

UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF LAW, HOWARD COLLEGE

**The Role of Restorative Justice in the Sentencing of Adult
Offenders Convicted of Serious Crimes: Some Reflections
Through the Case Law**

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This mini-dissertation is submitted in partial fulfilment of the requirements for the degree of Master of Laws in Advanced Criminal Law

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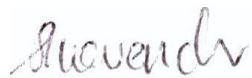
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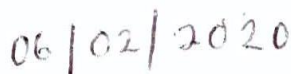


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“Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong.”

Theodore Roosevelt

CHAPTER 1

Introduction

1.1 Background

The effect and importance of restorative justice in South Africa has developed over the years and is recognised by South Africa’s Supreme Court of Appeal and Constitutional Court.¹ However, Bosielo JA in *Thabethe*, warns against the use of restorative justice in sentencing serious crimes that cause ‘law abiding and right thinking members’ to feel intense ‘outrage and revulsion’ because imprudent use of restorative justice as a sentencing option in inappropriate cases may degrade restorative justice and harm its integrity as a meaningful sentencing alternative.² This view was endorsed by the Supreme Court of Appeal in *Seedat’s* case.³ As a result of lenient sentences for serious crimes the administration of justice may be harmed and may result in loss of public confidence and formation of ‘kangaroo courts’.⁴ Nevertheless, some courts have applied the theory of restorative justice in sentencing offenders convicted of certain serious offences. Restorative justice according to Van Ness and Strong:

‘Focuses on repairing the harm caused by the crime and reducing the likelihood of future harm. It does this by encouraging offenders to take responsibility for their actions and for

¹ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) (2007 (1) BCLR 10); *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) (2008 (3) SA 232); 2007 (12) BCLR 1312; *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC); referred to in *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) para [20] 575G-I; Stephan Terblanche ‘Sentencing’ 2014 *SACJ* 104 at 105.

² *Thabethe* (n1) at para [20], 575H -576A.

³ *S v Seedat* 2017 (1) SACR 141 (SCA) at para [38], 153H-J.

⁴ *Thabethe* (n1) at para [20], 576 D-E.

the harm they have caused by providing redress for victims, and by promoting reintegration of both within the community.’⁵

Hector lists various factors that South African courts have held to exclude restorative justice as a valid sentencing option and concludes that exclusion will be in cases where the facts are not in accordance with the aims of restorative justice.⁶ Later sections of this dissertation will illuminate and critique some of these judgments with specific reference to criteria that our courts have held to exclude or include restorative justice as a possible sentencing option in serious crime.

This dissertation will be restricted to adult offenders convicted of serious crime because restorative justice favours youth and is legislated for young offenders.⁷ Despite the lack of formal legislation for adult offenders, restorative justice currently operates as a purpose of sentencing and it is seen as an option that typically excludes imprisonment.⁸

The South African criminal justice system needs a change in order to address the fear of serious and violent crimes and its dire consequences for its victims. Traditionally the criminal justice system disempowers and marginalises the individuals affected by crime which intensifies feelings of hopelessness and isolation by victims and fails to recognise that crime is a violation of specific

⁵ Daniel van Ness & Karen Heetderks Strong *Restoring Justice :An Introduction to Restorative Justice* 5 ed (2015) at 104.

⁶ SV Hector ‘When will restorative justice concerns not apply to sentencing an offender?’ May 2016 120 *e-Mantshi* 7 at 10.

⁷ Child Justice Act No.75 of 2008 s 73; PN Makiwane ‘Restorative Justice: Bringing Justice for Crime Victims?’ 2015 *Obiter* 79 at 94.

⁸ A Skelton & M Batley ‘Restorative Justice: A Contemporary South African Review’ (2008) 21(3) *Acta Criminologica* 37 at 40; Annette Van der Merwe & Ann Skelton ‘Victims Mitigating Views in Sentencing Decisions: A comparative analysis’ 2014 *Oxford Journal of Legal Studies* 1 at 7; *Director of Public Prosecutions, North Gauteng v Thabethe* (n1) at para [20], 575I; *S v Maluleke* 2008 (1) SACR 49 (T) para [34], 54; M Watney ‘The role of restorative justice in the sentencing of adult offenders convicted of rape’ 2015 *TSAR* 844 at 847.

people, not the state.⁹ Restorative justice currently augments the South African sentencing framework as a viable alternative to imprisonment.

This dissertation will argue for a hybrid model of criminal justice that will expand restorative justice beyond being merely a viable alternate approach in sentencing adult offenders convicted of serious crimes. The envisaged hybrid model includes restorative justice processes and aims together with deterrence and retribution as a way to provide more support for victims of serious offences and also to provide benefits to all parties affected by the commission of a crime. An overview of the limitations of both restorative justice and the criminal justice system will help to form a basis for the hybrid model of criminal justice.

Table 1. Limits of restorative justice and the criminal justice system.¹⁰

CRIMINAL JUSTICE SYSTEM	RESTORATIVE JUSTICE
Criminal Justice is represented by the State. The criminal justice system is adversarial in nature and the State is the prosecutor of an offence sanctioned by law.	Does not have a fact finding mechanism. It is premised on the wrongdoer admitting responsibility for his/her actions.
The offender in the criminal justice system is not seen as an individual but as a criminal who has to be punished/sanctioned in proportion to the seriousness of the crime by the judicial officer.	The victim, offender and community have a discretion as to the sentencing and therefore uniformity in sanction/reparation will not exist. Each victim and offender is individualised in the restorative justice process thereby avoiding uniformity. Amends may not always equate to seriousness of the offence.
It does not allow for the offender taking accountability for his/her actions nor does it take into account the	Restorative justice is seen as being soft on crime and allows the offender to avoid his/her 'just deserts'.

⁹ Charles Barton 'Theories of Restorative Justice' 2000, 1-15, 2 accessed on 8 February 2016 available @ http://www.voma.org/docs/barton_trj.pdf.

¹⁰ H Zehr & A Gohar *Little Book Of Restorative Justice* (2003) 15;

K Daly 'Limits of Restorative Justice' 2005, 1 at 2-3 accessed on 13 April 2016 available @ <https://pdfs.semanticscholar.org/6a38/92f03b7a01fbd8777c1d4458d74e2050845b.pdf>.

interests of the victim. A victim impact statement does not equate to healing and understanding of the offender's behaviour.	
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The limits of both the criminal justice system and restorative justice set out in Table 1 indicate the necessity for a hybrid model of justice to be implemented to overcome the criticism levelled against restorative justice's application in sentencing adult offenders convicted of serious crime.

Punishment is equated to the imposition of suffering, loss or hardship as a response to criminal conduct.¹¹ Crime is seen as harm done to the state. Therefore, the State through the criminal justice system, decides what punishment should be meted out to an offender found guilty of a crime. The South African sentencing framework is based on or underpinned by the following purposes of punishment: retribution, deterrence (general or individual deterrence), rehabilitation, and prevention. More recently, restorative justice has been included as a purpose of punishment and this purpose will be expanded on in Chapters Two and Three. The purpose of deterrence, prevention and rehabilitation (utilitarian theory) apply to the future of the offender. The purpose of deterrence is to deter the perpetrator and other 'would-be' offenders from committing a similar offence by the imposition of a severe sentence to instil fear in the offender and other would-be offenders.

According to Terblanche, the current dominating purpose of punishment in South Africa is retribution or 'just deserts'.¹² Retribution can be equated to 'deserved punishment' and retribution forms the basis for all sentences in the South African criminal justice system when a convicted offender is punished in proportion to the seriousness of the offence.¹³ However, Snyman posits that from a study of case law, general deterrence is accorded a higher status than any other purpose

¹¹ As defined in *Merriam Webster.com* accessed on 10 May 2018 available @ <https://www.merriamwebster.com/dictionarywebster/Thesaurus>.

¹² SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 178; SS Terblanche 'Judgments on Sentencing: Leaving a lasting legacy' 2013 *THRHR* 95, 96.

¹³ *Ibid* SS Terblanche *Guide to Sentencing in South Africa* 170, 178.

of punishment.¹⁴ Nonetheless, he argues that more importance should be placed on retribution ‘in order to express society’s justified condemnation of crime’ as retribution rights the legal imbalance caused by an act of crime and once convicted the offender is punished by means of a suitable sentence.¹⁵ The purpose of retribution is to punish the offender in proportion to the harm that he has caused to a victim by looking at the severity of the offence and his moral blameworthiness.¹⁶ For the purpose of this dissertation it is assumed that the current dominant purposes of punishment for serious crime are retribution and deterrence as they are important considerations when sentencing offenders convicted of serious crime.¹⁷ Serious crime deserves a serious response by way of severe punishment.¹⁸

The application of the dominant theories of retribution and deterrence by our criminal justice system has not achieved its desired goal in combating crime. Crime has not abated in South Africa, as is evident from the ‘Victims of Crime Survey’ which found that aggregate crime levels of housebreaking, theft of motor vehicle, murder and consumer fraud all increased between 2017-2018 and 2018-2019 albeit not appreciably.¹⁹ It was estimated that over 1 345 196 housebreaking crimes had occurred in 2018-2019.²⁰ Deliberate damaging, burning or destruction of residential property and theft of personal property increased notably.²¹ An estimated 1 241 122 incidences of theft of personal property occurred in 2018-2019.²² The 2017-2018 survey on perceptions of crime found that 46 per cent of respondents thought violent crime had increased over the past three years (a 4,5 per cent increase from previous figures).²³ South African Police Services Crime Statistics

¹⁴ CR Snyman *Criminal Law* 6ed (2014) 19.

¹⁵ *Ibid* 20.

¹⁶ South African Law Commission Report (Project 82) *Sentencing (A new sentencing framework)* (2000) Part 111, 40; referred to in Terblanche ‘Judgments on Sentencing: Leaving a lasting legacy’ (n12), 104-105.

¹⁷ *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519d-g.

¹⁸ A Kruger *Hiemstra’s Criminal Procedure* (last updated May 2018) Chapter 28-28.

¹⁹ Statistics South Africa, *Victims of crime survey*, Statistical release, Pretoria 2018-2019, 1 accessed on 11 October 2019 available @ <http://www.statssa.gov.za/publications/P0341/P03412018.pdf>.

²⁰ *Ibid*.

²¹ *Ibid*.

²² *Ibid*.

²³ Statistics South Africa, *Victims of crime survey*, Statistical release, Pretoria 2017/2018, 8 accessed on 18

found a total of 2, 01 million crimes were recorded in 2018-2019 – down from the 2, 09 million recorded in 2017-2018.²⁴ However, murder rates increased during the year to 21 022 compared to 20 336 recorded in 2017-2018 (an increase of 3,4 per cent) and the number of sexual offences in South Africa increased from 50 108 recorded in 2017/2018 to 52 420 cases reported in 2018-2019 (an increase of 4,6 per cent).²⁵ Rape increased to 41 583 compared to 40 035 reported in 2017-2018 (a 3,9 per cent increase).²⁶

Barton points out that the criminal justice system ‘...fails to acknowledge that seriously wrongful and criminal acts are primarily a violation of specific people, namely the victim and not the state...’²⁷ The current criminal justice system is offender-centred with the victim being marginalised.²⁸ In crafting a sentence, the court has to take into account the triad of *Zinn* which comprises of, the nature of the crime, the interests of society and the personal circumstances of the offender which are considered together with the purposes of punishment and any other factor that is deemed to be relevant.²⁹ The Supreme Court of Appeal in *Matyityi* held a sound penal system should have a wide array of sentencing options so that an appropriate sentence can be formulated to suit the particular circumstances of a case and should be victim-centred.³⁰

Snyman concludes that the court now has ‘four key considerations to take into account when determining a sentence: the crime, the criminal, interests of society and interests of victim.’³¹ This

October 2018 available @ <http://www.statssa.gov.za/publications/P0341/P03412017.pdf>.

²⁴ South African Police Service crime statistics accessed on 8 October 2019 available @ https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf; Businesstech accessed on 8 October 2019 available @ <https://businesstech.co.za/news/government/340513/south-africa-crime-stats-2019-everything-you-need-to-know/>.

²⁵ South African Police Service Crime Statistics.(n24)

²⁶ Ibid.

²⁷ Barton (n9) 2.

²⁸ PN Makiwane ‘Victim-Impact statements at the sentencing stage: Giving crime victims a voice’ 2010 *Obiter* 606 at 615.

²⁹ *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

³⁰ *Matyityi* 2011 (1) SACR 40 (SCA) at para [16], 48G-H.

³¹ Snyman (n14) 19.

approach is aptly referred to as a ‘squaring of the triad’.³² A victim's view on an appropriate sentence may be heard, although it is not binding on a court.³³ In *Wickham*’s case the Constitutional Court held that the, ‘Victims Charter confers neither standing to victims, nor an unqualified right to give evidence or hand papers, nor a right to be heard on demand.’³⁴ Terblanche explains that the Victims Charter empowers victims to describe the effects of crime and not their views on sentence.³⁵ He further notes that crime victims are exceedingly high in South Africa, consequently our country should be a forerunner in the ‘treatment of crime victims.’³⁶ This dissertation will argue that the creation of a hybrid sentencing model which incorporates both the criminal justice system and restorative justice principles and processes will be a step forward in enhancing victims’ rights in serious crime.

The rights of the offender are protected by specific provisions in the South African Constitution whereas victims do not enjoy the same protection.³⁷ Despite an endorsement of the Victims Rights Charter by Parliament and a directive for a victim impact statement to be lead as evidence during sentencing, we find this to be insufficient to protect the interests of a victim of serious crime as victim impact statements cannot be equated to restorative justice processes.³⁸ A victim impact statement does not amount to an encounter between the victim and offender with the offender accepting responsibility for his/her actions and being held accountable for the harm suffered by the victim. Restorative justice focuses on needs of the victim, which is similar to the values of therapeutic jurisprudence philosophy. However, where restorative justice differs from therapeutic jurisprudence is in its firm commitment to just processes and values while therapeutic

³² KD Müller and IA van der Merwe ‘Squaring the triad: The story of the victim in sentencing’ (2004) 6 Sexual Offences Bulletin 17; referred to in A van Der Merwe ‘Sentencing’ 2015 SACJ 415 at 416.

