

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal case no: 619/2010
NGHC case no: 468/06

In the matter of:

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
TRANSVAAL**

APPELLANT

AND

PAULUS KAM THABETHE

RESPONDENT

RESTORATIVE JUSTICE CENTRE

AMICUS CURIAE

SUBMISSIONS OF THE *AMICUS CURIAE*

OVERVIEW OF THESE SUBMISSIONS

1. These submissions begin with an **Introduction**, which explain the nature of the amicus curiae and its reasons why it requested to be admitted to present submissions in this matter.
2. The introduction is followed by a **description of the definitions of restorative justice**

3. The submissions then move on to demonstrate the **extent to which restorative justice is recognised** by South African law.
4. Several **misunderstandings in the appellants argument about restorative justice** are corrected, in particular that,
 - 4.1 The use of restorative justice **negates the seriousness of the offence**
 - 4.2 The use of restorative justice is **contrary to the interests of the community**
 - 4.3 The use of restorative justice **is contrary to the usual sentencing principles.**
5. The submissions then set out a basis for the **meaningful acknowledgement of victims' views in sentencing**, with reference to foreign case law.
6. The submissions then move on to the **sentencing process** that was followed in this matter, with particular reference to **power imbalances**, and also discuss problems with the **sentence itself**.
7. The conclusion includes a **remedy** that the matter be **referred back** to the court *a quo* for **reconsideration of the sentence**.

INTRODUCTION

8. The Restorative Justice Centre (the RJC) is a non-profit, non governmental organisation which promotes peace-making and peace-building through

restorative justice and conflict transformation processes. The RJC has been working in this field for over 12 years and offers both practical experience and theoretical knowledge in the area of restorative justice. The RJC has frequent contact and collaboration with communities regarding restorative justice.

9. The reason why the RJC has entered as *amicus curiae* in this matter is firstly, to offer a theoretical basis for aspects of the judgment made by the court *a quo*, and to throw light on some of the misunderstandings about restorative justice that are evidenced by the Heads of Argument of the appellant, and to some extent by the process and order of the court *a quo*.

10. Secondly, the *amicus curiae* is concerned that the positive developments in a new restorative justice jurisprudence in South Africa may receive a setback through this matter. The *amicus* therefore earnestly and respectfully endeavours to provide sufficient information for the thorough exposition of the restorative justice principles applicable to this matter, to ensure that this Court is able to make a judgment that is rooted in a proper understanding of restorative justice.

11. Whether this Court decides to uphold the sentence of the court *a quo*, to replace it with another sentence or refer the matter back for reconsideration of sentence, the *amicus* is concerned that the progressive approach to restorative justice that has thus far been enunciated by the South African should not be eroded. Whatever this Court's decision about the application of restorative justice in this matter, it is important that the effect of the judgment

is not to close down the opportunity for the application of restorative justice in cases where it can be appropriately applied.

12. The third reason for the *amicus*' intervention is that despite the developments in restorative justice there is much about the application of restorative justice in the South African context that is as yet unexplored. There are questions about whether restorative justice approaches can or should be used in serious crimes, about whether the community's (apparent) demand for retribution must outweigh the views of the individual crime victim and about the proper role of the victims' views in sentencing. These and other important questions will be explored in these submissions.

13. Fourthly, the submissions will go beyond a theoretical exposition, however, and will also traverse specific issues relating the conduct of this particular case. There were some errors in the way in which the process was conducted, and there are flaws in the sentence itself which give rise to a concern that it may not have been properly carried out or monitored. Recommendations arising from this are that the matter should be remitted back to the court *a quo* for a fresh report on how effectively the sentence has been carried out and on the current circumstances of the family. In the light of such report, and the benefit of guidance from this court, the sentencing court will then be in a position to make any necessary changes to the sentence, or to replace the sentence with an alternative such as correctional supervision, or if appropriate, imprisonment.

DEFINING RESTORATIVE JUSTICE

14. The Directors-General in the government's justice, safety and crime prevention cluster have recently approved a Restorative Justice National Policy Framework (RJ NPF).

15. Restorative justice is defined in the RJ NPF 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, and taking measures to prevent a recurrence of the incident and promoting reconciliation; this may be applied at any appropriate stage after the incident."

