

SOUTH AFRICA / JUDGMENT

Kruse v S (A100/2018) [2018] ZAWCHC 105; [2019] 4 All SA 287 (WCC) (27 August 2018) [2018] ZAWCHC 105

COURT

Western Cape High Court, Cape Town

BEFORE

Ndita, Davis

CASE / FILE NUMBER

A100/2018

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A 100/2018

In the matter between:

RAYMOND KRUSE Appellant

and

THE STATE Respondent

Coram Ndita J et Davis AJ

Heard: 4 May 2018

JUDGMENT DELIVERED ON 27 AUGUST 2018

DAVIS AJ:

1. This appeal highlights the need for judicial sensitivity and vigilance in criminal proceedings involving an accused with impaired hearing and speech, as well as the duty of judicial officers to treat all persons who come before court with due respect for their dignity.

2. Section 35(3) of the Constitution[1] guarantees every accused person the right to a fair trial, which includes the right to be present when being tried,[2] the right to adduce and challenge evidence,[3] the right to be tried in a language which the accused person understands or, if that is not practicable, to have the proceedings

interpreted in that language,[4] and the right to have required information given to an accused in a language that the accused understands.[5]

3. A fair trial requires that the accused be able to understand the proceedings at all times.[6] Even before the advent of the Constitution, our courts, dealing with s 6(2) of the Magistrates' Court Act 32 of 1944,[7] held that there was a duty on the presiding officer to consider whether an accused person 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.[8] The failure to do so amounted to a serious irregularity justifying the setting aside of a conviction.[9]
4. The Constitution affords wider protection than s 6(2), since s 35(3)(k) entitles an accused person to have the entire proceedings interpreted into a language in which he or she understands as opposed to the evidence only, while s 35(4) ensures that all information required to be given to accused is imparted in a language which he or she understands. These constitutional entitlements are founded on the recognition that effective communication is imperative for a fair trial. Indeed many of the rights guaranteed in s 35(3) depend on effective communication by and with the accused. For example:

- 4.1. The right to be present when being tried implies an ability to hear and understand the import of the evidence and the nature of the proceedings,[10] for as Lord Reading CJ long ago explained:

"The reason why the accused should be present at the trial is that he may hear the case being made against him and have the opportunity, having heard it, of answering it. 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." [11]

- 4.2. The right to adduce and challenge evidence depends on the accused's ability to hear and understand the testimony of witnesses and to make him or herself properly understood when instructing counsel and giving evidence.[12]

5. In short, it is widely accepted that the ability of an accused person to understand and be understood are fundamental requirements for a fair trial.[13]
6. The right to a fair trial poses particular challenges where a court is dealing with an accused whose hearing and/or speech is impaired, for there is a grave danger that the accused will be excluded from meaningful participation in the trial. It must be borne in mind that:

'In an uninterpreted trial, a deaf defendant's right to be heard in his own defense is significantly impaired, i.e., identification by the deaf defendant of factual misstatements is highly improbable and the opportunity for effective confrontation is correspondingly

diminished. Furthermore, participation in defensive strategy through communication with counsel during the trial phase is critically

impaired. In effect, deaf defendants are functionally excluded from uninterpreted trials.’ [14]

7. The presiding officer must therefore satisfy him or herself on proper grounds that the accused is able to hear and understand the proceedings at all times and to make him or herself understood. The presiding

officer should not simply accept the word of a legal representative in this regard, for an accused’s legal representative may be operating under a misapprehension as to the efficacy and accuracy of his or her attempts to communicate with the accused. Nor should the presiding officer be content with his or her own assessment of the situation.

8. Where there is any inkling that an accused may have hearing and/or speech difficulties, an expert assessment should be undertaken into the extent of the accused’s impairment and, depending on the results of that assessment, an appropriately qualified interpreter must be employed to assist the deaf and/or mute accused in order to ensure that he or she is able to participate fully in the trial. The nature of the skills and qualifications required of the interpreter will vary from case to case. A one-size-fits-all approach cannot be taken for all deaf/mute accused.
9. This case is a stark reminder of the challenges facing deaf persons in accessing justice in our courts. The presiding officer failed to have due regard to the special needs of the accused, who was deaf and mute, despite having been alerted at the outset to the fact that he could not hear and speak properly. The magistrate did not adjourn the proceedings and refer the accused for assessment by an audiologist in order to determine the extent of his hearing and speech impairment. Instead she pressed on with the trial and devised her own uninformed method for conducting the proceedings. For reasons which will become clear, that method was not adequate to ensure the accused’s effective participation in his trial and therefore did not pass muster.
10. The accused, who was legally represented throughout the proceedings, was tried in the Wynberg Regional Court on a charge of murder, it being alleged that on 23 June 2014 and at Eastridge, Mitchell’s Plaintiff, he unlawfully and intentionally shot and killed one Nashief Davids (“the deceased”). The accused’s defense was that he was acting in self-defense. He was convicted of murder on 5 May 2017 and subsequently sentenced to 15 years of imprisonment, of which 5 years were conditionally suspended for a period of 5 years.
11. At the time when he was tried, the accused was 62 years old. When he first appeared at court the magistrate was informed that he was deaf and would require assistance from a sign language interpreter (“SLI”). A SLI was duly sourced, but when the trial was set to commence the accused, through the SLI, informed the magistrate that he did not understand sign language well and could not follow the SLI. Indeed the magistrate himself observed that the SLI and the accused could not understand each other.