³³ *Thabethe* (n1) at para [21], 576E-G.

³⁴ *Wickham v Magistrate, Stellenbosch* 2017 (1) SACR 209 (CC) at para [26], 216B-D.

³⁵ Stephan Terblanche ‘Sentencing’ 2017 SACJ 96 at 98.

³⁶ *Ibid* 98.

³⁷ Constitution of the Republic of South Africa 1996 (henceforth will be referred to as ‘1996 Constitution’) Chapter III Bill of Rights s 35(3).

³⁸ Department of Justice and Constitutional Development Service Charter for Victims of Crime in South Africa (2004) accessed on 15 May 2016 @ <http://www.doj.gov.za/2004.dojsite/policy/vc/2004.vc.pdf>>; The Victims’ Charter was approved by Cabinet on 2 December 2004.

jurisprudence is merely a ‘lens’ to examine these interests.³⁹

Many proponents of restorative justice argue against the institutionalisation of restorative justice into the criminal justice system. The argument rests on the comparison between retributive justice and restorative justice as being polar opposites. Retributive justice centres on punishment while restorative justice focuses on the needs of the victim and the offender making amends. Daly argues that the accentuation of the dichotomy between retribution and restorative justice is incorrect.⁴⁰ The dichotomy lies between restorative justice and the criminal justice system, as retribution is but one aim of punishment.⁴¹ Daly contends that restorative justice is both retributive and rehabilitative in nature.⁴² Restorative justice is retributive as it consists of punishment in the form of censuring past behaviour.⁴³ As restorative justice does not have a fact-finding component, it cannot be substituted for the current criminal justice system.⁴⁴ Barton advocates expressing the differences of the two paradigms in terms of ‘empowerment and disempowerment’ of victim, offender and communities in the criminal justice system’s response to a crime instead of viewing them as polar opposites.⁴⁵ Restorative justice looks at censuring past behaviour, preventing future offences and finding a balance between the wrong and the consequences that follow. The restorative justice values of censure, empowerment, accountability, integration and respect can bring meaningful outcomes to both the victim and offender.

The following definition of restorative justice by Tony Marshal is the most widely recognized

³⁹ John Braithwaite ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) 38(2) *Criminal Law Bulletin – Boston* 244 at 245.

⁴⁰ K Daly ‘Revisiting the Relationship between Retributive and Restorative Justice’ 1999 Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra 1 at 4; accessed on 26 March 2016 available @ https://www.griffith.edu.au/__data/assets/pdf_file/0028/223759/2001-Daly-Revisiting-the-relationship-pre-print.pdf.

⁴¹ Ibid 4.

⁴² Ibid 4.

⁴³ Ibid 4.

⁴⁴ K Daly ‘What is Restorative Justice? Fresh Answers to a Vexed Question’ (2016) 11 (1) *Victim & Offender* 9 at 15.

⁴⁵ Barton (n9) 3.

and used:

‘Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve to deal with the aftermath of the offence and its implications for the future.’⁴⁶

The Restorative Justice National Policy Framework has expanded on this definition and defines restorative justice as:

‘an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, taking measures to prevent a recurrence of the incident; this may be applied at any appropriate stage after the incident.’⁴⁷

Morris quoted by Ministry of Justice in Best Practice in New Zealand advances that:

‘The essence of restorative justice is not an adoption of one form or another; it is the adoption of any form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives.’⁴⁸

Restorative justice is therefore an effective mechanism to address the harms suffered as a result of an offender’s actions and an opportunity for the offender to right such wrong by

⁴⁶ TF Marshal 'Restorative Justice: An Overview' (1999) at 5, A report by the Home Office Research Development and Statistics Directorate, accessed on 2 December 2018 @ www.antoniocasella.eu/restorative/Marshal_1999-b.pdf.

⁴⁷ Briefing on Restorative Justice National Policy Framework at Presentation on Restorative Justice National Conference on Victims Charter 1-3 February 2012, accessed on 26 October 2016 @ http://www.justice.gov.za/VC/events/2012natconf/paper_resjustice.pdf.

⁴⁸ A Morris ‘Critiquing the Critics: Response to Critics of Restorative Justice’ 2002 (42) *British Journal of Criminology* 596 at 600; referred to in Ministry of Justice: Restorative Justice: Best Practice in New Zealand (2004-2017) 1 at 6 accessed on 20 November 2017 available @ <https://www.justice.govt.nz/assets/Documents/Publications/RJ-Best-practice.pdf>.

acknowledgement, apology and reparation. Terblanche observes that restorative justice processes may be more successful than other measures to bring about change in the offender and thereby better able to fulfil factors affecting the interest of society component of sentencing.⁴⁹ According to Hudson, ‘Restorative justice can bring humane, and constructive gains to what is otherwise (in many countries) a time of punitive, destructive and exclusionary penal strategies.’⁵⁰

1.2 Aim of the study

The study aims to set a case for the importance of restorative justice and for it to be included alongside the current sentencing framework when sentencing adult offenders convicted of serious crimes. An analysis of the development of restorative justice in the South African criminal justice system, the approaches and processes currently in use, the outcomes of restorative justice within the South African criminal justice system will be undertaken. In this dissertation an examination of selected cases will be undertaken to reflect on the conditions that allow or disallow the application of restorative justice in sentencing adult offenders convicted of serious crimes. An analysis of the literature has revealed the benefits of restorative justice to both victims and perpetrators. The victim obtains closure and the perpetrator understands the impact of his/her behaviour on his/her victim.

1.3 Thesis Questions

In writing the dissertation the writer will attempt to find answers to the following questions:

- 1.3.1 In what circumstances do judicial officers take into consideration the principles or values of restorative justice when sentencing adult offenders convicted of serious crimes?
- 1.3.2 What are the circumstances for the exclusion of restorative justice when sentencing adult offenders convicted of serious crime?

⁴⁹ Terblanche (n12) para 10.6 (2) at 177.

⁵⁰ B Hudson ‘The institutionalisation of restorative justice: Justice and the ethics of discourse’ 2007 *Acta Juridica* 56 at 71.

1.3.3 How can restorative justice transform the current sentencing framework with respect to adult offenders convicted of serious crimes?

1.3.4 What model will suit the interests of justice, the offender and the victim?

1.4 Methodology

The research was conducted by way of desktop research using multiple search engines. The literature review will use a qualitative approach to explain and define concepts and processes of restorative justice and current sentencing purposes through an examination of case law, articles and legislation.

1.5 Synopsis of Chapters

Chapter One deals with a broad introduction of the research problem with an overview of the gist of the critique of the existing framework. In Chapter Two the South African current sentencing framework will be analysed together with the purposes of punishment in relation to sentencing of serious crimes. Chapter Three will embody a discussion of the concept of restorative justice, its current application in the criminal justice system, relevance in sentencing serious crime and the applicable restorative justice processes pertinent to sentencing. Chapter Four sets out a critique of cases with specific references to criteria that courts have held to exclude or include restorative justice as a possible sentencing option in serious crime. Chapter Five will deal with recommendations for the integration of restorative justice theory into the South African sentencing framework, not as an alternate sentencing option but as a mechanism to be incorporated together with retribution when sentencing adult offenders convicted of serious crime to provide more support for victims of serious crime.

CHAPTER 2

Current Sentencing Paradigm in Relation to Serious Crime

2.1 Introduction

The key object of sentencing is to punish the offender for contravening the law which safeguards society's right to a peaceful and just environment. Consequently, the sentence must instil confidence in the public by ensuring that the administration of justice is seen to be fair, reputable and just. Sentencing is aptly described as 'a lonely and onerous task'⁵¹ which is 'innately controversial'⁵² and 'always difficult.'⁵³ Sentencing is the 'prerogative' of the trial court.⁵⁴ Judicial officers sitting in the trial court can better understand the 'atmosphere of the case' and assess the circumstances of the case which will determine the 'need for a light or heavy sentence.'⁵⁵ It is beyond the scope of this dissertation to examine the justification for punishment and it is assumed to be valid in the context of sentencing.

Judicial officers are empowered with a discretion when sentencing a convicted offender.⁵⁶ However, the discretion of the judicial officer is subject to guidelines or principles laid down in case law, penalty clauses prescribed by legislation, mandatory sentencing legislation and relevant sentencing jurisdiction of the trial court. In an appeal against sentence, the court of appeal should be 'guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and an appeal court should be careful not to erode that discretion.'⁵⁷ Nonetheless, this discretion must be exercised consistently and judicially to maintain justice and fairness.

⁵¹ *S v Malgas* 2001 (2) SA 1222 (SCA) at para [1], 1225G-H.

⁵² *S v M (Centre for Child Law as amicus curiae)* (n1) at para [10], 549D-E.

⁵³ *Supra* at para [66], 572C-D.

⁵⁴ *Malgas* (n51) at para [13], 1232F-G.

⁵⁵ *R v Mapumulo* 1920 AD 56 at 57; referred to in JR Lund 'Discretion, principles and precedent in sentencing' (part two) (1980) 4 *SACC/SASK* 36 at 38.

⁵⁶ Criminal Procedure Act 51 of 1977 (henceforth Criminal Procedure Act will be referred to as 'CPA') s 83.

⁵⁷ *S v Rabie* 1975 (4) SA 855 (A) at 857D-E.

Consistency in sentencing consists of two factors: firstly a similar sentence should be imposed when a similar offender commits a similar crime and secondly, offenders who commit serious crime are required to be sentenced more severely.⁵⁸ Terblanche states that individualisation is an important part of sentencing but one should not overlook the fact that justice requires that sentences should not be ‘widely divergent without good reason’ for similar cases with similar facts.⁵⁹ Conradie JA declared that in an appeal on sentence, a rough comparison has to be made between the present sentence and those found appropriate by other courts.⁶⁰ Cases with similar facts will form the basis for a starting point for a judicial officer when exercising his/her judicial discretion in sentencing and this factor has to be taken into account together with all other relevant factors.⁶¹ Each case will have its own unique set of facts and similar cases may be applicable, but ultimately the unique facts of a case and applicable general principles will be pivotal in sentencing.⁶² However, use of the principle will ensure uniformity of sentencing. Justice and fairness is fundamental in the process of sentencing.⁶³

When determining an appropriate sentence, the trial court must give cognisance to rights, principles and values enshrined in the South African 1996 Constitution. Every accused has a right to a fair trial in terms of section 35(3) which includes the sentencing process.⁶⁴ The Constitutional Court in *S v Makyanyane* declared that the right to equality applies in sentencing of offenders and

⁵⁸ Terblanche (n12) 124.

⁵⁹ Stephan Terblanche ‘Sentencing’ 2015 *SACJ* 113 at 115.

⁶⁰ *S v Xaba* 2005 (1) SACR 435 (SCA) at para [15], 439F-G.

⁶¹ *S v Jimenez* 2003 (1) SACR (SCA) 507 at para [6], 511I-512B.

⁶² *S v Velebhayi* 2015 (1) SACR 7 (ECG) at para [23], 14A-C; JR Lund ‘Discretion, principles and precedent in sentencing (part one) 1979 *SACC* 203-215 at 214 maintains that ‘At most the sentence imposed in one case may in subsequent cases involving similar circumstances provide some general guidance as to the appropriate level of sentencing on the broad principle of fairness and consistency, and this principle must of course be weighed against other relevant principles, not the least of which is the basic principle that the court must give proper attention to the relevant circumstances of each case.’

⁶³ E Du Toit et al *Commentary on the Criminal Procedure Act* (2018) ch28 at 10B.

⁶⁴ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2006 (2) SACR 319 (CC) at para [23], 330F-H.

indiscriminate deliberations should be shunned at all costs.⁶⁵ Human dignity is one of the foundational values of the South African 1996 Constitution and manifests itself throughout the Bill of Rights.⁶⁶ Section 12(1)(e) states that everyone has a right to freedom and security and the right not to be treated in a cruel, inhumane and degrading manner.⁶⁷

In *Dodo's* case the Constitutional Court declared that the notion of proportionality encompasses an inquiry as to whether the punishment is cruel, inhumane and degrading and more so in formulating lengthy sentences of imprisonment.⁶⁸ The Constitutional Court further declared that:

‘To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.’⁶⁹

2.2 Nature of punishments

A judicial officer may request any information that may help him to arrive at a just sentence.⁷⁰ Section 276(1) of the CPA is a compendium of the type of punishments that may be imposed on a convicted offender.⁷¹ *S v Prins* held that section 276(1) empowers and authorises a court whether under statute or common law to impose a sentence in all cases and in cases where no provision for sentence exists.⁷²

⁶⁵ *S v Makyanyane* 1995 (2) SACR 1 (CC): referred to in A Spies ‘Substantive equality, restorative justice and the sentencing of rape offenders’ 2016 *SACJ* 273 at 286, Terblanche (n12) at 122-123.

⁶⁶ 1996 Constitution (n37) s10; *S v Dodo* 2001 (1) SACR 594 (CC) para [35] 614A-B; *Matyityi* (n30) at para [16], 49B-C.

⁶⁷ 1996 Constitution (n37).

⁶⁸ *Dodo* (n66) at para [37], 614D-E.

⁶⁹ *Supra* at para [38] , 614.

⁷⁰ CPA (n56) s 274.

⁷¹ CPA (n56).

⁷² *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 SACR 183 (SCA) at para [38], 204C-D.

Section 276(1) provides for imprisonment,⁷³ periodical imprisonment,⁷⁴ declaration to be a habitual criminal,⁷⁵ committal to any institution established by law,⁷⁶ a fine,⁷⁷ correctional supervision or imprisonment from which a person may be placed under correctional supervision in his/her discretion by the Commissioner.⁷⁸ Courts may not sentence beyond their specific jurisdictions.⁷⁹ Section 276(1) can be construed as allowing a combination of any forms of sentences unless there exists a practical or legal impediment.⁸⁰ A sentencing court can refer an accused to a treatment centre;⁸¹ or postpone the passing of sentence not exceeding a period of five years subject to conditions;⁸² or suspend a sentence in whole or in part not exceeding a period of five years subject to conditions.⁸³

2.3 General principles of sentencing

2.3.1 Overview

Sentencing guidelines emanate from judges' decisions in decided cases and form the basis of South Africa's general principles.⁸⁴ A sentencing court according to Mocumie JA, 'has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion.'⁸⁵ When determining an appropriate sentence the court takes into consideration the triad of Zinn which is the crime, the interests of society and the personal circumstances of the offender.⁸⁶

⁷³ CPA (n56) s 276(1)(b).