16. The RJ NPF quotes The UN Handbook on Restorative Justice Programmes' definition of a restorative process as;

"...any process in which the victim and the offender, and where appropriate any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator".¹

17. The RJ NPF goes on to make some important distinctions:

¹ United Nations Office on Drugs and Crime 2006. **Handbook on Restorative Justice Programmes**. United Nations Criminal Justice Handbook Series available at http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf [last accessed 4 December 2008].

Restorative approaches: these include initiatives such as non-custodial sentences. Interventions that contain restorative elements, such as cognitive and behavioural change programmes that address sexual behaviour, general life skills or vocational training. The distinctions between approaches, processes and interventions are important; although they are all based on the underlying philosophy of restorative justice to a greater or lesser extent the terms cannot be used synonymously. It is also important to note that both processes and interventions can be applied at a pre-trial, pre-sentence and post-sentence stage of criminal proceedings.²

18. In restorative justice theory, it is well understood that the central question to be asked following an incident is 'who has been harmed?', followed by 'what can be done to repair that harm?'. This is in contrast with the standard criminal justice response to an incident which is 'who has committed the deed?', followed by 'how can he or she be punished?'³

19. In the Constitutional Court judgment of **Dikoko v Mokhatla 2006 (6) SA 235 (CC), at para 114** Sachs J described the following elements of restorative justice: encounter, reparation, reintegration and participation.

20. It has been observed by several writers that restorative justice has a special resonance with African customary law processes.⁴ In such processes disputes

² Warner Roberts *Is Restorative justice tied to specific models of practice?* In Zehr, H, and B Toews (eds), *Critical Issues in Restorative Justice* (2004) 241-252.

³ See Zehr *Changing Lenses* (1990) 186.

⁴ Kgosimore 'Restorative justice as an alternative way of dealing with crime' 2002 *Acta Criminologica* 69; Roche 'Restorative justice and the regulatory State in South African townships' 2002 *British Journal of*

are treated in much the same way whether they are civil or criminal, and this tendency to avoid a strong distinction between civil and criminal wrongs is also a feature of restorative justice. Acceptance of responsibility, making restitution and promoting harmony are the key outcomes in all kinds of disputes.

THE EXTENT TO WHICH RESTORATIVE JUSTICE IS RECOGNISED BY SOUTH AFRICAN LAW

21. A full three pages of the latest updated version of du Toit's *Commentary of the Criminal Procedure Act*⁵ are devoted to Restorative Justice in the context of sentencing. The *Commentary* authors acknowledge that the principles of restorative justice can, when appropriate, be accommodated into the sentencing process and are not necessarily confined to minor offences.

22. South African restorative justice jurisprudence has developed significantly over the past decade. The first reported judgment that expressly mentioned restorative justice was the Constitutional Court case of **Dikoko v Mokhatla 2006 (6) SA 235 (CC)**, which was a delictual matter. Whilst the majority of the court awarded a hefty claim of financial damages, the two separate but concurring minority judgments by Justices Mokgoro and Sachs, focused instead on a restorative justice approach, making the point that dignity could not be restored through disproportionate punitive monetary claims, and that apology would have

Criminology 514; Tshehla 'The restorative justice bug bites the South African criminal justice system' 2004 *SACJ* 1.

⁵ Du Toit et al *Commentary on the Criminal Procedure Act* Juta [Service 2009] at 28-10A to 10-B1 (listed in bibliography under Van der Merwe).

been a more powerful tool, more in keeping with African notions of *ubuntu* and our constitutional commitment to dignity.

23. Although the restorative justice jurisprudence in **Dikoko** is contained in the minority judgments, it should be noted that a unanimous Constitutional Court has recently endorsed restorative justice in another delictual matter, **Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae) 2011 (3) SA 274 (CC)**. The Court expressly stated that 'it is time for our Roman Dutch common law to recognise the value of this kind of restorative justice', and went on to say that although the law cannot enforce reconciliation, it should create the best conditions for making it possible.⁶

24. In the field of criminal justice, the Constitutional Court has also encouraged a restorative justice approach. In **S v M (Centre for Child Law as Amicus Curiae) 2007 (12) BCLR 1312 (CC)**, dealt with the duties of a sentencing court when sentencing a primary care-giver of children. Sachs J, writing for the majority, characterised correctional supervision as providing better opportunities (than imprisonment) for a restorative justice approach. He found that restorative justice recognises that the community, rather than the criminal justice agencies, are the prime site of crime control. He also spoke about the significance of making repayments of defrauded money on a face-to-face basis, because "restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing."⁷ (para 71).

