

Legal Challenges Faced by Accused Persons with Speech and/or Hearing Impairment in South African Courts: An Analysis of *Kruse v S* 2018 (2) SACR 644 (WCC)

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Abstract

This case note identifies and analyses the legal impediments faced by speech and/or hearing-impaired (SHI) accused persons in South African courts. In examining the challenges faced by SHI accused persons in court, the note examines Kruse v S 2018 (2) SACR 644 (WCC). The note examines the barriers the SHI accused faces in understanding court proceedings and how South African law should address some of these obstacles. The note makes recommendations that may improve the position of SHI accused persons in the South African criminal justice system, particularly the courts.

Keywords

South African Constitution, court proceedings, criminal justice system, disability, equality, human rights, speech and hearing impairment

1. Introduction

In South Africa, few sign language interpreting services are available in public areas, such as hospitals, courts and police stations.¹ The absence of communication services disproportionately impacts speech and/or hearing-impaired (SHI) individuals in the criminal justice system, where effective communication is essential.² In the *Kruse* case,³ Raymond Kruse was a 61-year-old SHI accused person who stood trial in the Wynberg Regional Court in 2017. Mr Kruse was convicted of murder and sentenced to 15 years' imprisonment, of which five were suspended.⁴ The magistrate's court's decision to convict and sentence Kruse was appealed in the Western Cape High Court because it transpired that, before Kruse's conviction, he had informed the magistrate that he had an SHI and would require communication assistance from a sign language interpreter (SLI).⁵

1 Heap, M & Morgans, H 'Language Policy and SASL: Interpreters in the Public Service' in Watermeyer, B & Swartz, L *et al Disability and Social Change: A South African Agenda* (Human Sciences Research Council 2006) 134.

2 Petse, I 'An Analysis of the Legal Challenges Experienced by Offenders with Hearing and/or Speech Impairment in the South African Criminal Justice System' (LLM thesis, University of the Western Cape 2019) 5.

3 *Kruse v S* 2018 (2) SACR 644 (WCC).

4 *Ibid* para 10.

5 *Ibid* para 11.

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Even though the appellant alerted the magistrate to his difficulty and requested an SLI, the magistrate was convinced that the appellant could write and read.⁶ This suggested that the magistrate was ignorant and could not place herself in the shoes of the affected individual; therefore, because of the ignorance, the appellant stood trial without being able to hear or even understand the questions asked during the court proceedings.⁷ Even though the appellant was provided with written notes from witness testimonies during the court proceedings, he could not respond effectively as he was not given enough time to comprehend and verify the information provided.⁸ The appellant was not only affected by the magistrate's insensitive approach but also denied assistance from his family.⁹

For the above reasons, the appeal court confirmed that the magistrate was insensitive about the appellant's disability.¹⁰ The magistrate's refusal to give the appellant full access to an SLI hindered the appellant's adequate understanding of the court proceedings, which silenced the appellant's voice.¹¹ The appeal court held that the appellant's conviction for murder should be set aside.¹² An accused SHI can be reduced to a 'passive and powerless spectator' at his or her trial.¹³ The accused must understand the proceedings, and it is also essential that the court understands the accused.¹⁴ However, understanding is infinitely more difficult for the SHI accused because their only communication method may be sign language.¹⁵ The victimisation of individuals with severe communication disabilities is often overlooked. This lack of attention exacerbates their suffering and perpetuates their invisibility in society.¹⁶ SHI accused persons face significant challenges when they testify in court.¹⁷ This includes miscommunication and communication failures between interpreters and the accused.¹⁸ The accused often cannot understand court proceedings or follow the court officials' instructions.¹⁹ Their right to comprehend is thus often denied.²⁰

6 Ibid para 12.

7 Ibid para 21.

8 Ibid para 14.

9 Ibid para 18.

10 Ibid para 26.

11 Ibid para 20.

12 Ibid para 28.

13 Ibid para 20.

14 Ibid para 4.

15 Bourque, PC 'Admissibility of Statements Made by Deaf Accused' (1978) 20 *Criminal Law Quarterly* 238. See also Kelly, LM 'Sounding out d/Deafness: The Experience of d/Deaf Prisoners' (2018) 8 *Journal of Criminal Psychology* 1, 20–21.