⁷⁴ Ibid s 276(1)(c).

⁷⁵ Ibid s 276(1)(d).

⁷⁶ Ibid s 276(1)(e).

⁷⁷ Ibid s 276(1)(f).

⁷⁸ CPA (n55) s 276(1)(h) and s276(1)(i).

⁷⁹ Ibid s 276(2)(a).

⁸⁰ Terblanche (n12) 28.

⁸¹ CPA (n56) s 296.

⁸² Ibid s 297(1)(a)(i).

⁸³ Ibid s 29(1)(b).

⁸⁴ Terblanche (n12) 127.

⁸⁵ *S v Mhlongo* 2016 (2) SACR 611 (SCA) at para [9], 616G-H.

⁸⁶ *S v Zinn* (n29) at 540 G-H.

A court has to balance the elements of the triad ‘which is the nature of the circumstance of the offence, the characteristics of the offender and his/her circumstances and the impact of the crime on the community, its welfare and concerns’ together with the main purposes of punishment to arrive at an appropriate sentence.⁸⁷ The judicial officer has to maintain a balance between the different aspects of sentencing and endeavour to achieve an appropriate sentence.⁸⁸ However, this will not be relevant in serious offences as the elements of the triad when assessed with the facts of the case, may result in one element outweighing the other.⁸⁹ The personal circumstances of the accused cannot be the dominant factor at the expense of the well-established purposes of sentencing.⁹⁰ Holmes JA explained that;

‘[one] should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all the factors.’⁹¹

2.3.2 Personal circumstances of the offender

The personal circumstances of the offender will as a necessity in serious crime fade into the background when weighed against the aims of retribution and deterrence.⁹² Questions relating to the accused’s marital status, family and employment are unimportant in determining the length of a sentence.⁹³ The likelihood of reoffending by the accused cannot be predicted with any certainty but the personal circumstances of the accused may help in ‘making at least some assessment as to the likelihood of reoffending.’⁹⁴

⁸⁷ *S v M (Center for Child Law as amicus curiae)* (n1) at para [10], 550E-551A-D.

⁸⁸ Terblanche (n12) 147.

⁸⁹ Terblanche (n12) 147.

⁹⁰ *Director of Public Prosecutions, Gauteng v Pistorius* 2018 (1) SACR 115 (SCA) at para [22], 121F-H.

⁹¹ *S v Rabie* (n57) at 863A-B; referred to in Terblanche (n12) at para 2.6 (7) at 140.

⁹² *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para [58], 574C-D; *S v Kekana* 2019 (1) SACR 1 (SCA) at para [39], 12F-H.

⁹³ *Vilakazi* supra at para [58], 574D-E.

⁹⁴ *Supra* at para [58], 574E-F.

2.3.3 Victim interests

Victims are not protected by any specific law in the South African criminal justice system.⁹⁵ Recently *Matyityi* held that the victim has to be considered in sentencing as a ‘sound penal system’ should also be victim centered.⁹⁶ Victim empowerment is based on the concept of restorative justice.⁹⁷ Victim impact statements have been utilized to accommodate the victim in the sentencing process of the South African criminal justice system. A victim impact statement is defined as a statement that addresses the effects of crime on the victim.⁹⁸ By giving a victim a voice in court during sentencing, this will enable the court to understand the after-effects of the offence.⁹⁹ In order for a court to properly exercise its discretion, both the objective gravity of the offence and its impact on the victim should be placed before the court to ensure a balanced and proportional sentence.¹⁰⁰ Unchallenged evidence of a mother, teacher or social worker pertaining to the trauma suffered by the victim, is held acceptable by South African courts to determine the impact of the crime on the victim.¹⁰¹

In *Wickham*’s case the Constitutional Court held that the, ‘Victims Charter confers neither standing to victims, nor an unqualified right to give evidence or hand papers, nor a right to be heard on demand.’¹⁰² However, restorative justice ‘situates the displaced victim at the centre of the justice process by ensuring that victim participation and respect are key features of justice delivery.’¹⁰³ The inclusion of restorative justice in the criminal justice system can intensify victim

⁹⁵ Terblanche (n35), 98.

⁹⁶ *Matyityi* (n30).

⁹⁷ *Supra* at para [16], 49H-A.

⁹⁸ K Muller & A Van der Merwe ‘Recognising the Victims in the Sentencing Phase: The use of Victim Impact Statements’ (2006) 22 *SAJHR* 647 at 647.

⁹⁹ *Matyityi* (n30) at para [17], 49D-F.

¹⁰⁰ *Supra* at para [17], 49F-G.

¹⁰¹ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 124; referred to in K Muller & A Van Der Merwe (n97) 654; A Van der Merwe ‘Guidelines on sentencing in child abuse cases’ (2002) 3(2) *CARSA* 20 at 22.

¹⁰² *Wickham* (n34) at para [26], 216B-D.

¹⁰³ N Joyce & M Keenan 'Restorative Justice , Sexual Violence, and the Criminal Justice System' October 2013 Working Paper Series 1 at 8 accessed on 6 April 2017 available @ [https://www.ucd.ie/t4cms/WP33_Joyce & Keenan pdf.](https://www.ucd.ie/t4cms/WP33_Joyce_Keenan.pdf)

participation and healing.¹⁰⁴ More so in the sentencing phase of serious crimes. The parties most affected by the crime should be engaged and empowered to support the quest for justice.¹⁰⁵

2.3.4 Interests of society

In regard to the interests of society, Harms JA cautioned that the aim of sentencing ‘is not to satisfy public opinion but to serve the public interest.’¹⁰⁶ A court has a duty to impose a fair and just sentence even if it does not accord with public opinion.¹⁰⁷ When considering all relevant factors in sentencing, the court is enjoined to keep the public interest as an ‘ever present concern.’¹⁰⁸

Tshiqi JA stated that criminal proceedings should instil public confidence in the criminal justice system.¹⁰⁹ The public would be justifiably shocked if the courts imposed a suspended sentence for a convicted rape offender together with compensation for a rape victim.¹¹⁰

2.4 Objects of punishment

The theories that govern the aims of punishment are retributive theory, also known as the absolute theory, and utilitarian (or relative) theory. These theories embody the justification of punishment. The utilitarian theory comprises of rehabilitation or reformation, deterrence and prevention. Retribution looks at the past act to justify punishing the offender while the utilitarian theory (relative theory) looks at the future when punishing the offender. Snyman sees retribution as being absolute as ‘punishment is an end in itself, whereas relative theories sees punishment ‘as a means to a secondary end or purpose which is different for each purpose.’ Snyman advances the

¹⁰⁴ Mark S Umbreit & Marilyn Peterson Armour ‘Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community’ (2011) 36 *Wash.U.J.L & Poly'y* 65 at 79.

¹⁰⁵ Jennifer Larson Sawin & Howard Zehr ‘The ideas of engagement and empowerment’ in Gerry Goldstone & Daniel Van Ness (eds) *Handbook of Restorative Justice Routledge* ch3 41 at 44 accessed on the 31 March 2018 available @ <https://www.routledgehandbooks.com/doi/10.4324/9781843926191.ch3>).

¹⁰⁶ *Mhlakaza* (n17) at 518E-G; *Velebhayi* (n61) para [22] at 13G-I; *S v Humphreys* 2013 (2) SACR 1 (SCA) at para [26], 12F-G.

¹⁰⁷ *Mhlakaza* (n17) at 518F-G.

¹⁰⁸ *S v SM* (2) 2013 (2) SACR 111 (SCA) at para [56], 124.

¹⁰⁹ *Seedat* (n3) at para [39], 154E-F.

¹¹⁰ *Supra* at para [39], 154F-G.

combination theory and explains that it does not reject any one theory but considers all the theories as a whole in sentencing. The weight attached to a specific theory determines the type of the combination theory to be used in sentencing.¹¹¹ Terblanche suggests that the theories of punishment should be dealt with under the ‘interests of society’ leg of the Zinn triad.¹¹² Where a crime is serious, the public interest and seriousness of the harm will both play important roles in sentencing.

2.4.1 Prevention

Prevention seeks to prevent future crime by making it impossible for an offender to commit further crimes. The basis of the theory rests on the assumption and expectation that the offender is a dangerous criminal and is likely to reoffend unless he is incapacitated.¹¹³ This is done mostly by way of imposing a term of imprisonment to remove the offender from society.¹¹⁴ The imposition of life imprisonment is an example of the theory. The application of the preventive theory is used as a main justification for imprisonment by South African courts.¹¹⁵ According to Terblanche, prevention is rarely referred to or discussed by South African courts.¹¹⁶

2.4.2 Retribution

Retribution is seen to be backward-looking in that it looks at what law has been broken and how to restore the balance that has been upset by the commission of a crime. *Schiefer* declared that ‘retribution has been referred to as the natural indignation of interested persons and of the community at large’, and should be seen in connection with ‘denunciation’ (which is the condemnation of an offender's deeds), and ‘comes to the fore in cases of serious crime.’¹¹⁷

¹¹¹ Snyman (n14) 19.

¹¹² Terblanche (n12) 155.

¹¹³ MA Rabie et al *Punishment : An Introduction to Principles* 4ed (1994) ch2 27.

¹¹⁴ J Burchell *Principles of Criminal Law* (2006) ‘Punishment’ ch4 68.

¹¹⁵ Terblanche (n12), 163.

¹¹⁶ *Ibid* 138, 163.

¹¹⁷ *S v Schiefer* 2017 (4) NR 1073 (SC) at para [30], 1082.

Retribution forms the basis of every sentence and limits the blameworthiness of an offender which results in his/her just deserts.¹¹⁸ The object of retribution is to express the society's abhorrence at the commission of the crime and to punish the offender.¹¹⁹ The seriousness of the offence is determined by society's outrage at the commission of the offence. Punishment is justified because it is 'deserved.'¹²⁰ Retribution is based on proportionality, the offender must be punished in accordance with seriousness of the offence and his/her moral blameworthiness so as to arrive at a just and fair sentence. The imposition of a mandatory sentence based on proportionality is of essence to prevent an injustice in sentencing.¹²¹

Many proponents of restorative justice have accepted that retribution does have a role in restorative justice.¹²² Daly concludes that retributive censure should not be excluded from a restorative justice process as punishment in restorative justice makes it viable.¹²³

2.4.3 Deterrence

Deterrence looks at the future by imposing a sentence that will deter the offender or would-be offenders from committing future crimes. Deterrence is further classified as individual deterrence or general deterrence. Individual deterrence is punishment meted out specifically to the convicted individual to deter him from committing future crimes. General deterrence is used to deter potential offenders from committing crime by dispensing a heavy sentence on the convicted offender. The principle that the offender should not be sacrificed on the altar of deterrence came about to correct the unduly harsh and unjust sentences meted out to an individual under general deterrence, 'in the hope, not knowledge, that such treatment would prevent other potential crimes and promote law abiding conduct in the community at large.'¹²⁴

¹¹⁸ Terblanche (12) 178.

¹¹⁹ Du Toit et al (n63) ch28 at 10B.

¹²⁰ Terblanche (n12) 172.

¹²¹ *Vilakazi* (n92) at para [20], 562F-G.

¹²² Daly (n44), 15.

¹²³ Daly (n40) 23.

¹²⁴ Du Toit et al (n63) ch28 at 10B-6.

S v Mhlakaza declared that it is not the fear of punishment that deters a would-be criminal from offending but the fear of being caught.¹²⁵ The high recidivism statistics and increasing crime rate weaken deterrence.¹²⁶ Phelps concludes that despite evidence showing ‘...the fallacy of the belief that high crime rates are reduced by severe sentences our courts continue to accord importance to the theory in sentencing.’¹²⁷

2.4.4 Rehabilitation/ Reformation

Rehabilitation is defined as ‘to restore to effectiveness or normal life.’¹²⁸ Rehabilitation is driven by the need to improve the offender by convincing him to be a law-abiding citizen to enable his/her reintegration into the community.¹²⁹ Serious crimes will usually require that retribution and deterrence should be primary considerations and rehabilitation will play a smaller role.¹³⁰ Seriousness of a crime will cause visions of rehabilitation to pale into insignificance when pitted against aggravating factors.¹³¹ Skelton and Batley argue that besides the loss of faith in the efficacy of rehabilitation, rehabilitation is unable to attain the outcomes of a restorative justice process.¹³²

2.4.5 Restorative justice

Restorative justice is seen as forward-looking because restorative justice’s main aim seeks to bring together the offender, victim and other parties affected by the wrong, so that the offender is held accountable for her wrongdoing and makes amends by way of reparations, community work and apology. However Skelton and Batley explain that restorative justice is both backward-looking and forward-looking as it seeks to discover the cause of the offence, finds a solution and includes

¹²⁵ *Mhlakaza* (n17) at 515, 518E-G.

¹²⁶ *Snyman* (n14) 16.

¹²⁷ K Phelps ‘Sentencing’ 2013 *SACJ* 224 at 225.

¹²⁸ The Readers Digest Oxford Complete Word Finder (1993) The Readers Digest Association Limited at 1291.

¹²⁹ *Terblanche* (n12) 163; *Snyman* (n14) 17.

¹³⁰ *Director of Public Prosecutions, Gauteng v Pistorius* (n90) at para [23], 122A.

¹³¹ *Kekana* (n92) at para [39], 12F-G.