25. Although **Dikoko** was the first case to refer expressly to restorative justice, there were two written judgments of the High Court that preceded it, but were only

reported later as **S v Shilubane 2008 (1) SACR 295 (T)** and **S v Maluleke 2008 (1) SACR 49 (T)**. The unreported judgments were referred to approvingly by Sachs J in **Dikoko**.⁸

26. In **S v Shilubane**, Bosielo J, as he then was, (Shongwe J concurring) stated that 'in line with the new philosophy of restorative justice', a more appropriate sentence in that case would have been compensation to the victim coupled with a suspended sentence, rather than the 9 months of direct imprisonment that the offender had received for the theft of seven fowls.

27. The judgment in **S v Maluleke** arises from a case in which a woman was found guilty of murder in that she and her husband (who died before the trial commenced) beat to death a young intruder who had broken into their house. She was destitute and a mother of four. The victim's mother was hurt by the fact that no-one from the offender's family had come to their house to apologise for the wrongdoing, and she expressed a desire for this type of interaction. The sentence imposed was 8 years imprisonment, suspended for 3 years on condition, inter alia, that the offender should give an apology to the victim's family.

28. In the case of **S v Saayman 2008 (1) SACR 393 (E)** Port Elizabeth the accused was convicted of the six counts of fraud. She was sentenced to a suspended sentence linked to correctional supervision, coupled with a further condition that she should stand out in the open, to ask for forgiveness from the victims, by standing in entrance to the commercial crimes court, under supervision of a

⁶ Le Roux v Dey at para 202.

⁷ S v M para 71.

⁸ Dikoko v Mokhatla at para 115.

police official. She was required to stand there for fifteen minutes on a specified date, holding a placard bearing an apology to victims. The court distinguished between “stigmatising shaming” and “reintegrative shaming”,⁹ and found that the condition of sentence had the effect of stigmatising and of violating the accused’s right to dignity. The court found that sentence was therefore not in keeping with the principles of restorative justice, even though the magistrate had intended to follow a restorative justice approach.

29. The case law indicates that the courts are forging a new restorative justice jurisprudence. However, there remain questions about the theory and practice of restorative justice, and the next sections of these submissions deal with some of the questions that have been (and others that should have been) raised in the context of this case.

MISUNDERSTANDINGS ABOUT RESTORATIVE JUSTICE IN THE APPELLANTS’ HEADS OF ARGUMENT

30. The Appellant argues that the court a quo misdirected itself by approaching the determination of sentence from the perspective of restorative justice thereby negating the seriousness of the offence, the interests of the community, and the sentencing principles traditionally applied.

Appellants HOA page 11, para 12.1.

31. There are a number of misunderstandings about restorative justice contained in this ground of appeal. The submissions will discuss each in turn.

⁹ This distinction was first made by Braithwaite in *Crime, Shame and Reintegration* (1989) 102.

Use of restorative justice negates the seriousness of the offence

32. The statement that using a restorative justice approach negates the seriousness of the crime, implies that restorative justice cannot be applied in serious cases. However, later in the heads of argument it is conceded by the Appellant that 'restorative justice may find appropriate application in instances where serious crimes are in issue but will inherently not restore the scales of justice if applied as the foremost sentencing principle and only lip service is paid to traditional sentencing considerations'.

Appellant's HOA page 14, para 12.1.2.

33. With regard to the question of whether, and in what circumstances, restorative justice can be used in serious crimes, it is useful to note the experience of others who have been undertaking such work.

34. Whilst in the early years the majority of cases handled by the victim offender mediation were property cases, there has been a gradual increase in the number of more serious cases referred to them.