12. The accused communicated to the court in writing that he was not born deaf and dumb, but started experiencing hearing loss at around Grade 5 and gradually lost his hearing and speech abilities. He had never had any formal training in sign language, but he had passed Grade 5 at school and could read and write. One gathers from the probation officer's report[15] that the accused's hearing loss was caused by a shooting accident, and that he lost his hearing completely in Grade 7. He was then sent to the De La Bat School for the deaf in Worcester, but only spent 6 months there. It is recorded in the magistrate's notes that the accused pertinently requested an interpreter by the name of Anthony Salie from the De La Bat School in Worcester, but no regard was paid to this request.
13. Instead, because the magistrate satisfied herself that the accused could read and write, and because she was told by the accused's counsel that he had been able to communicate with the accused by means of written communication and with the assistance of his daughter, she directed that the trial proceed and that communication with the accused be done in writing.
14. The method employed for the presentation of the State's case was that the interpreter wrote down in Afrikaans the questions put to and the answers given by the State witnesses, who testified in English. The interpreter was not required to interpret from English into Afrikaans for the benefit of the magistrate, prosecutor and defense counsel, since they were all English speaking, but was required to write down in Afrikaans what was asked and answered for the benefit of the accused. As each State witness finished testifying in chief, the interpreter's notes were shown to the accused and his counsel before cross-examination in order to afford the accused and his counsel an opportunity to verify that the proceedings had been correctly recorded and to prepare for cross-examination.
15. There are several difficulties with this procedure, the most obvious being that the interpretation was sub-standard since it was not continuous, precise, competent and contemporaneous.[16] In this regard:

15.1. First, the interpreter was required to simultaneously translate and record what was being said. That is irregular. There is no provision in the Magistrates' Court Act or the Criminal Procedure Act which sanctions the recording of evidence by an interpreter as opposed to an official court stenographer. Furthermore, simultaneous written recordal and translation is a difficult task which carries a high risk that parts of the evidence will be missed, or the subtleties of communication lost. One sees from the transcript that the interpreter frequently complained that she could not keep up, and a comparison of the interpreter's notes with the record of the court proceedings reveals that the interpreter's note was a summary rather than an accurate verbatim transcript of the testimony. Thus the accused was deprived of the benefits of full and precise interpretation.

15.2. Second, because the accused was only afforded the opportunity to read the interpreter's notes at the end of each witness's testimony in chief, he was deprived of the benefit of contemporaneous interpretation, which requires that interpretation of dialogue be conveyed to the accused immediately once the person has spoken. The lapse of time between the giving of the testimony and the accused's access to the contents likely diminished his ability to detect errors and instruct his counsel to raise issues in cross-examination.

15.3. Thirdly, the record shows that the accused was not always afforded a proper and timeous opportunity to consider what had been said. For instance, when witness Fatima Davids testified, her cross-examination ensued immediately without an adjournment to afford the accused an opportunity to consider her evidence and instruct counsel accordingly. And when the court asked questions of State witnesses after the conclusion of cross-examination, there was no adjournment to allow the accused to be informed of the court's questions. This meant that he was practically excluded from important parts of the trial.

16. When the defense case was presented, it appears that the interpreter wrote down questions for the accused to read. The court transcript shows that the accused answered orally and that the audio equipment was able to record his answers despite his speech impediment. The magistrate instructed the accused that he could answer by speaking, but that he must also write all his answers down. That is a tall order for anyone, let alone someone who suffers from hearing and speech difficulties. Instead of facilitating the accused's communication, the magistrate made it more onerous for him. Included with the record are notes in summary form of the questions put to the accused and his answers, but those appear to be the notes produced by the interpreter, in which case the accused's

written notes, which should form part of the record, are missing.

17. The record gives rise to grave doubts about the efficacy of the accused's understanding and communication. His answers were frequently not directly pertinent to the question asked, he resorted to hand gestures at times, and there were differences between his evidence and the version which his counsel had put to the State witnesses. It is all too easy to put this down to mendacity on the part of the accused – as the magistrate appears to have done – when these factors may well be ascribed to poor comprehension and communication skills on the part of the accused. His ability to adduce and challenge evidence was undoubtedly

hampered by his disability and he would have benefited greatly from the assistance of the special interpreter who he recommended and requested – a request which the magistrate inexplicably ignored.