¹³² *Skelton & Batley* (n8) 49.

plans to prevent recidivism.¹³³ Skelton strongly argues that victims needs are central in restorative justice: it creates a suitable paradigm for the denouncing of crimes in South Africa, the communicative process of denunciation holds the victim central, victims harm are validated, by acknowledgment of wrongdoing by the offender, and the offender is required to undertake tasks and responsibilities to repair the harm caused by her wrongdoing.¹³⁴ However Van der Merwe challenges the ‘lofty’ idea that the ‘victim is central in restorative justice’ through analysis of restorative justice in the Child Justice Act 2008.¹³⁵ Van Der Merwe concludes that the child offender is central in the Act’s application of restorative justice, nevertheless the victim is given a voice and an opportunity to be part of the process which is ‘a step in the right direction’.¹³⁶

Restorative justice has rehabilitative aims, which may occur after a process has been held. Rehabilitation and restitution/reparations are important aims of restorative justice.¹³⁷ In *S v Pylman*, Wright AJ noted that:

‘Restorative justice attempts to restore the relationship between an offender and the complainant (as representative of the community at large). Instead of merely depriving an accused person of his freedom through imprisonment, restorative justice aims at giving an opportunity for a different version of punishment, such as compensating a victim of a crime through financial means. Either section 300 (compensation) or section 297(1)(b) (suspension on condition of compensation) can be used.’¹³⁸

¹³³ Skelton & Batley (n8) 49.

¹³⁴ Ann Skelton 'Tapping indigenous knowledge:traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' 2007 *Acta Juridica* 228 at 241; Skelton & Batley (n8) 49.

¹³⁵ Annette Van Der Merwe 'A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008' 2013 *De Jure* 1022 at 1022.

¹³⁶ *Ibid* 1038.

¹³⁷ Joyce & Keenan (n103) 16.

¹³⁸ *S v Pylman* unreported, FB review no 30/2015, 26 March 2015 at para [9]; referred to in Du Toit et al (n63) Ch28 at P10-B11.

Watney acknowledges the positive effects of restorative justice on the criminal justice system and sentencing.¹³⁹ She concludes as does Skelton and Batley that restorative justice should balance the current sentencing framework.

2.5 The mandatory and minimum sentencing legislation

2.5.1 Introduction

The Criminal Law Amendment Act 105 of 1977 came about as a response to soaring serious crime rates.¹⁴⁰ Writers demonstrate with reference to case law that deterrence is the main aim of the legislation.¹⁴¹ The Act aims to deter a convicted offender and would-be offenders by prescribing lengthy prison terms for serious crimes. The legislation specifically mandates the imposition of life imprisonment for murder and rape where the circumstances of the crime meet with criteria set out in Schedule 2 Part 1 of section 51(1) of the Act.¹⁴²

Patel J in *S v Wasserman* held on appeal that the Act was harmful to judicial discretion and undermined the values of restorative justice.¹⁴³ The Act has triggered scathing judicial chastisement, nevertheless, it has received the endorsement of both the Supreme Court of Appeal and Constitutional Court.¹⁴⁴ In *Dodo's* case Ackermann J endorsed *Malgas* with respect to section 51(1) of the Act limiting and not eliminating sentence discretion.¹⁴⁵ The Constitutional Court declared that section 51(1) of the Act 'does not compel a court to act inconsistently with the

¹³⁹ Watney (n8) at 845.

¹⁴⁰ Henceforth the Criminal law Amendment Act 105 of 1977 will be referred to as 'the Act'; Snyman (n14) 357.

¹⁴¹ SS Terblanche 'Mandatory and Minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997' in Burchell & Erasmus (eds) *Criminal Justice in a new society: Essays in honour of Solly Leeman* (2003) 194 at 195; James Lund 'Sentencing' 2000 *SACJ* 249 at 252.

¹⁴² The Act (n140) s 51(1) Schedule 2 Part I.

¹⁴³ *S v Wasserman* 2004 (1) SACR 251 (T) at para [3], 253B-C.

¹⁴⁴ *Supra* at para [3]; referred to *Malgas* (n51); *Dodo* (n66).

¹⁴⁵ *Dodo* (n66) at para [11], 602F-G.

Constitution’ as a court can depart from the prescribed sentences in terms of section 51(3) when substantial and compelling reasons are present.¹⁴⁶

The Act excludes the use of suspension of sentence in terms of section 297(4) of the CPA.¹⁴⁷

2.5.2 Substantial and compelling reasons

Section 51(3) of the Act provides for a deviation from the prescribed minimum sentence if the court finds substantial and compelling reasons not to impose the prescribed sentence.¹⁴⁸ In *Malgas* it was set out that the circumstances expressed by the phrase 'substantial and compelling reasons', need not be exceptional.¹⁴⁹ The particular circumstances of a case together with the triad normally taken into account by a court to arrive at a just and proportionate sentence are still important.¹⁵⁰

A court must provide 'truly convincing reasons' or 'weighty justification' for deviating from the prescribed sentence.¹⁵¹ Furthermore, the specified sentences should not be departed from 'lightly and for flimsy reasons'.¹⁵² If a court, after due weight is given to factors affecting sentence and the circumstances of the case is satisfied that a prescribed sentence would be disproportionate to the crime and result in an injustice, a court will be justified in imposing a lesser disposition.¹⁵³ In *S v Vilakazi* it was confirmed that a court is not compelled to perpetrate an injustice by imposing a sentence that is disproportionate to the particular offence.¹⁵⁴ When deviating from these sentences the public interest cannot be ignored due to the risk of confidence in the judicial system being undermined.¹⁵⁵

¹⁴⁶ *Dodo* (n66) at para [40], 615F-G.

¹⁴⁷ The Act (n140) s 51(5).

¹⁴⁸ The Act (n140).

¹⁴⁹ *Malgas* (n51) at para [10], 1231G-H.

¹⁵⁰ *Supra* at para [12], 1231-1232.

¹⁵¹ *Supra* at para [25] part B, 1235.

¹⁵² *Supra* at para [25] part D, 1235.

¹⁵³ *Supra* at para [25] part I, 1236.

¹⁵⁴ *Vilakazi* (n92) at para [20], 562F-G.

¹⁵⁵ *S v SM* (n108) at para[56], 124.

Sentencing in terms of the Act will exclude the use of restorative justice as an alternate sentencing option as presiding officers are bound by the Act's prescriptive sentences. *Abrahams'* case declared that when a court finds reasons to deviate from the Act, the prescribed sentences in terms of the Act will weigh heavily on the exercise of the court's discretion in sentencing.¹⁵⁶ However, Terblanche correctly states that where substantial and compelling reasons exist for a deviation from the prescribed sentences, a judicial officer will be free to impose any other sentence he/she deems fit in the absence of legislative guides as to what the lesser sentence may be and nothing prevents a court from imposing a partially or fully suspended sentence.¹⁵⁷ Terblanche maintains that to argue that, despite this fact, the respondent's offence is still subject to a minimum sentence is 'illogical'.¹⁵⁸ In this instance restorative justice can be used as a valid approach to formulate an appropriate sentence if the circumstances of the case fit the aims of restorative justice.

The statistics set out in Chapter One on crime show that the Act has not fulfilled its purpose as a deterrent to criminals as serious crimes are still escalating out of control. Terblanche has criticized the Act and has stated that it should be done away with before it does irreparable harm to the criminal justice system.¹⁵⁹

2.6 Conclusion

A sentence must instil confidence in the public by ensuring that the administration of justice is seen to be fair, reputable and just. Judicial officers are empowered with a discretion when sentencing a convicted offender which is subject to guidelines or principles laid down in case law, penalty clauses prescribed by legislation, mandatory sentencing legislation and relevant sentencing jurisdiction of the trial court. In the determination of a just and fair sentence, South African courts take into consideration the Zinn triad (the crime, the offender and the interest of society) together with the objects of punishment which are retribution, deterrence, prevention, rehabilitation and

¹⁵⁶ *S v Abrahams* (n101) at para [25], 126B-C.

¹⁵⁷ Terblanche (n35) 103.

¹⁵⁸ Terblanche (n35) 103.

¹⁵⁹ Terblanche (n141) 220.

restorative justice. The principles of fairness, consistency, proportionality, equality and dignity are essential requirements in determining an appropriate sentence in the South African criminal justice system.

Rehabilitation of the offender and his personal circumstances fade into the background when weighed against the aims of retribution and deterrence. Retribution and deterrence play significant roles in the punishment of serious offences and should be accorded their due weight. The aim of sentencing ‘is not to satisfy public opinion but to serve the public interest.’¹⁶⁰ A judicial officer when considering all relevant factors in sentencing is enjoined to keep the public interest as an ‘ever present concern.’¹⁶¹ The Supreme of Appeal has ruled that victims can present their view on the effects of the offence on him/her to court but do not have a decisive view on sentencing.¹⁶²

Where minimum mandatory sentences have application, restorative justice can only come to the fore if substantial and compelling reasons exist for a deviation from the prescribed minimum mandatory sentence. Once a deviation is justified, a court is free to impose any sentence it deems appropriate in the circumstances.¹⁶³

Restorative justice is both backward-looking and forward-looking as it seeks to discover the cause of the offence, finds a solution and includes plans to prevent recidivism.¹⁶⁴ The criminal justice system is centered on the offender and his/her due process rights. However restorative justice holds the victim central in its paradigm by looking at the needs of the victim and how to repair the harm caused by the commission of the offence. Restorative justice holds the victim central in denunciation of crime.¹⁶⁵ Restorative justice which is rehabilitative and retributive in nature is seen as a viable alternate option in sentencing and is interpreted as excluding imprisonment. Nevertheless, many writers find that restorative justice can include custodial

¹⁶⁰ *Mhlakaza* (n17).

¹⁶¹ *S v SM* (n108).

¹⁶² *Thabeth* (n1) at para [21], 576E-G; *Seedat* (n3) at para [38], 154A-C.

¹⁶³ *Malgas* (n51) at para [25] part I, 1236.

¹⁶⁴ *Skelton & Batley* (n8) 49.

¹⁶⁵ *Ibid.*

sentences to make it viable in the application of serious crime which will be discussed further in the following Chapter Three.

CHAPTER 3

Restorative Justice

3.1 Introducing restorative justice

The application of restorative principles inside and outside of the criminal justice system in South Africa is equal to or beyond restorative justices' development in the United Kingdom or Australia.¹⁶⁶ This is borne out by South African case law to be discussed in Chapter Four and various other initiatives implemented by the Department of Justice of South Africa. The development of restorative justice in South African law found its roots in the Truth and Reconciliation Commission whose main aim for the adoption of restorative justice principles, values and processes was to bring about a peaceful change to South Africa after the demise of the apartheid regime.¹⁶⁷ Currently in South African jurisprudence *ubuntu-botho* embodies the 'element of human solidarity' that glues together 'liberty and equality' to form 'an affirmative and mutually supportive triad of central constitutional values.'¹⁶⁸ Sachs J held in a minority judgment that the concept of *ubuntu-botho* resonates with the elements of restorative justice, namely, encounter, participation, reparation and reintegration.¹⁶⁹ The South African Constitutional Court has emphasised that restorative justice is linked to the foundational value of *ubuntu-botho*, which recognises the inherent human dignity of the individual offender.¹⁷⁰

Inherent in restorative justice is the tenet that those most affected by crime should be given the opportunity to participate actively in resolving the conflict.¹⁷¹ Restorative justice is founded on values that provide healing and accountability of individuals impacted by an offence whereas the

¹⁶⁶ LW Sherman & H Strang 'Crime and Reconciliation: Experimental Criminology and the future of Restorative Justice' (2009) 22(1) *Acta Criminologica* 1 at 5.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Dikoko v Mokhatla* (n1) at para [113], 272G-H.

¹⁶⁹ *supra* at para [114], 273.

¹⁷⁰ *Van Vuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC) at para [51], 130A-C.

¹⁷¹ Mark S Umbreit. Betty Vos & Robert B Coates et al 'Restorative Justice in the Twenty First Century: A Social Movement Full of Opportunities and Pitfalls' (2005) 89 *Marquette Law Review* 251 at 255.

criminal justice system focuses on past criminal behaviour and imposing different levels of punishment.¹⁷² In restorative justice, crime is not restricted to lawbreaking but acknowledgment of the offender's conduct as harmful to victims, communities and to the offender himself. Therefore, crime is not only a problem for the state but also for communities. Furthermore, the state through the criminal justice system looks at 'just deserts' (retribution) and deterrence when formulating an appropriate sentence for the commission of a serious crime, whereas restorative justice considers how the harm can be repaired or averted in the future.¹⁷³ Despite the victim being central in restorative justice, the offender's needs and interest are also taken into account in a restorative justice process.

Restorative justice can be used before appearance in a criminal court, pre-trial, pre-sentence, post-sentencing in prison before parole, or on release from prison. The focus of this Chapter will be on the concept of restorative justice in relation to sentencing of adult offenders convicted of serious crime. Other applications of restorative justice will be excluded from discussion in this Chapter.

3.2 Defining restorative justice

Restorative justice as a theory of justice has developed largely through practice.¹⁷⁴ It has been likened to a 'process of discovery rather than invention.'¹⁷⁵ Restorative justice is an evolving theory, deeply contested and although widely accepted, does not have a concrete universal definition because restorative justice means different things to different countries.¹⁷⁶ Therefore,

¹⁷² Umbreit, Vos & Coates et al (n171) 255.

¹⁷³ *S v Maluleke* (n8) at para [28], 53B-D.

¹⁷⁴ Andrew Ashworth 'Responsibilities, Rights and Restorative Justice' (2002) 42 *Brit. J. Criminol* 578 at 578.

¹⁷⁵ P McCold 'Towards Mid-Range Theory of Restorative Criminal Justice: A Reply to the Maximalist Model'

2000 1 at 2 accessed on 20 February 2019 available @

https://www.researchgate.net/profile/Paul_Mccold/publication/292733753_Toward_a_holistic_vision_of_restorative_juvenile_justice_A_reply_to_the_maximalist_model/links/58deb80f92851c36954572cf/Toward-a-holistic-vision-of-restorative-juvenile-justice-A-reply-to-the-maximalist-model.pdf.