35. Researchers writing about mediation in selected cases of serious offences are cautiously optimistic about the results.¹⁰ Preliminary data indicates exceptionally high levels of client satisfaction, and this is a positive indicator for this emerging application of restorative justice.

¹⁰ Flaten "Victim-Offender Mediation: Application with Serious Offenses Committed by Juveniles" in Galaway and Hudson (eds) *Restorative Justice: International Perspectives* (1996) 388-401; Umbreit *et al* (2003) 141-142; Gustafson (2004) 302.

36. Writing in the South African legal journal, *Acta Juridica*, Umbreit *et al* have described their victim-offender dialogue work in violent cases in the United States.¹¹ They explain that the work with serious crimes began because victims of more serious crimes began to request victim offender meetings (which were being used in less serious cases).¹² The programmes described by Umbreit *et al* are very violent (including sniper shootings) and do not imply an alternative to imprisonment, but rather a parallel process which aims primarily at giving victims a sense of vindication.

37. Umbreit *et al* describe the following benefits for victims, based on their descriptions of what they had derived from the experience:

‘[T]hey had finally been heard, the offender now no longer exercised control over them; they could see the offender as a person rather than a monster; they felt more trust in their relationships with others; they felt less fear; they were no longer preoccupied with the offender; they felt peace; they would not feel suicidal again; and they had no more anger’.

38. Recently, New Zealand Judge Fred McElrea has published an article on 20 years experience in restorative justice. He observes that ‘the more serious the harm, the greater need for healing on the part of the victims and the greater the potential for restorative justice’.¹³

39. These experiences show that it is simplistic to view a restorative justice approach as being inapplicable to serious offences. To take that view is to

¹¹ Umbreit, Vos, Coates and Brown ‘Victim-offender dialogue in violent cases: A multi-site study in the United States’ (2007) *Acta Juridica* 22.

¹² Umbreit *et al* (2007) *Acta Juridica* 22 23 records that in the early 1990s various agencies started to explore the use of restorative justice in serious crimes. By 2007 there were 19 states in the USA that provide for victim offender dialogue in crimes of severe violence. See also

ignore the fact that victims of serious crimes want and need vindication and acknowledgement of the wrongdoing, and they often do not get that from the criminal justice system. A criminal justice system which refuses the possibility of restorative justice application in serious offences is not sufficiently flexible to allow victim's needs to be met.

40. To sum up on the issue of seriousness: Restorative justice (whether as a general approach, processes or interventions) may find application in relation to all crimes, no matter how serious. The reason for this is that restorative justice provides the victim optimal opportunity for acknowledgement, vindication, healing and closure.

41. The level of seriousness of the crime will play a role in the determination of how restorative justice will find application – it might not prevent the offender from going to prison, but can be a parallel part of the sentence. In other serious cases where, for example, the offender represents a low risk to society, restorative justice can result in a sentence that avoids imprisonment.

42. Another issue is the fact that although this crime was not as serious as some other cases where restorative justice has been applied (such as murder), it was a sexual crime, and the victim was a child. These factors raise concerns about 'power imbalances' These submissions will return to that issue under the heading 'The Sentencing Process'.

¹³ Mc Elrea 'Twenty years of restorative justice in New Zealand – Reflections of a judicial participant (2011)

Use of restorative justice is contrary to the interests of the community

43. The Appellant's second leg of their rejection of the application of restorative in this matter rests on the idea that such application is contrary to the interests of the community. The idea behind this is that even if the victim did not want the offender to go to prison, the community is assumed to want him to go to prison, so the victim's views should be dislodged by the (assumed) views of the broader community.

44. In **S v M (Centre for Child Law as Amicus Curiae) 2007 (12) BCLR 1312 (CC)** the Constitutional Court stressed, as a factor in favour of correctional supervision served entirely in the community, that the community should not be seen 'simply as a vengeful mass uninterested in the moral and social recuperation of one of its members.'¹⁴

45. The community certainly has a legitimate interest in seeing crime denounced. In **Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC)** Chaskalson CJ held that 'at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens'.¹⁵

46. The court went on to say that the power of denunciation, although important, is constitutionally constrained, and the means used to denounce crime must be compatible with the values society seeks to affirm.

