



Africa Criminal Justice Reform
 Organisation pour la Réforme de la Justice Pénale en Afrique
 Organização para a Reforma da Justiça Criminal em África

The right to a fair trial and being hearing impaired

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Kruse v S (Case no. A 100/2018) Cape High Court

The Cape High Court recently (27 August 2018) overturned on appeal the conviction and sentence of a 62-year old man convicted in the Wynberg Regional Court of murder because the trial court failed to protect his right to a fair trial by not making special arrangements for his hearing and speech impairment, the refusal to admit potentially crucial testimony, and the negative bias of the presiding officer. In *Kruse v S* (Case no. A 100/2018) the High Court was scathing of the trial court for its lack of sensitivity and understanding in dealing with hearing and speech impaired accused persons despite good precedent existing in law. Kruse was convicted in 2015 for the shooting to death of one Nashief Davids, an act he claimed was committed in self-defence, and upon conviction was sentenced to 15 years imprisonment, of which five years were suspended conditionally for five years.

The High Court neatly sets out the importance of the right to a fair trial and the duty of the court to protect that right by, amongst others, ensuring that the accused is able to participate meaningfully in the trial. Citing a case from 1916 the High Court noted: “The presence of the accused means not merely that he must be physically in attendance, but also that he must be

capable of understanding the nature of the proceedings.” The judgment also cites the Magistrates Court Act 32 of 1944 noting that that there is a duty on the presiding officer to consider whether the accused is sufficiently conversant with the language in which evidence is given and, if necessary, to employ the services of a competent interpreter to assist the accused. Moreover, that the failure to do so amounted to a serious irregularity justifying the setting aside of a conviction. In short, effective communication is imperative for a fair trial.

The High Court further stated that the presiding officer must satisfy him or herself on ‘proper grounds’ that the accused will be able to follow proceedings and that the word of the accused’s legal representative is not sufficient as this person may be operating under misconceptions of the accused person’s abilities. If there is *any doubt* the presiding officer must order an expert assessment and based on the result of such an assessment an appropriate interpreter must be appointed to ensure that the accused is able to fully participate in the trial.

At the trial in the regional court the accused informed the court that he was deaf and would require a sign language interpreter (SLI) but when the trial commenced with the SLI, Kruse informed

the court that he did not understand sign language that well and could not follow the SLI, a fact confirmed by the magistrate. The accused then requested the services of a specific SLI from the De La Bat School for the deaf where he had spent some six months in his youth, but this request was ignored.

However, the Magistrate satisfied herself that the accused could read and write and was told by counsel for the accused that he had been communicating in writing with his client, and she directed that the trial must proceed. What followed was a makeshift system of handwritten recording and translation from English to Afrikaans administered by a court interpreter for the benefit of the accused. As each State witness finished testifying in chief the translated notes were given to the accused and his counsel prior to cross examination.

The High Court found this to be highly problematic because the interpretation was sub-standard as it was not continuous, precise, competent and contemporaneous. Firstly, the interpreter was required to translate and record at the same time whilst there is no provision for this in the Magistrates Act and a court stenographer should have been used. In effect, the accused received a written summary of what was said. Secondly, because the accused was only able to read the notes of the interpreter at the end of each witness's testimony the translation was not contemporaneous – the translation must be immediate and direct. Thirdly, from the record it is evident that the accused was not always given the opportunity to properly consider what was said. Fourth, the magistrate instructed the accused that he can answer by speaking but that he must write all his answers down. In the view of the High Court, the magistrate, instead of assisting the accused, made his communication more onerous. At times the accused resorted to hand gestures and it is unclear to what extent this was understood. It was also evident that the accused did not understand some questions as his answers were off point. The magistrate also refused that the accused's son testifies as he would, in her opinion, have nothing to contribute. The son's

intended testimony was indeed aimed at explaining how his father communicates and that this would have been relevant to the shooting incident. The High Court also remarked on the insensitive and prejudicial attitude of the Magistrate towards the accused's communication abilities as reflected in her views that he was not truthful about his disabilities. This she did without verifying the extent of his impairment with expert testimony. The accused's hearing impairment should not have been an issue during the trial at all.

The effect of all this was that the accused was excluded from the trial in large parts as he did not receive contemporaneous interpretation and at other times were simply ignored by both the presiding officer and his counsel. The judgment concludes that there was a miscarriage of justice on several grounds, being the denial of the accused's right to a properly qualified interpreter, the refusal to allow his son to testify, and the negative bias of the presiding officer. The accused was thus not afforded a fair trial and the murder conviction cannot stand.

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