¹⁷⁶ United Nations Commission on Crime Prevention and Criminal Justice *Use and application of United Nations standards and norms in crime prevention and criminal justice*. E/CN.15/2017/1/ 22 May 2017, 1 at 4 accessed

restorative justice's interpretation is dependent on each country's criminal justice system, culture and the norms of its people.¹⁷⁷ Restorative justice has been described as a 'catch-all' expression for any process that responds to crime in a way that does not conform to the traditional criminal process which may be partly or fully restorative.¹⁷⁸ Shapland et al maintain that victim-offender mediation is an 'umbrella concept' that covers many practices, comprising of mediation, conferencing, sentencing circles and community panels without a concrete universal definition.¹⁷⁹

Robinson & Hudson argue that lack of consensus on restorative justice theory can make 'Restorative justice applications inconsistent, confusing and directionless.'¹⁸⁰ Earlier, Daly asserted the lack of consensus in defining restorative justice is not serious because it is a 'logical and defensible position' as 'justice has no unchanging nature' and 'justice is beyond definition.'¹⁸¹ However, recently Daly posits that the future of restorative justice is in doubt unless it is defined solidly to enable empirical enquiry of its practices and outcomes.¹⁸² Daly defines restorative justice as follows;

'Restorative justice is a *contemporary justice mechanism* to address crime, disputes and bounded community conflict. The mechanism is a *meeting* (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process—pre-arrest, diversion from court, pre-sentence, and post-sentence—as well as for offending or conflicts not reported to the police. Specific practices will

on 10 May 2018 available @

https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/1703956E.pdf;

Van Ness & Strong (n5) at 84.

¹⁷⁷ United Nations Commission on Crime Prevention and Criminal Justice (n176) 4.

¹⁷⁸ Anne Marie McAlinden 'Restorative Justice as a Response to Sexual Offending –Addressing the Failings of Current Punitive Approaches' (2008) 3(1) *Sexual Offender Treatment* 1 at 4.

¹⁷⁹ J Shapland et al 'Situating restorative justice within criminal justice' (2006) 10(4) *Theoretical Criminology* 505 at 506.

¹⁸⁰ Joseph Robinson & Jennifer Hudson 'Restorative Justice: A Typology and Critical Appraisal' (2015-2016) 23(2) *Williamette J. Int'l L. & Dis. Res.* 335 at 337.

¹⁸¹ K Daly (n10) 2.

¹⁸² K Daly (n44) 11.

vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict.’¹⁸³

Watney proposes that for the purpose of the South African legal framework the interpretation of restorative justice by Skelton is relevant:- ¹⁸⁴

‘Restorative justice emphasises the harm done to the victim and the accountability of the offender for repairing that harm. Thus the offender is held responsible, and the aim is to restore him to the status of a moral being who can make and act on choices, although he or she may need assistance to do so.’

Bertelsmann J cites with approval the definition employed by Cormier which sees restorative justice as:

‘... an approach that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community – to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.’¹⁸⁵

Despite a lack of a universally accepted definition of restorative justice, the following notions are universally agreed on: restorative justice views crime as harm done to individuals and community; offenders have obligations to make the harm right and both offenders and victims are stakeholders.¹⁸⁶ The four key values of restorative justice are:¹⁸⁷

¹⁸³ Daly (n44) 21, italics in original.

¹⁸⁴ Skelton & Batley (n8) 48; referred to in M Watney (n8) 846.

¹⁸⁵ *Maluleke* (n8) at para [28], 53B-D.

¹⁸⁶ P McCold ‘Restorative Justice - Variations on a Theme’ in L Walgrave (ed) *Restorative Justice for Juveniles: Potentialities, Risks, and Problems for Research* (1998) 19; referred to in Robinson & Hudson (n180) 337.

¹⁸⁷ Van Ness & Strong (n5) 93.

1. Inclusion: All parties affected by the offence are given an opportunity to directly determine the outcome.

2. Encounter (engagement): By creating an effective space for all affected parties to meet the offender to discuss the crime, its effects and apposite response.

3. Amends: Offenders to take steps to repair the harm they have caused to the extent possible.

4. Reintegration: Victims and offenders are given the opportunity and resources to return to their communities as contributing members of society free from any stigma of the harm or wrongdoing.

Barton identifies four strands of restorative justice theory that will enable a successful and constructive restorative justice process: reversal of moral disengagement - re-engaging the offender with the consequences of his/her behaviour; social and moral development involves helping the offender to learn from his/her mistake and become wiser; emotional and psychological healing is brought about by dialogue between the parties by symbolic reparations; and reintegrative shaming.¹⁸⁸

3.3 Models of restorative justice

There are two models of restorative justice known as the 'purist' model and 'maximalist' model. Restorative justice is narrowly interpreted by the 'purist' approach. McCold explains that Marshal's definition of restorative justice best explains the 'purist' model: 'Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve to deal with the aftermath of the offence and its implications for the future', which excludes 'obedience and hard treatment.'¹⁸⁹ The 'purist' approach is rejected by maximalists as being too restrictive.¹⁹⁰ The maximalist school has an expansive view of restorative justice and widens the net to include programmes that do not conform fully to restorative justice theory. The maximalist model

¹⁸⁸ Barton (n9) 14.

¹⁸⁹ P McCold (n175) 12.

¹⁹⁰ P McCold (n175) 13.

essentially broadens the purist definition, as ‘every action that is primarily orientated towards doing justice by repairing harm that has been caused by crime.’¹⁹¹

Put simply the purist model focuses on ‘processes’ while the maximalist model focuses on ‘outcomes.’¹⁹² The voluntary and willing participation by the victim and offender is central for restorative justice to be successful in processes or outcomes. Hargovan maintains that restorative justice is applied under the maximalist model in South Africa.¹⁹³ From a careful reading of case law and other literature the writer concurs with this view. South African courts have placed emphasis on the outcomes of a case to determine its suitability for the application of restorative justice in sentencing.

3.4 Restorative processes and outcomes

The United Nations defines restorative process as a process which may include mediation, conciliation, conferencing and sentencing circles. The victims’ and the offender, and where fitting any other individuals or community members affected by a crime, work together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.¹⁹⁴ Restorative outcome means an agreement reached as a result of a restorative process. Restorative outcomes such as reparation, restitution, and community service are aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender into their community.’¹⁹⁵

¹⁹¹ P McCold (n175) 14.

¹⁹² Daly (n44) 21.

¹⁹³ Hema Hargovan ‘Restorative Justice in South Africa: For the offender, for the victim, or for Criminal Justice?’ 2018 The 16th International Symposium of the World Society of Victimology accessed on the 6 April 2019 available @ http://www.cityu.edu.hk/ss_wsv2018/about/files/Conc/Hema Hargovan-Restorative Justice in South Africa.pdf.

¹⁹⁴ United Nations Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2002/12: *Basic principles on the use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002 E/RES/2002/12 accessed on 2 August 2016 available @ <https://www.refworld.org/docid/46c455820.html>.

¹⁹⁵ Ibid.

A typical process will entail the offender explaining the reasons for committing the offence; the victim explains the effects of the offence on him; the offender has an opportunity to apologise to the victim; the parties collectively decide how the offender can repair the harm which may be by way of an apology, undertaking of tasks, reparations, community service or equivalent.¹⁹⁶ Restorative justice processes have been proven very beneficial in assisting victims and offenders find satisfaction, closure and healing in the aftermath of crime.¹⁹⁷ Use of these processes can take place at any point in the justice process, including pre-arrest, pre-court referral, pre-sentencing, or post-sentencing and even during incarceration.

3.4.1 Victim-offender mediation (VOM)

Victim-offender mediation also called “reconciliation programs” in some countries, refers to a process where the victim and the offender engage in a discussion of the crime that is facilitated by an impartial third party trained for this purpose, either in a face-to-face meeting or through other indirect means (shuttle mediation where information is carried back and forth between participants by a third person).¹⁹⁸

3.4.2 Restorative justice conference (RJC)

Restorative justice conference include “family group conferencing” or “community group conferencing” or “restorative group conferencing”. Restorative justice conference differs from victim-offender mediation because they involve more participants in addition to victim and offender. The participants usually are family members, friends, community representatives, and a facilitator. The purpose of the conference seeks to assist the offender to understand the effect of

¹⁹⁶ L Gromet & JM Darley 'Restoration and Retribution: How Including Retributive Components Affects the Acceptability Of Restorative Justice Procedures' (2006) 19(4) *Social Justice Research* 395 at 396.

¹⁹⁷ K Richards 'Taking victims seriously? The Role of Victims Rights Movements in the Emergence of Restorative Justice' (2009) 21(2) *Current Issues in Criminal Justice* 302 at 304.

¹⁹⁸ MS Umbreit, B Vos & RB Coates 'Restorative Justice Dialogue: Evidence-Based-Practice' 1 January 2006 1 at 1 accessed on 14 March 2018 available @ <http://www.d.umn.edu/center-restorative-justice-and-peacemaking/resources>.

his/her criminal behaviour on both the victim and their families and his/her own family and provides a chance for restoration of damaged relationships.

3.4.3 Sentencing circles

Circles are variously called “peace-making circles,” “restorative justice circles,” “repair of harm circles” and “sentencing circles.” The numbers and types of participants gathered for circles are similar to those gathered for conferences, though sometimes there is even wider community member participation, either as interested persons or as additional circle-keepers or facilitators. The process involves the use of a “talking piece” that is passed around the circle to designate who may speak.

3.5 Restorative justice and serious crime

Larsen notes that restorative justice processes are widely used in cases of serious crime and there is growing evidence of positive outcomes in this area.¹⁹⁹ McElrea believes that the ‘more serious the harm the greater the need for healing on the victims’ part and the greater the potential for restorative justice.’²⁰⁰ Many studies have found victim-offender dialogue and mediation in less serious crimes to have a positive impact on victims and reduction in reoffending.²⁰¹ A study on victim-offender dialogue held in prisons found high satisfaction levels by participants with process and outcome in serious and violent offences.²⁰²

¹⁹⁹ J Larsen ‘Restorative justice in the Australian criminal justice system’ Research and Public Policy Series No 126 published 22 February 2014 1 at 32 accessed on the 5 March 2016 @ <https://aic.gov.au/publications/rpp/rpp> 127

²⁰⁰ FWM McElrea ‘Twenty years of Restorative Justice in New Zealand-Reflections of a Judicial Participant’ 2011 *Journal of Commonwealth Criminal Law* 44 at 49 accessed on 22 February 2016 available @ <https://www.napierlibrary.co.nz/assets/mcelrea/Twenty-years-of-rj-in-NZ-Jnl-of-Commonwealth-crim-law-2011.pdf>.

²⁰¹ MS Umbreit et al ‘Victim-Offender dialogue in violent cases: a multi-site study in the United States’ 2007 *Acta Juridica* 22 at 22.

²⁰² *Ibid* 38.

A study of victims' reasons for requesting a mediated dialogue in severely violent crime found that it was based on a need for information, to relate to the offender the impact of the offence and human interaction with the person responsible for the harm.²⁰³ Offenders' reasons were to apologise to the victims, help the victims heal, and do what is necessary to benefit victims, receive benefits in terms of rehabilitation and alter victims' perception of them.²⁰⁴ In a study on the influence of restorative justice on recidivism, Sherman and Strang determined that restorative justice was most fruitful in reducing crime when 'face-to-face meetings occurred between offender and their personal victim' and it may decrease recidivism more effectively with serious crime than less serious crime.²⁰⁵ In a review of the effectiveness of restorative justice conference on recidivism, Sherman et al concluded that it seemed more likely to reduce frequency of reoffending and it was more successful where the victim and offender's participation was voluntary.²⁰⁶ Significantly, the request for more participation in the criminal justice system has not come from victims of mainly minor or property crimes but from victims of serious personal crime.²⁰⁷

Gromet and Darley in a typology of scenarios (pure restorative justice procedure, pure criminal justice procedure or both (mixed procedure)) to determine choices of participants in sentencing offenders in serious crime discovered that offenders of mid-serious offences were more likely to be sent to both restorative justice and mixed procedure while offenders of high-seriousness crime were most likely to be sent to a mixed procedure.²⁰⁸ Participants were more likely to reduce a sentence if an offender completed a restorative justice process.²⁰⁹ Van Camp & Wemmers found in a study on restorative justice experiences by thirty-four victims of serious crime in Canada and

²⁰³ Umbreit, Vos & Coates 'Restorative Justice Dialogue: Evidence-Based-Practice' (n198) 3.

²⁰⁴ Ibid 3.

²⁰⁵ Sherman & Strang (n166) 11.

²⁰⁶ Lawrence W Sherman et al 'Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systemic Review' (2015) 31 (1) *J Quant Criminol* 1 at 19.

²⁰⁷ K Richards (n197) 303.

²⁰⁸ Gromet & Darley (n196) 407; referred to in MJ van Maastricht 'An Interdisciplinary Theoretical Interpretive Synthesis Examining the Barriers to Implementing Restorative Justice as the Standard Paradigm of Adult Criminal Justice Within the Context of the United States' at 35 (Unpublished LLM Theses Paper 4, Grand Valley State University (2010) accessed on the 23 October 2016 available @ <http://scholarworks.gvsu.edu/theses>).

²⁰⁹ Ibid 35.

Belgium that victims preferred to be ‘pro-actively’ informed about restorative justice options as opposed to the ‘protective’ approach which entails the request for restorative justice to stem from victims themselves.²¹⁰ The ‘proactive’ approach was readily acceptable to victims if it was voluntary and complementary to the criminal process.²¹¹

Restorative justice is limited in its application in criminal offences of a serious nature as it has no proportionality constraints and cannot adhere to principles of consistency in outcome as each victim and offender will bring their own normative understanding of justice to a restorative justice process.²¹² This may lead to different outcomes for similar offences with a different victim and offender.²¹³ Where reparation and restitution is agreed upon, the wealthy offender may be favoured over the less well-off offender resulting in an injustice in the outcomes for similar offences and may be viewed as being available only to wealthy offenders.²¹⁴ Restorative justice processes have to be used in a way to avoid conflict with principles of justice in matters where the outcomes result in more punishment or less punishment than is deserved.²¹⁵

Restorative justice is seen as being soft on crime as the offender escapes his/her ‘just deserts’ in terms of the law which is imprisonment. This view is embodied in the fear that the administration of justice will fall into disrepute as the public will lose confidence in a criminal justice system that

²¹⁰ Tinneke Van Camp & Jo-Anne Wemmers 'Victims Reflection on the Protective and Pro-active Approaches to the Offer of Restorative Justice: The Importance of Information' (2016) 58 (3) *Canadian Journal of Criminology and Criminal Justice* 415 at 429.

²¹¹ Ibid 430-431, 433.

²¹² Daly 'Limits of Restorative Justice' (n10) 1; Terblanche (n12) 177.

²¹³ Terblanche (n 12) 177.