Journal of Commonwealth Criminal Law 44 at 49.

¹⁴ S v M para 75.

¹⁵ Home Affairs v NICRO para 57.

47. In restorative justice, a central value is listening to the victim, and recognising her needs as central to the resolution of the crime. A restorative justice approach would thus place a higher value on the needs of the victim, but would not ignore the importance of denunciation of crime. However, the departure point of restorative justice would not assume that the community mindlessly seeks vengeance. The community also has an interest in seeing the victim healed.

48. The interests of the community also rest in their own safety being preserved. In this case the court *a quo* assumed that the offender posed little risk to the community. Presumably this was because he was in his 30s and this was his first offence, it was done on the spur of the moment, he was remorseful and was aware of the wrongfulness of his actions. The fact that the mother continued to allow him contact with her other children after the incident may also have suggested to the court *a quo* that the offender was not a risk. It is submitted that risk is an important factor, and the court *a quo* should have been more explicit about this aspect.

Use of restorative justice is contrary to the usual sentencing principles

49. The third leg of the Appellant's rejection of the use of a restorative justice approach is that it is contrary to the usual sentencing principles.

50. 'The usual sentencing principles' are presumably retribution, deterrence and rehabilitation. The early years of restorative justice debates were marked by intense exchanges highlighting the differences between the retributive and restorative justice approaches. However, in recent years there has been some recognition of the similarities between the two approaches.

51. Howard Zehr was the first author to develop a fully theorised model of restorative justice in his book *Changing Lenses* in 1990. In that book he contrasted models of retributive and restorative justice, and this has subsequently been criticised.¹⁶ In 2002 Zehr acknowledged these criticisms and conceded as follows:

'In my earlier writings I often drew a sharp contrast between the retributive framework of the legal or criminal justice system and a more restorative approach to justice. More recently, however, I have come to believe that this polarization may be somewhat misleading. Although charts that highlight contrasting characteristics illuminate some important elements in differentiating the two approaches, they also mislead and hide important similarities and areas of collaboration.'¹⁷

52. Zehr¹⁸ recognises that both retributive and restorative theories of justice acknowledge "a basic moral intuition that a balance has been thrown off by the wrongdoing". Where the two approaches differ is on the currency that will right the balance. Retribution as punishment seeks to vindicate and reciprocate, but it uses pain or punishment as its measure.

53. Braithwaite (a restorative justice advocate) has found some common ground between the retributivist and restorative approaches: what liberal modern

¹⁶ Zedner 1994 *Mod L R* 228-250.

¹⁷ Zehr *The Little Book of Restorative Justice* 58.

retributivists have in common with most restorative justice advocates is that they are all reductionists when it comes to punishment. They would all wish to place upper constraints or limits on the kinds of punishments that can be meted out for certain kinds of crimes, so that severe punishments, such as the use of imprisonment, should only be used for serious crimes. However, just deserts theory (modern retributivism) would also require the setting of lower limits, so that proportionality can be maintained, whilst restorative justice theorists would not require punishment, relying instead on the participants in the process to decide on the outcome.¹⁹

54. To sum up on this issue: It is a common misunderstanding to view a retributive approach to justice as being completely at odds with restorative justice. However, there are obviously differences in the two approaches. These differences centre on how wrongs caused by the crime will be put right. The retributive system focuses on punishment of the offender, whilst restorative justice tends to focus more on the harms and needs of the victim, and the obligations that the offender has to put the wrong right.

MEANINGFUL ACKNOWLEDGEMENT OF VICTIM'S VIEWS IN SENTENCING

55. A question that should have been, but was not properly canvassed during the deliberations or in the judgment of the court *a quo* is the vexing question of how to give a meaningful role in sentencing to the voice of the victim.

¹⁸ Zehr 'Journey to belonging' in Weitekamp and Kerner (eds) *Restorative Justice: Theoretical Foundations* (2002) 29.

¹⁹ Braithwaite 'Principles of Restorative Justice' in von Hirsch, Roberts, Bottoms, Roach and Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) page 1-20.

56. There is a trend – both world wide and in South Africa – towards giving victims more of a voice in sentencing. Indeed, this is one of the factors that gives restorative justice wide appeal – it provides a central role to the harms and needs of the victim.

