 1982(2) SA 269 (NC) at 277 B and the English Headnotes, S v Ntuli, 1967 (3) SA 721 (N) at 722 F - G.

There were a number of other irregularities in the proceedings. The Magistrate did explain the right of appellants to adduce evidence and entered that in the record. However what he recorded was a bald statement:

"Accused rights explained. Accused understands."

He equally failed to write what - precisely it was he explained to the appellants about their rights to cross-examine State witnesses or other appellants. The record shows an entry which tersely says:

"Nature and Purpose of cross-examination
explained to the accused. Accused understands."

He should have recorded the nature of the explanation given to appellants. All that he told them about cross-examination should have been written down.

It is difficult for an appellate court to accept that the Magistrate explained fully to the appellants the import of cross-examination. The terse statements entered in the

record do not suggest what it was that the Magistrate told the appellants. In this case it is difficult to believe that the Magistrate explained fully what cross-examination was all about because the record reveals that appellants did not understand what they were expected to do during cross-examination .

Appellants were not informed of their right to make submissions at the close of the defence case. These irregularities prevented appellants from putting before the court reliable and comprehensive evidence. Because of this a doubt is created in the mind of the Appellate Court. One would still want to know whether appellants understood the purpose of leading evidence and cross-examining State witnesses. Without a precise record giving particulars of the nature of explanations made to the appellants it is difficult to come to the conclusion that the Magistrate fully explained to the appellants their rights. It is easy to come to the view that appellants failed to perform during

the proceedings because the Magistrate did not tell them fully what their rights were and what they were expected to do. One would like to know whether appellants failed to perform because they were just not up to it on account of their illiteracy and other disadvantages. See S v Daniels en Ander, supra, at 317 A - E and S v Motaung 1980 (4) SA 131 (T) at 133 A - B.

The cumulative effect of all the above irregularities abrogated appellants' rights to a fair trial. I agree

with

Mr Kuny when he argued that in the circumstances of this case it cannot be said, in the absence of representation on their behalf, that all the evidence which should have been placed before Court was in fact placed before the Court or that State witnesses were properly cross-examined and tested or that the cases of each of the appellants were properly presented. See S v Shabancru, 1976 (3) SA 555 (A) at 558 F where Jansen, J.A. remarked:

> "The case against the appellant on the merits certainly appears to be formidable and to have fully justified the conviction. But, on the other hand, it is impossible to say what effect a properly conducted defence could have had on the ultimate result."

In the instant case the importance of the above statement becomes more significant because there was no credible evidence on the merits justifying conviction. Mr Miller, for the respondent, argued every conceivable point in support of conviction. He did the best he could for the state. In the end, while not conceding, he appreciated the lack of credible evidence and the seriousness of irregularities in this case. The appeal against conviction must succeed.

There was an appeal against sentence. In view of the conclusion to which the Court has come on conviction, it is unnecessary to consider submissions of counsel against or in support of sentence. The fines imposed by the Magistrate were too severe for appellants who told the trial Court that they had no money with which to pay fines. Only one

appellant indicated that someone else would assist in paying his fine. The prosecutor asked for a suspended sentence and for the two counts to be taken as one for purposes of sentence. However the Magistrate did not take into account the prosecutor's submissions. He should have. Because the convictions have fallen away it is unnecessary to set aside sentences except as a mere formality.

In the result the appeal succeeds and both conviction and sentence are set aside.

E. DUMBUTSHENA, ACTING JUDGE OF APPEAL

I agree

I. MAHOMED, CHIEF JUSTICE

I agree

M. CHOMBA, ACTING JUDGE OF APPEAL
F.M. CHOMBA, ACTING JUDGE OF APPEAL