16 Combrinck, H & Meer, T *Gender-based Violence Against Women with Psychosocial and Intellectual Disabilities in South Africa: Promoting Access to Justice* (Committee on the Rights of Persons with Disabilities, Half-day of General Discussion on Women and Girls with Disabilities, 2013) 13.

17 Pillay, AL 'The Rape Survivor with an Intellectual Disability vs the Court' (2012) *South African Journal of Psychology* 313.

18 Dagut, H & Morgan, R 'Barriers to Justice: Violations of the Rights of Deaf and Hard-of-Hearing People in the South African Justice System' (2003) 19 *South African Journal on Human Rights* 30. See also Holness, W & Rule, S 'Legal Capacity of Parties with Intellectual, Psycho-social and Communication Disabilities in Traditional Courts in Kwazulu-Natal' (2018) 6 *African Disability Rights Yearbook* 39.

19 Dagut & Morgan *ibid* 30. See also *Kruse v S* para 11.

20 Petse (note 2) 6.

Observing the controversy around the legal test for competency to testify,²¹ this note argues that, in the *Kruse* case, the appeal court correctly identified the inadequate attention paid to the difficulties encountered by SHI individuals in the South African criminal justice system. This note contends that obstacles faced by SHI accused are prevalent and are exacerbated in the context of the criminal justice system. These obstacles may violate the rights of persons with SHIs. Therefore, there is a need to create awareness of the legal challenges these accused may face in the criminal justice system. This note analyses South African domestic law to determine whether the law is crafted in a manner that supports the rights of SHI accused in the courts.

2. What does understanding and effective communication mean in a fair trial?

South African law has long entrenched the principle that the accused should be able to understand court proceedings.²² Courts and laws emphasise the crucial nature of the accused comprehending court proceedings.²³ A lack of understanding can significantly prevent the accused from participating meaningfully in the trial.²⁴ This means the court must ascertain whether the accused can comprehend and effectively communicate to offer a proper defence.²⁵ The court has also stated that 'effective communication imposes a duty on the state to provide competent interpreters.'²⁶ Effective communication is essential at every stage of the criminal proceedings, from apprehension to sentencing.²⁷

A fair trial requires not only the physical presence of an accused in court, but also the ability of that person to understand the proceedings.²⁸ It is widely accepted that an accused's ability to understand and be understood is a fundamental requirement for a fair trial.²⁹ In *S v Dlali*³⁰ the court re-stated that the criterion for fitness to stand trial is whether the accused, because of mental illness or mental defect, is capable of understanding the proceedings to make a proper defence.³¹

The court in *Kesavarajah v R*³² also discussed a further consideration to determine whether the accused is fit to stand trial. The majority held that

21 Bornman, J 'Identifying Barriers in the South African Criminal Justice System: Implications for Individuals with Severe Communication Disability' (2016) *Southern African Journal of Criminology* 4. See also Suder, I 'Police tells court of arrest of deaf mute' (6 June 2001) <<https://www.iol.co.za/news/south-africa/policeman-tells-court-of-arrest-of-deaf-mute-67711>> accessed 7 July 2018. Four policemen were charged with murdering a hearing-impaired offender, Clive Michael, and then dumping him in a cell at the Chatsworth Police Station.

22 Cassim, F *The Right to Meaningful and Informed Participation in the Criminal Process* (LLM thesis, University of South Africa, 2009) chapter 6.

23 Petse (note 2) 58.

24 Ibid.

25 *Kesavarajah v R* (1994) 123 ALR para 463.

26 *S v Ndala* 1996 (2) SACR 218 (C).

27 Denmark, JC *Deafness and Mental Health* (Jessica Kingsley Publishers, 1994) 114.

28 *Rex v Lee Kun* 1916 (1) KB 337 paras 340–43.

29 *Kruse v S* para 5. See also Cassim (note 22).

30 *S v Dlali* [2015] ZAECBHC para 18.

31 Criminal Procedure Act 51 of 1977, s 77(1).

32 *Kesavarajah v R* (1994) 123 ALR.