57. This court has recently stated the following in **S v Matyityi [2011] 2 All SA 424 (SCA)**

‘An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also need to be victim-centred’.²⁰

58. The court went on to describe the UN Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as the Service Charter for Victims of Crime in South Africa. These instruments seek to give victims the right to participate and proffer information during the sentencing stage:

‘The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and in future is likely to have.’²¹

59. The court went on to say that if a sentencing court has at its disposal information pertaining to both the accused and the victim, a more balanced approach to sentencing can be achieved. This should enhance proportionality rather than harshness. The court quoted Muller and Van der Merwe as follows:

‘It is extremely difficult for any individual, even a highly trained person such as a magistrate or judge, to comprehend the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual

²⁰ S v Matyityi para 16.

²¹ Ibid.

brings with himself or herself a different background, a different support system, and therefore, a different manner of coping with the trauma flowing from the abuse'.²²

60. In **Matyityi** the court increased the sentences for rape and murder to life imprisonment. In **Matyityi**, there were multiple offences, the use of brutal violence resulting in death of a man and the gang rape of a woman under threat of death. The court found that there had been insufficient reasons for departing from the minimum sentence. Remorse was dubious, the "relative youthfulness" was off the mark as he was 27 years old, the guilty plea left the court with inadequate information about the victims.

61. What **Matyityi** does not fully explain, however, is if, having obtained the views of the victim, the court is faced with a request that the offender not be sent to prison. Do the victim's views carry the day?

62. The problem with basing sentenced entirely on the views of the victim is that some victims are more merciful, whilst others may be vengeful. Principles of proportionality and equality in sentencing will be compromised if we consider the victims views as the only factor in sentencing.

63. However, to make sentencing meaningful, we cannot listen to the views of the victims and then completely ignore those views. The views of victims must be central to sentencing, but must be considered alongside other factors.

²² Muller and Van der Merwe "Recognising the Victim in the Sentencing Phase: The Use of Victim Statements

64. An important issue to be considered is the safety of the community. There needs to be a sincere effort at assessing the risk that an offender poses to other members of society besides the victim. This can assist with whether to use a non-custodial sentence, or if a sentence of imprisonment is deemed unavoidable, will influence its length.

65. Case law from England illustrates how the views of the victim can be incorporated, and can have the effect of reducing the sentence. In the Law of England and Wales anyone experiencing injury or loss from crime may make a 'victim personal statement'.

66. In **R v Perks 2001 1 Cr App R (S) 19**, Garland J of the Court of Appeal explains how victim's views may be considered.

'The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, subject to two exceptions (i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. (ii) Where the victim's forgiveness or unwillingness to press charges provides evidence that his or her psychological or mental suffering must be very much less than would normally be the case'.

67. In **R v Nunn [1996] 2 Cr App R (S) 136** the accused had caused the death of someone through dangerous driving. The family of the deceased said that the sentence was too long and was making it difficult to cope with the trauma, as they also knew the offender and felt he had suffered enough. The court again drew out the exception of a sentence that is compounding the anguish of the victim:

'The court is concerned not with the judgment of the deceased mother and sister about the level of sentence imposed on the applicant, but with the clear evidence, which we accept, that by its very length the sentence on [the

victim's] friend is adding to the grief and anxiety which they are suffering ... When the mother and sister of the deceased and the rest of the family have already suffered so much, we do not think that these adverse consequences of this particular sentence should be disregarded. In mercy to them we shall reduce the sentence as far as we can, consistent with our continuing public duty to impose appropriate sentences for those who cause death by driving dangerously under the influence of a drink'.

68. The case of **R v Mills [1998] 2 Cr App R (S) 252** involved attempted rape by a former partner of the victim. In this matter the court considered the importance of evidence of an improving relationship of between the defendant and the victim. The sentence was reduced from 6 to 3 years:

'It is clear that the victim in this case has chosen to forgive the perpetrator of the crime, and has said so in terms, perfectly genuinely. That cannot decide the appropriate level of sentence, but we take her evidence into account as indicating the current context of the impact of this particular crime on the victim. Having considered the matter in the light of the information before us, we have come to the conclusion that the sentence ... was too long'.²³

69. **Perks, Nunn and Mills** take a balanced approach to victim's views, remaining firm on the importance of objectivity in sentencing, but confirming that when a victim's anguish is increased by the sentence, then the sentence can be reduced in recognition of this.