²¹⁴ M Batley 'Some restorative elements in an unusual sentence' 2015 accessed on 20 April 2016 available @ http://www.rcj.co.za/index.php?option=com_content&view=article&id=143:some-restorative-elements-in-an-unusual-sentence&catid=31:releases&Itemid=46; The Hon Sir Anthony Mason AC KBE ' Restorative Justice: Courts and Civil Society' in H Strang & J Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (2016) Routledge 1 at 8.

²¹⁵ Paul H Robinson 'The Virtues of Restorative Processes, The Vices of Restorative Justice' 2002 Faculty Scholarship Paper 33, 375 at 380 accessed on 10 November 2017 available @ http://scholarship.law.upenn.edu/faculty_scholarship/33

fails to imprison offenders convicted of serious crimes such as rape.²¹⁶ Widespread criticisms of the use of restorative justice in serious crimes of rape and domestic violence stems from the common argument that serious crime deserves a serious response.²¹⁷ Further, many critics argue that ‘it reproduces and reinforces the power imbalances entrenched in abusive relationships and leads to possible re-victimisation’²¹⁸ Victimisation and re-victimisation are inherent risks in the ‘emotionally charged process.’²¹⁹ However, to achieve restoration and healing, the emotional aspects of serious harm has to be addressed.²²⁰ A restorative justice process must aim to heal the effects of crime which are basically moral, psychological and emotional.²²¹ By moving from a purely punitive response to sex offending to one where retribution and restorative justice are combined will facilitate the management of both known and unknown risks posed by sexual offenders.²²² A combination of restorative justice and criminal justice procedure can ‘present itself as a regulatory approach to sexual crime.’²²³ The writer submits that this approach will also be applicable for various other serious crimes.

McElrea considers that punishment can be part of a restorative justice solution and therefore restorative justice need not be an alternate to punishment.²²⁴ Nevertheless, many writers advocate that restorative justice should exclude punishment. However, Daly argues that restorative justice is retributive and rehabilitative in nature.²²⁵ Restorative justice is retributive as it consists of punishment in the form of censure of past behaviour.²²⁶ Lubaale contends that restorative justice

²¹⁶ *Thabethe* (n1) at para [22], 576G-J.

²¹⁷ *Spies* (n65) 275.

²¹⁸ *McAlinden* (178) 8.

²¹⁹ *Barton* (n9) 11.

²²⁰ *Ibid* 11.

²²¹ *Ibid* 11.

²²² *MacAlinden* (n178) 10.

²²³ *Ibid*.

²²⁴ FWM McElrea 'Restorative Justice- A New Zealand Perspective' 2013 Ch9 119 at 128 accessed on 22 February 2016 available @ <https://www.napierlibrary.co.nz/assests/mcelrea/A-NZ-perspective-in-old-and-new-rj-writings-chapter-2013.pdf>.

²²⁵ *Daly* (n40) 4.

²²⁶ *Daly* (n40) 4.

elements can reduce custodial sentences and finds that literature affirms that restorative justice does not necessarily exclude punishment.²²⁷ Dignan explains that imprisonment can be part of restorative justice in circumstances where offenders pose a threat to the ‘wellbeing and freedom of others.’²²⁸

3.6 Conclusion

The concept of restorative justice does not have a universally agreed definition and means different things to different countries and to different writers. However the following notions are universally agreed on: restorative justice views crime as harm done to individuals and the community; offenders have obligations to make the harm right; and both offenders and victims are stakeholders. South African courts have found that *ubuntu-botho* resonates with the elements of restorative justice, namely encounter, participation, reparation, reintegration, and recognition of the inherent human dignity of the individual offender.²²⁹ The four key values of restorative justice are inclusion, encounter, amends and integration.

Restorative justice consists of two models of justice the ‘purist’ and ‘maximalist’ model. In simple terms the purist model focuses on the processes and maximalist model focuses on outcomes.²³⁰ The maximalist model prevails in the South African criminal justice system which is reflected by the prevalent case law and restorative justice practices in the criminal justice system.

Decisions of how to respond to crime are best made by the parties directly affected by the crime and should preferably be by way of dialogue between the victim and offender or affected communities or with other stakeholders. The following restorative justice processes used

²²⁷ EC Lubaale 'Concessions on custodial sentences. Learning from New Zealand approach to restorative justice' (2017) 61 *South African Crime Quarterly* 31 at 38.

²²⁸ J Dignan 'Restorative Justice and the Law: The case for an integrated, systemic approach' 2002 1 at 28 accessed on 20 August 2017 available @ <http://www.restorativejustice.org/10fulltext/dignan-james.-restorative-justice-and-the-law-the-case-for-an-integrated-systemic-approach.pdf>.

²²⁹ *Dikoko v Mokhatla* (n1) at para [114], 273A-C.

²³⁰ Daly (n44) 21.

frequently in serious crime are victim-offender mediation, restorative justice conferencing and sentencing circles. Participants in victim-offender mediation and dialogues in serious crime have expressed high satisfaction ratings to its outcomes and processes. Victim-offender mediation has been found to be more suitable for serious offences. Restorative justice is effective where there is an identifiable victim; responsibility for the offence is not in dispute; consent to settle the matter that is meaningful to both parties is concluded, provided that the agreement falls within the law and is not harmful to public interest.

Victims prefer the ‘proactive approach’ which is to be informed about restorative justice applications in the criminal justice system.²³¹ Restorative justice processes are widely used in cases of serious crime and there is growing evidence of positive outcomes in this area. Much controversy surrounds the use of restorative justice in sexual offences and domestic violence. By moving from a purely punitive response to sex offending to one where retribution and restorative justice are combined will facilitate the management of both known and unknown risks posed by sexual offenders.²³²

Restorative justice is limited in its application in criminal offences of a serious nature as it has no proportionality constraints and cannot adhere to principles of consistency in outcome. The definition of restorative justice does not exclude the imposition of custodial sentences. A hybrid model which sees restorative justice being complementary to the criminal justice system will obviate perceptions that restorative justice is a soft option in response to serious crime.

A combination of restorative justice and criminal justice procedure can ‘present itself as a regulatory approach to sexual crime.’²³³ This approach will also be applicable for various serious crimes. This hybrid model of justice will be expanded on in Chapter Five.

²³¹ Van Camp & Wemmers (n210).

²³² MacAlinden (n178) 10.

²³³ Ibid.

CHAPTER 4

Examination of Restorative Justice through South African Case Law

4.1 Introduction

Restorative justices' appearance into the South African sentencing paradigm has created 'stimulating positive debate' and has extended judicial officers' options when sentencing offenders.²³⁴ Skelton and Batley assert that restorative justice encourages a new way of doing justice and offers new insights that have been accepted by South Africa's highest courts.²³⁵ Van Ness and Strong maintain that restorative justice responds to crime by underscoring 'recovery of the victim through redress, vindication and healing as well as recompense by the offender through reparation, fair treatment and rehabilitation.'²³⁶

South African courts have accepted restorative justice to be a proper object of punishment, operating as a viable option to imprisonment.²³⁷ Restorative justice is currently used as a supplement to the South African criminal justice system. A maximalist approach has been adopted by the South African judiciary and its courts have focused on the outcomes when deciding to apply the principles of restorative justice which becomes clearer from the examination of the case law. The process requirement of restorative justice, if it does occur, may still not be in accordance with set standards.²³⁸ South African courts have not fully embraced all the principles and values of restorative justice when formulating an appropriate sentence. The following factors have been found to be absent: non-compliance with restorative justice processes in that the victim and offender were not properly prepared for an encounter; the encounter itself was not facilitated by a

²³⁴ Watney (n8) 844.

²³⁵ Skelton & Batley (n8) 49.

²³⁶ Van Ness & Strong (n5) 107.

²³⁷ A Skelton & M Batley (n8) 40; *Director of Public Prosecutions, North Gauteng v Thabethe* (n1) at para [20], 575I; *S v Maluleke* (n8) at para [34], 540.

²³⁸ M Batley 'A call to agents of change in the justice system: Guidelines in the use of restorative justice in sentencing for Magistrates, Judges, Prosecutors and Probation Officers' 1 at 14 accessed on the 03 March 2016 available @ <http://rjc.co.za>.

trained facilitator in the specific offence; reparation in terms of monetary value being the key reason why it is deemed to be restorative justice; the offender not acknowledging his/her wrongdoing and stakeholders have not had an encounter to collectively decide the outcome. The various factors found by Hoctor to exclude the application of restorative justice in sentencing will be referred to and expounded further on in this Chapter together with factors found to be compatible with restorative justice aims.²³⁹

4.2 Application of restorative justice must be underpinned by the values of the South African Constitution.

In *S v Saayman* the accused pleaded guilty to fraud and was sentenced by the trial court to two years of imprisonment suspended for five years with the following conditions: (1) she had to undergo correctional supervision for a period of eighteen months; (2) She had to carry a placard outside the foyer of the court declaring that she was guilty of fraud; and further to apologise to the complainants whilst under guard by a police officer for a set period of time.²⁴⁰

On review the court had to determine whether condition (2) was in accordance with the principles of restorative justice and if it infringed the accused's right to human dignity and the right not to be punished in a cruel, inhumane and degrading manner.

The regional magistrate in his refusal of the application to appeal held that the sentence was not in conflict with the elements of restorative justice as it would aid to 'restore the relations between the parties by assisting the accused to tender an apology in public to the complainants'.²⁴¹ However the review court held that although the creative application of restorative justice by the regional magistrate was praiseworthy, the court maintained that the application of restorative justice in criminal matters had to be done against the backdrop of the South African Constitution.²⁴²

²³⁹ Hoctor (n6) 7-10.

²⁴⁰ *Saayman* 2008 (1) SACR at 393 (E).

²⁴¹ *Supra* 396F-G.

²⁴² *Supra* at 397E-F, 398A-H, 399A-B.

Pickering J found that the condition (2) was inconsistent with the accused's inherent right to human dignity and infringed the constitutional right of freedom from cruel, inhumane or degrading punishment.²⁴³

The court noted that an encounter between offender and victim is important to facilitate an apology by the offender to the victim.²⁴⁴ Without a face-to-face meeting it was difficult to comprehend how restoration of the relationship between the accused and victim could be effected when the apology was 'in the absence of and without knowledge of the victim.'²⁴⁵

4.3 Circumstances in which the application of restorative justice in sentencing has been approved

4.3.1 Where restorative justice is in accordance with the values of *ubuntu-botho* as found in customary law

The accused in *S v Maluleke* was convicted of murder of an intruder known to her.²⁴⁶ The accused was accompanied by her husband in the severe assault on the deceased. The husband died before the trial commenced. The accused a widow had four minor children who were dependant on her. She was a first offender and the court found that the accused did not have a tendency to be violent nor was it likely that she would commit another similar offence. Furthermore she was regretful of causing the death of the deceased. Upon questioning by the state and defence, the deceased's mother desired in accordance with customary law that the accused apologise for the murder of her son by sending an elder member or members of her family to the family of the deceased.²⁴⁷ The court found this paved the way for involvement of the community in sentencing and rehabilitation of the accused.²⁴⁸

²⁴³ *Saayman* (n240) at 401E-H.

²⁴⁴ *Supra* at 403G-J.

²⁴⁵ *Supra*.

²⁴⁶ *Maluleke* (n8).

²⁴⁷ *Supra* at para [19], 52.

²⁴⁸ *Supra* at para [21], 52.

Due to the mitigatory circumstances present, the court sentenced the accused to eight years imprisonment suspended for three years subject to *inter alia*, the condition that she apologised to the mother of the deceased and her family in accordance with local custom within a month from date of imposition of sentence.²⁴⁹

Bertelsmann J acknowledged *Shilubane's* case as the earliest recognition of restorative justice in sentencing.²⁵⁰

Bertelsmann J concluded that restorative justice cannot deliver 'single and definitive' solutions to all evils of crime and its consequence.²⁵¹ Restorative justice cannot guarantee that society will be safeguarded from offenders who have no desire to reform and continue to harm our societies.²⁵² However if restorative justice is applied in a careful manner it may well bring about, 'significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society.'²⁵³ Restorative justice as an 'innovative approach' can help reconcile 'the victim and the offender and the offender and the community' and our overcrowded prisons may be eased by restorative justice providing 'supple alternatives to imprisonment.'²⁵⁴

With respect to customary law, Bertelsmann J asserted that in the future, legislation may recognise certain aspects of customary law but judicial officers should be not discouraged from initiating 'exciting and vibrant potential alternative sentences into our criminal justice system.'²⁵⁵

Sachs J held in *Dikoko v Mokhatla* in a separate concurring judgment that the concept of *ubuntu-botho* resonates with the elements of restorative justice, namely, encounter, participation,

²⁴⁹ *Maluleke* (n8) at para [22], 52.

²⁵⁰ *Supra* at para [32], 54 B-C: *S v Shilubane* 2008 (1) SACR 295 (T).

²⁵¹ *Supra* at para [32], 54 C-D.

²⁵² *Supra* at para [32], 54C-D.

²⁵³ *Supra* at para [33], 54D.

²⁵⁴ *Supra* at para [34], 54.

²⁵⁵ *Supra* at para [41], 55

reparation and reintegration and found that resolution of disputes in traditional law is underpinned by *ubuntu-botho*.²⁵⁶ Sachs J endorsed the inventive application of *ubuntu-botho* in *Maluleke* by the court's blending of a suspended custodial sentence with the condition of an apology from an elder representative from the family of the accused as requested for by the deceased's mother.²⁵⁷

4.3.2 Where the crime is not too serious

The earliest reference to restorative justice was in *S v Shilubane*.²⁵⁸ Mr Shilubane was convicted of the theft of fowls to the value of R216-16 and sentenced to nine months imprisonment by the trial court. On review, Bosielo J, set aside the sentence, calling it 'shockingly inappropriate' and replaced it with a suspended sentence. The court asserted that a restorative approach would have better suited the circumstances of the case as the complainant would have been compensated for his loss. He further went on to state that judicial officers have to be creative and find alternative methods to alleviate the problem of overcrowding in prisons as retributive justice has failed to stop the escalating 'wave of crime'.²⁵⁹

The case of *S v Mfana* was a matter that came before the High Court on automatic review in terms of section 302 read with section 304 of the CPA.²⁶⁰ The offender was 19 years old and was convicted of using a motor vehicle (belonging to his sister) without the owner's consent. He was sentenced to pay a fine of R3 000 or 12 months imprisonment, which was wholly suspended on certain conditions.

