

RESTORATIVE JUSTICE CENTRE

MEDIA RELEASE: COMMENT ON THE JUDGMENT BY THE SUPREME COURT OF APPEAL IN MATTER OF THE STATE VS THABETHE (THE USE OF RESTORATIVE JUSTICE IN A CASE OF RAPE)

The headline in the report “Restorative justice for rape doesn’t fit the crime’ (Pretoria News 6 October 2011) is rather misleading, and an oversimplification of the judgement handed down by the Supreme Court of Appeal in this matter.

All parties in the matter agreed that restorative justice can be a useful foundation for sentencing; the judge was also explicit that he was not laying down a general rule regarding the use of restorative justice. The conclusion the court reached was that in this specific matter, the original outcome ordered by Judge Bertelsmann of the North Gauteng High Court was not appropriate. We must thus be careful not to generalize this finding too far, and infer that restorative justice cannot be used in serious cases. A restorative approach to sentencing seeks to keep the needs of victims in focus, and to consider how best the harm they have suffered can be addressed, while taking other considerations, such as community safety, into account as well.

Our typical approach to sentencing based on the idea of retribution leads us to think that unless there is a suitable amount of punishment, justice has not been served. However, we seldom stop to consider whether such an approach really addresses the needs of victims or whether it is effective in deterring the individual concerned and others from committing similar crimes in future. There is considerable research to suggest that punishment alone does not address these any of these concerns well; in effect all it does is express society’s outrage at the crime in question. This is obviously one of the things we expect from our courts, but perhaps there are other, more constructive ways of denouncing behaviour that evokes “feelings of outrage and revulsion”?

This case and its various judgments challenge us to consider these issues afresh, and present an opportunity for constructive debate about how best to respond to the deeply disturbing problem of rape generally, and more specifically rape within

families. The original order by Judge Bertelsmann attempted to address this matter in a creative way. It was prompted by his concern for the needs of the victims and was based on the principles of restorative justice. While the order had some shortcomings, its orientation was positive. The SCA judgement is disappointing in a number of ways. It does not properly address these fundamental questions, but remains entirely within the conventional approach, which has already been proved seriously inadequate. It has also missed an opportunity to provide constructive guidelines for dealing with matters such as these in future by addressing issues such as how much weight the views of victims should be given, and how to manage power imbalances when parties involved in a matter engage with one another.

The RJC hopes that the judgement does not have the effect of limiting the creativity of judges and magistrates in seeking to provide meaningful responses to crime, balancing the needs of victims and obligations of offenders.

The submissions of the RJC as *amicus curiae* in this matter can be found on www.rjc.co.za.

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