70. Applying that approach to this case, the views of the victim are in line with the exceptions set out in **Perks**, namely (i) the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree and (ii) the victim's forgiveness provides evidence that his or her psychological or mental suffering must be very much less than would normally be the case'. The presence of these exceptions would mean that the victim's views could take a central role in the consideration of sentencing.

This, together with the low risk of the offender to other persons in society, would have been reasons to apply a restorative justice approach in this case.

THE SENTENCING PROCESS

Use of restorative justice process prior to sentence

71. The record suggests (in the words of the judge himself) that it is highly unusual to utilize victim offender mediation as part of the sentencing process.

Record pp 113, line 5-7 (Application for leave to appeal).

72. While it may be unusual to do so in current sentencing practice in South Africa, there is nothing misguided in the concept of utilizing this mechanism at this point of proceedings. Indeed, utilizing this process can be invaluable in addressing a victim's needs for validation, acknowledgement, restitution, redress and apology, and integrating these into a meaningful sentence.²⁴

73. In his recent journal article, Judge Fred McElrea of New Zealand describes the system used in that country, where judges use their discretion to postpone matters during the sentencing process, to allow for a family group conference to take place. The information from the conference is presented back to court to inform the sentencing process.²⁵

²³ R v Mills at 254.

²⁴ Van der Merwe ('Therapeutic jurisprudence: Judicial officers and the victims's welfare – S v M 2007 (2) SACR 60 (W)' (2010) SACJ 98 at 101) in a comparison of restorative justice and therapeutic jurisprudence explains that 'restorative justice processes can find application at the pre-trial, pre-sentence, sentence and post-trial stages'.

²⁵ McElrea (2011) JCCL 44 at 49.

74. Likewise, s 73 the South African Child Justice Act allows for referral to a family group conference or victim offender mediation prior to sentence. The recommendations of those processes are then presented back to the sentencing court which can (but is not obliged to) make them a sentence.

Managing power imbalances

75. The appellant's arguments for the rejection of a restorative justice approach in this matter is the problem of power imbalances that are present. There are two different types of power imbalance at work – one is that the matter is a sexual offence, and the other is that the victim was a child at the time of the offence, and is the stepdaughter of the offender. According to the record, she was not supported by anyone else (other than her mother) at the victim offender conference. She was aware that she and her family were dependent on the offender. In view of this it would probably have been difficult for her to express herself freely. There is also very little indicated about the impact of the offence on her, raising questions about whether her voice was really heard and whether the harm she had suffered was fully acknowledged.

76. Kathleen Daly²⁶ looks at the question whether restorative justice is appropriate in cases of sexual violence. She cautions at the outset of her essay that the problem of responding justly to such cases- refraining from punitive responses that further brutalize perpetrators without appearing to accept their violent behavior - is ultimately insoluble.

77. Yet, because sexual assaults occur, Daly pursues the problem in terms of its two components: how to treat harms as serious without harsh forms of punishment or hyper-criminalization? and how to do justice in an unequal society? She contends there may be a way forward in addressing the problem of responding justly if three things are done, which she explores in this essay: (1) rehabilitate 'retribution' and make it part of restorative justice processes; (2) redefine the harm of rape, other forms of gendered harms, and violence more generally; and (3) recognize the variety of meanings and contexts of sexual violence, domestic violence, and family violence.

78. New Zealand, Judge FWM Mc Elrea recently dealt with the issue of power imbalance and restorative justice in a conference paper entitled 'Restorative Justice and Sexual Abuse – A New Zealand Perspective'.