²⁵⁶ *Dikoko v Mokhatla* (n1) at para [114], 273.

²⁵⁷ *Supra* at para [115], 274A-B.

²⁵⁸ *Shilubane* (n250).

²⁵⁹ *Supra* at para [5], 297C-E; In *S v Pylman* (n138) Wright AJ found that 'Restorative justice attempts to restore the relationship between an offender and the complainant (as representative of the community at large). Instead of merely depriving an accused person of his freedom through imprisonment, restorative justice aims at giving an opportunity for a different version of punishment, such as compensating a victim of a crime through financial means. Either section 300 (compensation) or section 297 (1)(b) (suspension on condition of compensation) can be used.'

²⁶⁰ *S v Mfana* 2009 JOL 23867 (FB).

Held on review that although the sentence was wholly suspended, the sentence was deemed too harsh. The court, referring to Batley and Skelton, explained that with respect to restorative justice, the usual outcome of a family group conference involves an ‘apology, restitution, performance of service for the victim or community service for the benefit of the community, referral of the offender to some form of assistance programme to address some of his or her needs.’²⁶¹ A family group conference would have best suited the facts of the case as engagement of the victim, family and offender would have led to acknowledgment of wrong done by the offender and apology to his sister (victim).²⁶² The result would be a restoration of a fractured family relationship without sacrificing the accused on ‘the altar of deterrence.’²⁶³ This would be appropriate in the circumstances as the accused being immature and thus lacking judgment, wronged his sister.²⁶⁴

The court referred to the cases of *Maluleke* and *Shilubane* with approval, finding that judicial officers should move away from imposing traditional sentences and are encouraged to be innovative and proactive in opting for other alternative sentences to imprisonment and thereby reducing recidivism and overcrowding in South African prisons.²⁶⁵

4.3.3 Restorative justice in the case of offenders being primary caregivers

The offender in *S v M (Centre for Child Law as amicus curiae)* was the primary care giver of her minor children and was convicted of fraud and sentenced to four years imprisonment.²⁶⁶ The issue to be decided was whether in imposing a sentence on a primary care giver of minor children, the trial courts gave sufficient weight to the provision of the Constitution that all matters relating to children shall hold the ‘child’s best interests’ as supreme.

²⁶¹ *Mfana* (n260) at para [18], 12-13.

²⁶² *Supra* at para [19], 13.

²⁶³ *Supra*.

²⁶⁴ *Supra*.

²⁶⁵ *Supra* at para [20], 14.

²⁶⁶ *S v M (Centre for Child Law as amicus curiae)* (n1) at para [2], 547.

The court sentenced the accused to four years imprisonment suspended for four years; correctional supervision in terms of 276(1)(h) for three years subject to the condition that the accused perform community service; attend counselling and repay all stolen moneys to the complainant.²⁶⁷

Sachs J delivering the majority judgment held that correctional supervision is an innovative sentence that protects society without the stigmatizing impact of imprisonment and paves the way for the application of restorative justice in sentencing.²⁶⁸ The court found the accused's offer to make payment to the complainant was genuine and stated that restorative justice requires the offender 'to look the victim in the eye' and admit her wrongdoing.²⁶⁹ The importance of acknowledgement and reconciliation leads to restoration of trust and reintegration of the accused into the community which mends a relationship that with otherwise remain fractured.²⁷⁰

4.3.4 Where a crime is serious but restitution has been fulfilled

In *S v Mpumelelo Nyoka*, the Director of Public Prosecutions entered an appeal in terms of section 310A of the Criminal Procedure Act, 51 of 1977 as amended ("the Act") against the sentence imposed by the trial court.²⁷¹ The respondent, an attorney, was convicted of theft of trust funds in the amount of R461 731.25. He pleaded guilty to the charge and was sentenced to three years of correctional supervision in terms of section 276(1)(h) of the CPA together with a term of five years' imprisonment, wholly suspended for five years on certain conditions.

The issue on appeal was whether a sentence of direct imprisonment would have been more in line with the majority of sentences imposed in cases involving theft by attorneys, and which should have been imposed in this case.

²⁶⁷ *S v M (Centre for Child Law as amicus curiae)* (n1) at para [77], 575D-I, 576A.

²⁶⁸ *Supra* at para [61], 569C-D, at para [62], 569E-570A-B.

²⁶⁹ *Supra* at para [72], 574A-C.

²⁷⁰ *Supra* at para [72], 574C-D.

²⁷¹ *S v Mpumelelo Nyoka* 2009 JDR 1117 (ECG).

Revelas J could find no reason to overturn the trial court's reliance on the principles of restorative justice as being inappropriate in this case. The court noted that the magistrate had taken into account the seriousness of the offence and found that 'fairness and justice dictate that full repayment of stolen money must be of considerable mitigatory value.'²⁷² The court held that the reimbursement of the Fund was at least a form of restorative justice.²⁷³

The case was distinguished from *S v Mtshabe* (discussed below in this Chapter) who received 8 years imprisonment.²⁷⁴ *Mtshabe* was influenced by greed and refused to accept responsibility for the fraud instead and blamed his staff and his lack of supervision of the staff for the theft. *Mtshabe* made payment of half the money stolen to the complainant and did not attempt to pay the balance although he had sufficient time to do so. He maintained his innocence at all times.²⁷⁵

4.4 Circumstances that the courts have held to exclude the application of restorative justice in sentencing

4.4.1 Where an offender has no means to make restitution

The appellant in *S v Mkhize* shot and killed the deceased in a bar after being assaulted and fearing for his safety.²⁷⁶ With the leave of the court the appellant appealed both his conviction and sentence. The main attack of the appeal was that the trial court erred in convicting the appellant of murder as the State had failed to prove its case beyond a reasonable doubt given the material inconsistencies and improbabilities in the evidence of the State witnesses.

The Supreme Court of Appeal set aside the murder conviction and substituted a conviction of culpable homicide and imposed a suspended sentence. Firstly, the court found that a sentence of correctional supervision was unsuitable as rehabilitation of the offender was not relevant as the

²⁷² *Mpumelelo Nyoka* (n271) at para [25], 11.

²⁷³ *Supra* at para [25], 12.

²⁷⁴ *S v Mtshabe* 2008 JDR 1308 (Tk).

²⁷⁵ *Mpumelelo Nyoka* (n271) at para [23]-[24], 10.

²⁷⁶ *Mkhize* 2014 JDR 0771 (SCA).

offence occurred ten years ago.²⁷⁷ Secondly, a sentence based on restorative justice principles although praised and accepted in South Africa ‘at a slow pace’, would be ill-founded in this case due to the loss of life and high levels of violence prevalent in society.²⁷⁸ Thirdly, compensation to the deceased’s wife in any event would be futile as the appellant was unemployed.²⁷⁹

4.4.2 Application of restorative justice where there is no relationship to repair.

The appellant in *S v Mtshabe* was an attorney who committed fraud in the amount of R458 406.75.²⁸⁰ Mtshabe submitted fifteen statements of account to the State Attorney for professional services rendered which were found to be fraudulent.

The appeal centred on whether the sentence of 8 years imprisonment was shockingly inappropriate in the circumstances. The Court found the case to be inappropriate for application of restorative justice. The following three reasons supported its finding:-²⁸¹

1. The appellant refused to admit his wrong-doing which is the ‘first step in redressing the harm that he has done’. Despite being found guilty he blamed his staff and his lack of supervision.
2. There was no individual to whom he had to apologise to. He had defrauded the State and therefore there was no relationship to repair.
3. The seriousness of the conduct in the matter had no room for the principles of restorative justice although ‘useful and important as they are in the abstract.’

The Appeal on sentence was dismissed.²⁸²

²⁷⁷ *Mkize* (n276) at para [21], 9.

²⁷⁸ *Supra*.

²⁷⁹ *Supra*.

²⁸⁰ *Mtshabe* (n274).

²⁸¹ *Supra* at para [13], 19-20.

²⁸² This judgment may be criticised as a ‘poor judgment’ of the aims of restorative justice as the mere absence of a restorative element (there was no individual to apologise to) should not bar the application of restorative justice. However the accused’s refusal to admit his guilt, take responsibility for his actions and failure to pay the balance of the moneys to the complainant are valid reasons for excluding the application of restorative justice.

However Jansen J delivering a dissenting judgment held that he would have allowed the appeal on sentence, based not on misdirection by the trial court in sentence but on the striking disparity between the sentence and the sentence the appeal court would impose, if it was sitting as the trial court. The court has to balance the nature of the crime, interests of society together with all other relevant circumstances to arrive at an appropriate sentence without ‘primitive revenge’ but with humanity.²⁸³ Jansen J took into consideration that half of the monies obtained in the fraud was paid by the offender and the important role he played in the community as mitigating factors to allow the appeal and would have set aside the appellant’s current sentence and substituted it with five years imprisonment in terms of section 276(1)(i) of the CPA.²⁸⁴

The minority judgment sentence can be interpreted as being partly restorative as the court took into consideration the payment by the accused of half of the monies obtained by fraud when substituting the trial court’s sentence with one of five years imprisonment in terms of section 276(1)(i) of the CPA.²⁸⁵

On the other hand *Mpumelelo Nyoka*’s case also had no victim to apologise to but the court nevertheless, accepted restorative justice to be a valid approach because restitution is a form of restorative justice.²⁸⁶

4.4.3 Restorative justice and very serious crime

In the case of *S v Thabethe* the accused entered a plea of guilty in the trial court and was convicted of raping the daughter of his female companion, who was below 16 years of age at the time of the rape.²⁸⁷ The matter was remitted to the High Court for sentencing. Bertelsmann J found numerous substantial and compelling reasons to deviate from the minimum sentence of life imprisonment in

²⁸³ *S v Mtshabe* (274) 12.

²⁸⁴ *Supra* 11, 12, 13.

²⁸⁵ The sentence is seen as partly restorative as it does not comply with all the values of restorative justice which are encounter, reparation/amends, reintegration and participation.

²⁸⁶ *Mpumelelo Nyoka* (n271) at para [25], 12.

²⁸⁷ *Thabethe* 2009 (2) SACR 62 (T).

terms of section 51(1) of the Act.²⁸⁸ The court concluded that restorative justice should not only be confined to minor offences but in appropriate circumstances be applicable to serious offences as facts and circumstances of the case allows.²⁸⁹ The court explained that restorative justice punishes the accused, restores the victim, allows for rehabilitation of the accused and heals the damage caused by the crime.²⁹⁰

The accused was sentenced by the High Court to ten years imprisonment suspended for five years on condition: that at least 80% of his income must be devoted to the support of the victim and her family; the accused must accept responsibility for the victim's schooling and if applicable for her tertiary education; support for the family is to continue even on termination of his relationship with the victim's mother; participate in any program that the probation officer might prescribe which programs must include a Sexual Offender's Programme to be attended at the accused's cost and the accused is to perform 800 hours of community service.²⁹¹

The state in *Director of Public Prosecutions, North Gauteng v Thabethe* appealed the sentence to the Supreme Court of Appeal.²⁹² The issue on appeal was whether the sentence was appropriate in the circumstances.²⁹³ The appellant argued that restorative justice is not an appropriate sentence given the seriousness of the offence and the personal circumstances of the accused were over-emphasised at the expense of the victim's trauma.²⁹⁴

On appeal Bosielo JA confirmed the importance and feasibility of restorative justice in sentencing on condition it was applied to appropriate matters.²⁹⁵ An ill-considered application of restorative justice in inappropriate cases is likely to debase it and make it lose its credibility as a

²⁸⁸ *Thabethe* (n287) at para [35] 67C-J, 68A-E.

²⁸⁹ *Supra* at para [39], 68I-J.

²⁹⁰ *Supra* at para [40], 69A-B.

²⁹¹ *Supra* at para [41], 69.

²⁹² *Thabethe* (n1).

²⁹³ *Supra* at para [4], 570F-G.

²⁹⁴ *Supra* at para [12], 573F-G, at para [13], 573H-I.

²⁹⁵ *Supra* at para [20], 575I-J.

viable sentencing option.²⁹⁶ Judicial officers should be cautious not to allow some overenthusiasm to lead them to impose restorative justice even in cases where it is clearly unsuitable.²⁹⁷ The ‘seriousness of the offence and natural indignation and outrage of the community’ must be reflected in a balanced sentence.²⁹⁸ The court noted that the views of the victim was important but not decisive when arriving at an appropriate sentence.²⁹⁹ The court upheld the appeal and sentenced the accused to ten years imprisonment.³⁰⁰

Van Der Merwe and Skelton’s discussion of the application of restorative justice in serious crimes criticises the Supreme Court of Appeal in *Thabethe* for its failure to ‘provide constructive guidelines in relation to victims’ views regarding sentence.’³⁰¹ The writers advance that if the court had sight of progress in case law of England and Wales then it most likely would have formulated a guideline case as to how best to utilise victims mitigating views when constructing an appropriate sentence for serious crime.³⁰²

In *S v Mbuyisa* the accused was convicted of attempted murder in that she poured petrol over the complainant and set him alight causing him to suffer severe injuries.³⁰³ The trial court sentenced the accused to eight years imprisonment and conditionally suspended half of the sentence for four years.

The trial court refused the accused leave to appeal her conviction and sentence to the high court. The accused then petitioned the South Gauteng High Court for leave to appeal and was further refused. However the high court granted her leave to appeal the refusal of the petition to the

²⁹⁶ *Thabethe* (n1) at para [20], 575I-J, 576A.

²⁹⁷ *Supra* at para [20], 576A-B.

²⁹⁸ *Supra* at para [20], 576A-B.

²⁹⁹ *Supra* at para [21], 576E-G.

³⁰⁰ *Supra* at para [31], 579.

³⁰¹ Annette Van der Merwe & Ann Skelton (n8) 10.

³⁰² *Ibid* 18.

³⁰³ *Mbuyisa* 2012 (1) SACR 571 (SCA) at para [1], 572.