[t]he defendant (accused) needs to understand what it is that he is charged with ... He needs to understand generally the nature of the proceedings ... He needs to be able to follow the course of proceedings to understand what is going on in court in a general sense, though he need not, of course, understand the meaning of various court formalities.³³

The principle of understanding court proceedings is linked to the accused's presence.³⁴ The court has an obligation to assist an accused in understanding or to assess whether the accused is capable of understanding court proceedings.³⁵ To guarantee a fair trial, it is imperative to ensure that the accused can present and challenge evidence and that the accused is tried in a language that he or she understands.³⁶

3. Rights applicable to effective communication and the SHI accused's understanding during court proceedings

Effective communication is imperative for a fair trial.³⁷ Many rights guaranteed in s 35(3) of the Constitution depend on effective communication by and with the accused.³⁸ The Constitution states 'that every accused has a right to a fair trial, which includes: the right to be present when being tried',³⁹ the right to adduce and challenge evidence,⁴⁰ the right to be tried in a language which the accused understands or, if that is not practical, to have the proceedings interpreted in that language,⁴¹ and the right to have the required information provided in a language the accused understands.⁴²

3.1 The right to be present when being tried (section 35(3)(e)) and the right to adduce and challenge evidence (section 35(3)(i))

An accused's presence at trial is a prerequisite for exercising active defence rights effectively.⁴³ The physical presence of an accused is of value only if he or she is also able to communicate.⁴⁴ The right to an interpreter guarantees the communication aspect.⁴⁵ The presence of the accused is a fundamental component of a fair trial, and failing to comply with this right may result in the proceedings being set aside.⁴⁶

33 Ibid para 463.

34 Cassim (note 22) chapter 6.

35 *Kruse v S* para 7.

36 Petse (note 2) 59.

37 *Kruse v S* para 4.

38 Ibid.

39 Constitution of South Africa 1996, s 35(3)(e).

40 Constitution of South Africa 1996, s 35(3)(i).

41 Constitution of South Africa 1996, s 35(3)(k).

42 Constitution of South Africa 1996, s 35(4).

43 Steytler, N *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa, 1996* (Butterworth; Lexis Law Pub, 1998) 294. See also Joubert, JJ & Bekker, PM *et al Criminal Procedure Handbook* (5 ed, Juta and Company, 2001) 202.

44 Steytler *ibid*.

45 Constitution of South Africa 1996, s 35(3)(k).

46 *S v Eyden* 1982 (4) SA 141 (T).

In *Pachcourie v Additional Magistrate*,⁴⁷ which dealt with the position of a hearing-impaired person, the court held that for the accused to be considered present, the accused should be present in body and also in mind.⁴⁸ ‘The accused must be able to hear and understand the importance of the evidence being led at his or her trial.’⁴⁹ The court concluded that the trial was not handled properly due to improper interpretation. As a result, the hearing-impaired person could not appreciate or understand the importance of the trial.⁵⁰

From the *Pachcourie*⁵¹ case, it can be inferred that presence as a principle does not only entail being of sound mind or being present physically, but includes the fact that the accused should appreciate and understand the importance of the evidence being led in the trial. The purpose of the principle is for the accused to hear the case being made against him or her and to be granted an opportunity to answer what he or she hears.⁵² Furthermore, in other jurisdictions where the ‘right to be present is not explicitly mentioned in the Constitution, courts have deduced it from the right to adduce and challenge evidence.’⁵³ Hence, this seems to be a common right. The right to adduce and challenge evidence lies at the heart of the criminal trial, namely, establishing the truth about an accused’s guilt or innocence.⁵⁴ The right also includes the right to testify and enable defence witnesses to go to court and get support or assistance.⁵⁵ Presumably, the right also allows the defence witness to request assistance on behalf of the accused during court proceedings, including support for SLI.

The courts have repeatedly held that a duty rests on a presiding officer to assist the unrepresented accused in exercising his or her right to adduce evidence.⁵⁶ The right to adduce evidence also requires a qualified and adequately sworn-in interpreter where appropriate.⁵⁷ This is closely linked to the accused’s right to be tried in a language that he or she understands.⁵⁸ The SHI accused can comprehend and participate in legal proceedings by effectively communicating through a certified and properly sworn-in interpreter. This enhances the standing of the accused.⁵⁹

3.2 The right to be tried in a language that the accused understands (section 35(3)(k)) and the right to be informed in a language which the accused understands (section 35(4))

Section 35(3)(k) has two distinct rights: the right to be tried in a language that the accused understands; if this is not practical, then the accused has a right to have proceedings

47 *Pachcourie v Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N).

48 Holness & Rule (note 18) 41.

49 *Ibid.*

50 *Pachcourie* (note 47).

51 *Ibid.*

52 *Kruse v S* (note 3) para 4.1.