79. He says the following:

'Recently one of my colleagues, Her Honour Judge Jan Doogue, challenged the assumptions underlying certain provisions of our domestic violence legislation. She said this:

"The Domestic Violence Act 1995 and s.16B of the Guardianship Act 1968 were based on the classification of violence within the power and control model. In my experience and that of other Judges this model does not fit the profile of many cases coming before the Family Court in New Zealand. Research and experience supports the proposition that in New Zealand some children are being deprived of contact with a parent who has been alleged or judged to be violent when that is not in their best interests ... we need to provide a more sophisticated approach to the implementation of this legislation, all the while recognising that it is not fair or just to view all violence as fitting within the classification of the power and control model."

²⁶ Daly 'Sexual Assault and restorative justice' in H Strang and J Braithwaite (eds) *Restorative justice and family violence* (2002) 62-88. Accessed from www.restorativejustice.org 5 January 2011.

In a similar vein, I respectfully suggest that we cannot generalise about power imbalances, or assume that they rule out the use of restorative justice processes. What is needed instead is an assessment in each case as to whether it is suitable for restorative justice, and a **recognition that support is likely to be needed for both victim and offender to enable them to play a proper part in such a process**'. (emphasis added)

80. It is true that the victim in the current matter was a child of 15 (going on 16) when the crime occurred, and a court does indeed have to be careful about the fact that a child may be under pressure from family members. However, she was almost 19 years old when she testified in the sentencing court (not 17 as appellant's heads of argument state),²⁷ so although very young and vulnerable when the offence took place she had gained autonomy during the ensuing years following the offence.

81. This case may therefore distinguished, to some extent, from the case of **S v M 2007 (2) SACR 60 (W)**. That case also dealt with the rape by a stepfather of a girl who was below 16 (she was 14) years of age. Satchwell J found there were no substantial and compelling reasons to depart from the minimum sentence. Although there was evidence before the court that the girl had 'forgiven' her stepfather and did not want him to go to prison for such a long time, the Court disregarded it because there was other conflicting evidence that the child was emotionally alone, rejected and blamed by her mother, who could have influenced her to say this.²⁸

²⁷ The witness herself says she is 17 at the time when she testifies (Record page 33 line 18). However, her date of birth is given in the report compiled by the social worker as 7.11.1989 (Record page 125). This date of birth accords with the details of the offence which indicate that the victim was 15 years and 11 months old (18 days from her 16th birthday) at the time of the offence (15.10.2004). She testified almost 3 years later on 5.9.2007, and would have been 18 years, soon to turn 19 years, on the date of testimony.

THE SENTENCE

The sentence is vague and the supervision of the offender not sufficiently detailed. The method used by the judge to decide on the details of community service and attendance at programmes was not sufficiently rigorous.

It is submitted that the aims of what the court wanted to do could have been achieved more safely and predictably through a sentence of correctional supervision in terms of s 276(1)(h), which could have been coupled with a long term of imprisonment, conditionally suspended. That would have ensured a more reliable framework for ensured compliance. This sentence was amongst those recommended by the probation officer. **Record page 139, Probation Officer's report.**

CONCLUSION

Although this was a case where restorative justice could be applied, there were some problems with the process, and the theoretical underpinning of the judgment was insufficiently explained. The judge should, with respect, have subjected the victim's views and their relevance in sentencing to the same kind of analysis evidenced by the English case law.

²⁸ See Van der Merwe *SACJ* (2010) 1.

The major problem, however, lies with the sentence itself, which is vague and raises a concern that the sentence may not have been carried out fully. For this reason, it is the submission of the *amicus curiae* that the sentence cannot stand as it is.

It is respectfully submitted that this court, as a court of appeal, has insufficient information about the current circumstances of the victim, the offender and the other family members to decide what would be an appropriate sentence at this stage. It should be noted that the crime occurred on 15.10.2004, almost 7 years ago.

It is submitted that this court should provide guidance regarding an appropriate approach to sentencing in this matter. It is further submitted that the matter be remitted back to the sentencing court, where a new probation officer's report should be obtained, which will focus on whether the sentence has been complied with.

Once the court a quo has that information, and with the guidance of this court's judgment, it will be in a position to reconsider the sentence, and either adjust the sentence, or replace it with an entirely new sentence, such as correctional supervision, or if necessary (such as if the offender has failed to fulfil the terms of the sentence and such failure is his own fault) sentence the offender to a sentence of imprisonment.

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**PRETORIA
15 JULY 2011**

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