Supreme Court of Appeal. The supreme court of appeal dismissed the appellant's application for leave to appeal on conviction and granted her application for leave to appeal on sentence.³⁰⁴

The appellant's attorney argued that the trial court misdirected itself by not considering correctional supervision, a compensatory order in favour of the complainant or some other form of restorative justice.³⁰⁵

The Supreme Court of Appeal found no misdirection by the trial court and declared that the use of correctional supervision and restorative justice orders in inappropriate cases would devalue their benefits.³⁰⁶ The brutal nature of the crime and its seriousness calls for a 'salutary sentence'.³⁰⁷ Although rehabilitation is an important factor in sentencing, punishment has to take precedence in this case due to the 'brutal nature of the attack'.³⁰⁸

The court found that neither a correctional service order nor a restorative justice order would be appropriate in this case.³⁰⁹ The imposition of any sentence other than one of imprisonment 'in a case of barbaric violence would bring the law into disrepute'.³¹⁰ Applicant's leave to appeal was dismissed.

The case of *Seedat* is the most recent case on restorative justice.³¹¹ The appellant was a 63-year-old businessman who was convicted of rape and sentenced to seven years imprisonment in the trial court.³¹² In sentencing the accused, the trial court took into account that: the complainant was a first offender (in the light of the fact that his previous convictions were more than 10 years old);

³⁰⁴ *S v Mbuyisa* (n303) at para [2], 572.

³⁰⁵ *Supra* at para [16], 576.

³⁰⁶ *Supra* at para [17], 576F-G.

³⁰⁷ *Supra* at para [17], 576F-G.

³⁰⁸ *Supra* at para [17], 576G-H.

³⁰⁹ *Supra* at para [17], 576G-H.

³¹⁰ *Supra* at para [18], 576I-J.

³¹¹ *S v Seedat* 2015 (2) SACR 612 (GP).

³¹² *Supra* at para [1], 614.

his advanced age; and the fact that he was not in good health, as substantial and compelling reasons to deviate from the minimum sentence of 10 years imprisonment, and sentenced him to 7 years' imprisonment.³¹³

The accused appealed his sentence and conviction to the high court. Mavundla J dismissed the appeal against conviction and upheld the appeal on sentence. The court acknowledged that the crime of rape was very serious and required the imposition of a long term of imprisonment.³¹⁴ The court was entitled to interfere with a sentence where the 'exercise of discretion is flawed.'³¹⁵ Despite the focus on punishment rather than justice, high crime rates remained and therefore a different approach is required.³¹⁶ The application of restorative justice is not only suitable for minor offences but also for serious offences.³¹⁷ The court endeavours to maintain a balance between the serious nature of the crime, the interests of society, the interest of the victim and personal circumstance of the accused together with the aims of punishment to arrive at an appropriate sentence.³¹⁸ The court found that deterrence overlaps with restorative justice aims, and the desire of the complainant, the advanced age of the appellant, and the circumstances of this case calls for the application of restorative justice with a compensatory order³¹⁹

The court upheld the appeal on sentence and substituted that sentencing is suspended for a period of five years on condition the accused pays the complainant an amount of R100 000.³²⁰

The Director of Public Prosecutions appealed to the Supreme Court of Appeal against the sentence of the High Court on the basis that the sentence was incompetent and invalid as a sentence

³¹³ *S v Seedat* (n311) at para [31], 623E-F.

³¹⁴ *Supra* at para [37], 625.

³¹⁵ *Supra* at para [39], 625F.

³¹⁶ *Supra* at para [44], 626G.

³¹⁷ *Supra* at para [45], 626H-I.

³¹⁸ *Supra* at para [47], 627-628.

³¹⁹ *Supra* at para [48], 628B-C.

³²⁰ *Supra* at para [50], 628.

of restorative justice is inappropriate in sentencing rape offenders.³²¹ The State contended that the High Court confused the provisions of section 297(1) and section 297(4) when justifying the application of restorative justice in sentencing.³²²

Section 297(1)(a)(i)(aa) stipulates that where a court convicts a person for an offence other than an offence in respect of which any law prescribes a minimum punishment, the court has a discretion to postpone the passing of the sentence for a period not exceeding five years and to release the person concerned on one or more conditions, including a compensatory order.³²³ Section 297(4) allows a court that convicts a person of an offence in respect of which any law prescribes a minimum punishment to pass sentence at its discretion and to suspend the operation of a part thereof for a period not exceeding five years on any condition referred to in section 297(1)(a).³²⁴

The Supreme Court of Appeal found that section 297(1) of the CPA did not allow for postponement of a sentence where an accused was sentenced in terms of minimum sentencing legislation and declared further that section 297(1) of the CPA does not allow for ‘suspension’ of sentence but for a ‘postponement’ of sentence.³²⁵ The Supreme Court of Appeal found the High court reasons for the imposition of a suspended sentence in terms of section 297(1) was incorrect.³²⁶ Therefore the sentence imposed by the High Court was not competent in terms of section 297 of the Act as ‘there is no provision in law permitting a court to so suspend the sentencing of an accused’.³²⁷ Furthermore the Supreme Court of Appeal found that section 297(4) provides that ‘only part of a sentence should be suspended and not the whole sentence.’³²⁸

³²¹ *Seedat* (n3) at para [19], 147.

³²² *Supra* at para [31], 152.

³²³ *Supra* at para [32], 152.

³²⁴ *Supra* at para [33], 152.

³²⁵ *Supra* at para [35], 152-153.

³²⁶ *Supra* at para [35], 153.

³²⁷ *Supra* at para [36], 153; Andra Le Roux-Kemp 'Sentencing' 2017 *Annual Survey* 1092 at 1131.

³²⁸ *Seedat* (n3) at para [37], 153.

The court found that an error in law was executed by the High Court and set aside the sentence imposed.³²⁹

The Supreme Court of Appeal in considering sentencing afresh did not agree with the High Court's view that restorative justice was an appropriate sentencing option for rape.³³⁰ The Supreme Court of Appeal referred to *Director of Public Prosecutions, North Gauteng v Thabethe* and endorsed the view that restorative justice was a valid approach in appropriate cases but cautioned against its use in serious offences;

‘...which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option.’³³¹

The court found that the victim's views were deserved to be heard, but were not decisive in sentencing.³³² The victim's view was not the sole consideration in sentencing as a strong message had to be sent out to society and potential rapists that rape would not be tolerated.³³³ It was important for the courts to inculcate public confidence in the South African criminal justice system as the public would ‘justifiably be alarmed if courts tended to impose a suspended sentence coupled with monetary compensation for rape.’³³⁴

The Supreme Court of Appeal took into consideration the fact that the appellant complied with the High Court's order of compensation thinking it was valid and imposed a sentence of 4 years imprisonment, cautioning that it in no way endorsed the payment as valid.³³⁵

³²⁹ *S v Seedat* (n3) at para [37], 153.

³³⁰ *Supra* at para [38], 153.

³³¹ *Supra* at para [38], 153H-J, 154A.

³³² *Supra* at para [38], 154A-C.

³³³ *Supra* at para [39], 154C-D.

³³⁴ *Supra* at para [39], 154D-G, para [40], 154.

³³⁵ *Supra* at para [42], 155.

Terblanche notes the confusion of the court and its omission to take note of section 297(1)(b) of the CPA which allows for a court to impose any sentence and then to suspend the coming into operation of the sentence.³³⁶ Where minimum sentences are involved, section 297(4) appears to allow only partial suspension but section 51(5) of the minimum sentence legislation clearly prohibits suspension of any mandatory minimum sentence in term of the Act.³³⁷ He further argues that once substantial and compelling reasons are furnished for the departure from Act, the court can then suspend a sentence in terms of section 297(1)(b) of the CPA because the ‘precondition for the prohibition does not exist when another sentence, other than the prescribed minimum, is imposed.’³³⁸

4.5 Conclusion

South African courts have acknowledged that restorative justice is a new way of dealing with crime which may become ‘an important tool in reconciling the victim and the offender, and the community and offender.’³³⁹ Pickering J in *Saayman’s* case declared that if restorative justice is developed in a constitutionally acceptable manner and applied in appropriate cases, it can make important inputs to sentencing options.³⁴⁰ South African courts have applied restorative justice in crimes of fraud, theft and murder but have excluded restorative justice from serious crime of rape and murder where it was held to be inappropriate. Terblanche referring to *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) states that declaring restorative justice a ‘viable sentencing alternative’ for ‘appropriate cases’ is unrealistic.³⁴¹ The quote will be applied fervently by presiding officers who are proponents or opponents of restorative justice at every opportunity.³⁴²

³³⁶ Terblanche (n35) 103.

³³⁷ Ibid 103.

³³⁸ Ibid 103.

³³⁹ *Maluleke* (n8) at para [34], 54.

³⁴⁰ *S v Saayman* (n240) at para [34], 402I, 403A.

³⁴¹ SS Terblanche 'Sentencing' 2011 *Annual Survey* 1186 at 1188.

³⁴² Ibid.

From the examination of the case law we find that a maximalist model of restorative justice is applied by the South African courts which places emphasis on the outcomes to determine if restorative justice can be a valid approach to sentencing. Restorative justice's application in some cases may be seen as partly restorative rather than fully restorative.

Spies criticizes the Supreme Court of Appeal for its judgment in *Seedat* due to its formalistic approach and failure to enhance the recognition of victims in the criminal process.³⁴³ Spies advocates adopting substantive equality into South Africa's sentencing paradigm 'which would see restorative justice as a method to give effect to substantive equality values for the address of both victims and offenders needs to formulate a just decision.'³⁴⁴ Batley in his submissions made to the United Nations Commission on behalf of the Restorative Justice Centre notes that South African courts: 'recognise the community, rather than criminal justice agencies as the "prime site of crime control"; affirmed the validity of community-based sentences that allow the option of restoration in a way that imprisonment does not; and affirmed the importance of restitution or compensation to victims as well as centrality of restoring relationships.'³⁴⁵

The case of *Maluleke* declared that the application of harsher sentences to improve the efficacy of the criminal justice system has been found to be unsuccessful in crime prevention.³⁴⁶ The escalation of crime in South Africa and government's emphasis on punishment rather than justice requires a different approach to crime.³⁴⁷ Important considerations for delivery of justice require placing emphasis on victim needs, assisting offenders to take personal responsibility for their actions and cultivating a 'culture that values personal morality'.³⁴⁸ The role of the victim in the criminal justice system can be enhanced by the incorporation of restorative justice processes in sentencing of serious crime. The recommendations in Chapter Five will clearly set out how this can be achieved.

³⁴³ Spies 'Substantive equality, restorative justice and the sentencing of rape offenders' (n65) 285.

³⁴⁴ Ibid 288-289.

³⁴⁵ United Nations Commission on Crime Prevention and Criminal Justice (n176) 39.

³⁴⁶ *Maluleke* (n8) at para [26], 52H-I.

³⁴⁷ *Maluleke* (n8) at para [26], 52H-I.

³⁴⁸ *Supra* at para [26], 52I.

CHAPTER 5

Conclusion and Recommendations

5.1 Conclusion

This dissertation highlighted the limits of both restorative justice and criminal justice system, together with the limited role of victims in the criminal justice system to argue for the application of restorative justice in the sentencing of serious crimes. Despite no formal recognition, restorative justice has been incorporated into the sentencing framework by using existing provisions of the CPA. From an examination of case law, we find that restorative justice is currently operating as a complement to the criminal justice system, but its application is excluded in cases of serious crime as South African courts have declared that its application in serious crime may result in a loss of confidence by the public in the South African criminal justice system.

The inability of the current criminal justice system to stymie the escalating levels of serious crime provides further impetus for the application of restorative justice in sentencing of serious crimes. The writer's discussion on serious crime and adult offenders has found evidence that argues for the application of restorative justice in sentencing adult offenders convicted of serious crime.

Shapland et al concluded that communication between participants where restorative justice was situated in the criminal justice system in relation to victims, resulted not only in 'recognizing their right not to have suffered, but also their right to the identity of "victim", to permit them to ask for reparation (though not necessarily to receive it)' and partake in finding a solution to future offending.³⁴⁹ Likewise offenders rights 'to have a voice and responsibility', to amend their ways, put things right and 'reinforce bonds with their supporters' are also acknowledged.³⁵⁰ This will help victims understand why they were victims and help wrongdoers understand the impact of their behaviour, which enhances the victim's role in sentencing.

³⁴⁹ J Shapland et al (n179) 522.

³⁵⁰ Ibid.

A vigorous and determined effort has to be made by South African judicial officers to embrace a new model of sentencing serious crimes to enable both victims and offenders to benefit from the positive effects of restorative justice. Including restorative justice into the South African sentencing paradigm for sentencing adult offenders convicted of serious crime, allows for the opportunity ‘to build a far a more accountable, intelligible healing system of justice and law’ by taking into consideration the needs of the victims and offender.³⁵¹

5.2 Recommendations

The hybrid model will address the concern of South Africa’s Supreme Court of Appeal which declared that the application of restorative justice in serious crime ought to be carefully considered so as not to devalue its status as an important sentencing tool and to protect the reputation of criminal justice and public interest.³⁵² Some guidance is required from a guideline case to pave the way for the use of restorative justice in sentencing adult offenders convicted of serious crime. The enactment of legislation to this effect will be needed at some point to ensure consistency in the use of restorative justice in serious crime. The guidelines set out by Batley should be adopted to ensure safety of victims.³⁵³ Safeguards regarding risks to victims in serious offences should be put in place and the process should be entirely voluntary.

As a starting point it is recommended that restorative justice should initially be applied in serious cases where the offender and victim are somewhat familiar with each other as a pilot project to evaluate its efficacy. After a restorative justice process, the matter can then be finalized by the judicial officer at his/her discretion which could take into consideration the positive outcomes of a restorative justice process as mitigating factors. This will also apply where the outcomes of a restorative justice process are inconsistent with criminal justice principles. The use of restorative justice for serious crime may or may not exclude imprisonment and at the most it may well reduce the terms of imprisonment for an offender at the discretion of the judicial officer.³⁵⁴

³⁵¹ Umbreit & Armour (n104) 89.

³⁵² *Thabethe* (n1) at para [20], 575I-J, 576A-B.

³⁵³ M Batley (n238) 15-16.

³⁵⁴ FWM McElrea (n200) 50.

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