18. Not only did the magistrate ignore the accused's request for a particular interpreter, but she also refused to permit the accused's son to testify on his behalf because she decided, in her wisdom, that his son would have nothing relevant to say because he did not witness the events in question. That, however, was not her call to make. The accused's counsel had indicated earlier that he intended to call members of the accused's family to testify regarding how the accused communicated. That evidence could have been helpful in

understanding the accused's interaction with the deceased,[17] and it would have been relevant to counter the magistrate's clear scepticism about the accused's disability – an aspect which is dealt with below. The magistrate's refusal to allow the accused's son to testify was a clear misdirection

which violated the accused's right to adduce evidence.

19. The procedure adopted by the magistrate was not sufficient to ensure that the accused was able to participate effectively in his trial. It is clear from the record that the accused struggled to hear and to follow the proceedings. During the presentation of the State's case he was effectively excluded for large portions of the trial since as he was not given a contemporaneous interpretation of the dialogue. At times he was simply ignored, for instance on two occasions when the State made applications, one for leave to amend the indictment and another to introduce the hearsay evidence of a written statement made by a deceased witness. On both occasions the accused's counsel blithely consented to the applications without asking the accused for instructions. The magistrate did not ask whether the accused had been informed of his rights in these regards, and whether he agreed with the stance taken by his counsel. This was a particularly egregious admission in the case of the damaging hearsay evidence which was

evidently admitted without the accused's informed consent.

20. In essence, the accused did not have full and proper access to what was being said in court, and his own voice was stifled due to the lack of an appropriately skilled interpreter and the magistrate's refusal to allow his son to testify. He was reduced to a passive and powerless spectator at his own trial, which rolled on like a juggernaut, trampling his constitutional rights in the process.
21. The violation of the accused's right to a fair trial could and should have been avoided by the simple expedient of referring the accused for an audiological examination in order to ascertain the extent of his impairment and obtain expert guidance on how best to facilitate effective communication with and by the accused. A good example was set in the case of *S v Mbezi* 2010 (2) SACR 169 (WCC) where the magistrate adjourned the trial and sent the accused for an audiogram as soon as it became apparent that he either did not hear or could not understand questions. That is what the magistrate should have done in this case as soon as she was informed of the accused's hearing difficulties.
22. Judicial officers must be sensitive to the fact that there is great diversity within the deaf population. One cannot assume that a SLI trained in South African Sign Language (SASL) will make it possible for a deaf accused to understand the proceedings, for there are many forms of sign language other than SASL and the accused may not be proficient in SASL, or indeed in any form of sign language. An individualized enquiry needs to take place in order for the court to understand the particular needs of a deaf accused so as to ensure that he or she will be able to understand and follow the court proceedings. In the same way that an expert assessment takes place when there is a question about an accused's mental

competence to stand trial, where a court is dealing with a

hearing and/or speech impaired accused, an expert assessment should be undertaken in order to ascertain the nature and extent of the accused's impairment, the nature and extent of his or her communication skills, how to maximize effective communication with the accused, and whether it will in fact be possible for the accused properly to understand and participate in court proceedings.

23. The constitution proclaims that everyone is equal before the law and entitled to equal protection and benefit from the law. Unfair discrimination on grounds disability is not countenanced. In the case of a hearing and/or speech impaired accused a court must be alive to the fact that special measures may be necessary to respect, protect, promote and fulfil that accused's right to a fair trial.
24. It is unfortunately necessary to comment on another aspect of the magistrate's treatment of the accused in this case. The record shows that the magistrate formed the impression that the accused was not being truthful about the extent of his disabilities. The magistrate took it upon herself to question a number of the State witnesses about whether or not the accused could hear and speak. Not only was it wholly inappropriate to make the accused's disability an issue in the trial, but the magistrate also erred in taking into account the unreliable evidence of lay persons instead of seeking expert opinion on the accused's condition.
25. What made matters worse was that the magistrate gave public vent to her scepticism about the accused's inability to communicate. At the commencement of the trial, when the accused's counsel requested permission to approach the accused for instructions, the following unseemly exchange occurred:

'Court: Yes. But what is funny, Mr Matseme is that you can communicate with your client without writing ...

Mr Matseme: No, I open my mouth ...

Court: Ha-ha-ha ...

Mr Matseme: (Indistinct) I am going to do that also so that, Your Worship because when we consulted if you are closer and you try and open your mouth wide, he can understand but the problem is now that if you just speak as I am speaking now he will not understand.

Court: Gmfh ... This is interesting ... Mr Matseme he wishes to speak with you. ...'