53 *Colozza v Italy* 12 Feb 1985 Series A no 89 para 27. See also Schwikkard, PJ & Van der Merwe, *S Principles of Evidence* (3 ed, Juta and Company, 2013) 790.

54 *Chamber v Mississippi* 410 US 284 294 (1973).

55 *Pennington v Minister of Justice* 1995 (3) BCLR 270 (C).

56 *S v Sinxadi* 1997 (1) SACR 169 (C); *S v Dyani* 2004 (2) SACR 365 (E).

57 Schwikkard & Van der Merwe (note 53) 794.

58 *S v Saidi* 2007 (2) SACR 637 (C); *S v Manzini* 2007 (2) SACR 107 (W).

59 Petse (note 2) 61.

interpreted in a language that he or she understands. The right to be tried and given information in a language that the accused understands is essential for the accused to exercise the s 35 constitutional right⁶⁰ to participate in the trial.⁶¹ The right only comes into play when an accused cannot understand the language in which the court usually conducts its proceedings.⁶² This means a language that the accused understands, not the accused's preferred language.⁶³ Hence, this establishes a communication right for the accused, rather than a language right. Consequently, SHI individuals may rely on this right.⁶⁴ The court must comply with the duty to conduct the proceeding in a language that the accused understands only if the duty can be executed in practice.⁶⁵

If the court is unable to conduct the proceedings in a language that the accused understands, the accused has the right to an interpreter.⁶⁶ However, due to the high level of linguistic understanding required in court proceedings, those with difficulty in communicating or understanding should not be given an unfair advantage; there should be fairness.⁶⁷ The test is whether the accused has the same opportunity to understand and be understood as if he or she is conversant in the language employed in the proceedings.⁶⁸ Interpretation should 'be continuous, precise, impartial, competent, and contemporaneous.'⁶⁹ Interpretation should also not be in a language that the accused partially understands.⁷⁰ The principles mentioned earlier, such as the right to be tried and given information in a language that is comprehensible,⁷¹ must be applied equally to the SHI accused.

The right to effective communication imposes a duty on the state to provide interpreters of competence and integrity.⁷² Interpreters should swear under oath to interpret faithfully and to the best of their ability.⁷³ Legal representation should also be appointed for the accused so that he or she can communicate and be informed of his or her rights.⁷⁴ This does not entail that, without legal representation, the SHI accused will not be informed of his or her right, but legal representation will ensure that the SHI accused does not self-incriminate. This means that the right to be tried in a language that the accused understands is applicable not only in court proceedings, but also in pre-trial proceedings under section 35(1).

60 *S v Manzini* 2007 (2) SACR 107 (W).

61 Schwikkard & Van der Merwe (note 53) 800.

62 Steytler (note 43) 363.

63 *Mthethwa v De Bruin NO* 1998 (3) SA BCLR 336 (N) para 338; *S v Damoyi* 2004 (1) SACR 126 (C) para 17.

64 Petse (note 2) 61.

65 Steytler (note 43) 363.

66 *Ibid.* See also Schwikkard & Van der Merwe (note 53) 800.

67 *R v Tran* (1994) 117 DLR (4th) 7 (SCC) para 30.

68 *Ibid* para 36.

69 *S v Ngubane* 1995 (1) SACR 384 (T) 385f; *S v Ndala* 1996 (2) SACR 218 (C) para 221b.

70 *S v Ngubane* *ibid*; *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T) para 898.

71 Schwikkard & Van der Merwe (note 53) 800.

72 *Matemane v Magistrate, Alberton* 1991 (4) SA 613 (W) para 6191; *S v Ndala* 1996 (2) SACR 218 (C) para 222h.

73 *S v Ndala* paras 221-222; *S v Saidi* 2007 (2) SACR 637 (C).

74 *S v Pienaar* 2000 (2) SACR 143 (NC).

4. The SHI accused during court proceedings

In the criminal justice system, there are two types of accused individuals with SHI: the first type can communicate through an SLI, while the second type cannot. Both types face the risk of their constitutionally guaranteed rights being infringed upon during court proceedings.⁷⁵ These risks are discussed in the following section.

4.1 Risk of infringing the rights of the SHI accused during court proceedings

An SHI accused faces significant difficulties when he or she needs to testify in court.⁷⁶ In legal proceedings, misunderstandings and breakdowns in communication can occur between interpreters and the individuals on trial.⁷⁷ This may result in the accused's inability to understand court proceedings and follow court officials' instructions.⁷⁸ There are controversies 'around the legal test for competency to testify, as well as whether individuals with a severe communication disability can testify in court.'⁷⁹ The following risks of infringement were identified and discussed in the *Kruse* case.