26. The magistrate's remarks display an appalling insensitivity and prejudice regarding the accused's disability. She violated his dignity with her callous laughter and open incredulity. She failed to accord him the respect which every person who appears in a South African court is entitled to receive from a judicial officer. Her conduct demonstrates the need for ongoing social awareness and sensitivity training to alert all judicial officers to the challenges facing people with disabilities when they appear in our courts.

27. Furthermore, the magistrate's undisguised scepticism about the accused's disability evidences a preconceived notion that he was untruthful, which amounted to bias on her part. Quite apart from the interpretation issues, the bias of the presiding officer rendered the accused's trial unfair.
28. It is therefore clear that there was a miscarriage of justice on several grounds, namely 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 not afforded a fair trial and his murder conviction therefore cannot stand. If the State decides to bring fresh charges against the accused, the case must be tried before a different magistrate, and regard must be had to the guidelines set out in this judgment.
29. I would therefore make the following order:
1. The appeal is upheld.
 2. The accused's conviction and sentence are set aside.
 3. A copy of this judgment is to be sent to the Magistrates' Commission with a view to raising awareness of the need for social awareness and sensitivity training in relation to persons with disabilities.

D M DAVIS AJ

I agree and it is so ordered.

T NDITA J

[1] Constitution of the Republic of South Africa, 1996.

[2] Section 35(3)(e).

[3] Section 35(3)(i).

[4] Section 35(3)(k).

[5] Section 35(4).

[6] See *S v Ngubane* 1995

(1) SACR 384 (T); *S v Ndala* 1996

(2) SACR 218 (C) *S v Abrahams* 1997

(2) SACR 47 (C); *S v Manzini* 2007

(2) SACR 107 (W).

[7] Section 6(2) of Act 32 of 1944 reads as follows: “If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not.”

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[8] See *S v Ndala* (supra) at 221 g, citing *Mackessack and Others v Assistant Magistrate, Empangeni and Others* 1963

(1) 892 (N) at 896 E - H; *Geidel v Bosman N.O. and Another* 1963

(4) SA 253 (T) at 256 F – 257 H; *Ohannesen v Koen N.O. and Another* 1964 (1) SA 663 (T) at 664 B – C; *S v Mafu* 1978

(1) SA 454 (C).

[9] See *S v Abrahams* 1997

(2) SACR 47 (C) and the cases cited in footnote 8 above.

[10] See *Pachcourie v Additional Magistrate, Ladysmith and Another* 1978

(3) SA 986 (N) at 991 B – H.

[11] *R v Lee Kun* (1916) 1 KB 337 at 341, quoted with approval in *Pachcourie v Additional Magistrate, Ladysmith and Another* (supra) at 991 C – F and in *Mackessack and Others v Assistant Magistrate, Empangeni and Others* (supra) at 895 G – H. A similar view was expressed in the case of *Terry v State* 21 Ala. 100, 102

(1925) where an Alabama Criminal Appeal Court, dealing with the refusal of the court a quo to appoint an interpreter for a deaf accused, held that mere physical confrontation of witnesses was pointless if the accused could not hear and understand the testimony. It characterized the mere physical appearance of the deaf accused without an interpreter as “useless, bordering on the farcical.”

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[12] F Cassim ‘The right to meaningful and informed participation in the criminal process’ (2009) (Thesis available online at UNISA Institutional Repository).

[13] See F Cassim (supra); Jeffery B. Wood ‘Protecting Deaf Suspects’ Right to Understand Criminal Proceedings’ 75 J. Crim. L. & Criminology 166 (1984); Gregg F. Relyea ‘Procedural Due Process: A Deaf Defendant’s Right to be Heard Should Encompass a Right to “Hear” Civil Trials Through Interpretation’ 29 Cath. U.L. Rev 867 (1980) at 868; R v Lee Kun (supra); Terry v State (supra); Mothershead v King 112 F.2d 1004 (8th Cir. 1940); United States ex rel. Negron v New York

[1970] USCA2 719; 434 F.2d 386 (2nd Cir. 1970); Attorney General of Ontario v. Reale, [1975] 2 S.C.R. 624; Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education, District 50 Branch [1986] 1 SCR 549 at 577 and 622.

[14] Gregg F. Relyea (supra) at

868. (Although the article deals with the right of the deaf to interpreted civil trials, the remarks are equally apposite to

criminal proceedings.)

[15] This report naturally only became available at the sentencing stage and the information contained therein was not known to the magistrate at the start of the trial.

[16] See S v Ngubane 1995

(1) SACR 384 (T).

[17] Since the accused averred that he was acting in self-defense, evidence about how he ordinarily communicated with his family might have shed light on how much he would likely have heard and understood of what the deceased said to him.

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Prepared on 9 October 2026 · Esheria