4.2 Risk of infringing the right to be present during court proceedings

During courtroom proceedings, SHI individuals may not consistently have the chance to adequately and promptly process the information due to the quick and interactive nature of communication.⁸⁰ In the *Kruse* case, it was found that when a witness testified, her cross-examination followed immediately, without an adjournment to afford the accused an opportunity to consider her evidence and instruct counsel accordingly.⁸¹ This meant that the offender was practically excluded from essential parts of the trial.⁸² The case clearly demonstrates the significant risk of violating the rights of an SHI accused to be present, as previously described.⁸³

4.3 Risk of infringing the right to adduce evidence during court proceedings

Court interpreters are required to simultaneously translate and record what is being said.⁸⁴ In the *Kruse* case, it was noted that the simultaneous written record and translation were complex because there was a high risk that parts of the evidence would be missed or the 'subtleties of communication would be lost'.⁸⁵ The interpreter frequently complained that she could not keep up with the proceedings, and her notes were also not an accurate verbatim transcript of the testimony.⁸⁶ Consequently, the rights of the SHI accused are at risk of being violated, as they are unable to present and contest evidence.⁸⁷

75 Petse (note 2) 62.

76 Pillay (note 17) 313.

77 Petse (note 2) 62.

78 Dagut & Morgan (note 18) 30.

79 Bornman (note 21) 4.

80 Petse (note 2) 63.

81 *S v Kruse* para 15.3.

82 *Ibid.*

83 Petse (note 2) 63.

84 *S v Kruse* para 15.1.

85 *Ibid.*

86 *Ibid.*

87 Petse (note 2) 64.

4.4 Risk of infringing the right to have the trial interpreted in a language that an SHI accused understands

Interpretation during court proceedings can also be sub-standard, because it may be inconsistent, inaccurate, incompetent and not contemporaneous.⁸⁸ In the *Kruse* case, the accused was deprived of the benefit of contemporaneous interpretation, which requires that the interpretation of dialogue be conveyed to the accused as soon as the person has spoken. Due to the lapse of time between giving the testimony and the accused's access to the testimony, there was a limited opportunity for him to detect errors and instruct his counsel to raise issues in cross-examination.⁸⁹ In this context, SHI individuals are denied proper interpretation services, which threatens their right to understand the trial proceedings.⁹⁰

5. Conclusion and recommendations

Persons with SHIs face numerous challenges, such as educational disadvantage,⁹¹ social exclusion and potential constitutional violations. Despite this being a longstanding issue, little significant progress has been made in addressing it.⁹² To tackle these, specific measures must be implemented. This includes carrying out a fitness-to-stand trial assessment, following the *Kruse* guidelines. Moreover, offering interpreters' services when they are needed to aid communication and guaranteeing access to assistive tools, especially when instructing law enforcement personnel, can significantly address the challenges.⁹³

As mentioned before, it may be necessary to pass targeted legislation to address the challenges faced by SHI individuals in the criminal justice system.⁹⁴ Educational programmes should be created to educate SHI people about their rights in court procedures, such as how to use interpreters and legal terminology.⁹⁵ This should include interdisciplinary training and general role-plays that involve all stakeholders to ensure full access to justice for vulnerable and neglected accused with SHIs in our society.⁹⁶ Expert assessments should also be done to ascertain the nature and extent of the accused's impairment and communication skills.⁹⁷ Courts must also be made aware that special measures may be necessary to respect, protect, promote and fulfil the SHI accused's right to a fair trial.⁹⁸ This will prevent courts from avoiding their duties to deal with matters affecting SHI accused.⁹⁹

88 *S v Ngubane* 1995 (1) SACR 384 (T).

89 *S v Kruse* para 15.3.

90 Petse (note 2) 64.

91 The educational disadvantage was evident in para 12 of *Kruse v S*; the appellant confirmed that he had not had any formal sign language training, even after he left school in grade 5.

92 Petse (note 2) 70.

93 *Ibid* 72.

94 *Ibid*.

95 Dagut & Morgan (note 18) 52.

96 Bornman (note 21) 14.

97 *Kruse v S* para 22.

98 *Ibid* para 23.

99 Petse (note 2) 73.

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