

## **RESTORATIVE JUSTICE IN SENTENCING: RECENT GUIDANCE FROM CASE LAW**

The South Africa legislature has twice defined restorative justice: the first time was in the Probation Services Act no 116 of 1991 (as amended by Act 35 of 2002), where it was defined as follows: “The promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child's parents, family members, victims and the communities concerned”. The second time was in the Child Justice Bill (B 49B 2002), which was passed by the National Assembly on 25 June 2008. The definition of restorative justice in this Bill is as follows:

“An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation”.

Although both of these definitions are concerned with child offenders, the utilisation of restorative justice is not limited to child offenders. However, much of South Africa’s experience in restorative justice has been achieved in the area of child justice, linked to Diversion.

The courts are more frequently attempting to utilise restorative justice. This is a practice that should be encouraged. However, it is important to understand the essence of restorative justice properly, because there is a risk that if used incorrectly human rights infringements may occur.

In the case of *S v Saayman* 2008 (1) SACR 393 (E) restorative justice came in for some careful examination regarding the concepts of “shaming” and the constitutional right to dignity. In the commercial crimes court of Port Elizabeth, the court had pleaded guilty and was convicted of the six counts of fraud amounting to a total value of R13 387,21. The frauds committed by her had led to certain of the complainants, whose identities she had fraudulently used, being black-listed by the Credit Bureau, thereby causing them embarrassment and inconvenience.

In sentencing the accused the regional magistrate indicated that he wanted the sentence to provide some measure of relief for the victims of the crime.

To a suspended sentence linked to correctional supervision, he added 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 police official. She was required to stand there for fifteen minutes on a specified date, holding a placard bearing an apology to victims. When an application for leave to appeal was brought before the magistrate he explained that what the Court was attempting to achieve was “to try and restore the relations between the parties by assisting the accused to tender an apology in public to the complainants.”

The questions that were central to the review proceedings was whether the condition imposed by the magistrate accorded with restorative justice principles and whether it passed constitutional muster. On both counts, the Court found that the order, as creative and well-intentioned as it may have been, was not consonant with restorative justice principles, and that it was unconstitutional on the basis that infringed the right to dignity. The court, with reference to Braithwaite (1989), distinguished between “stigmatising shaming” and “reintegrative shaming”, and found that the condition of sentence had the effect of stigmatising and of violating the accused’s right to dignity.

When recommending sentences that contain a restorative justice element (or where this is recommended as a diversion, prior to trial) it is necessary to ensure that no stigmatising shame tactics are used. The essential elements of a restorative justice process is to bring together the victim and the offender (together with their support persons) in a meeting that is facilitated by a trained person. There may be sentencing options that involve restorative justice ideas that do not include a face-to-face meeting (because in some cases the victim does not want such a meeting, and a restorative justice approach must always respect the views of the victim). Examples might include letters of apology or offers to compensate or put right the wrong in some way. These aspects of sentencing are to be welcomed because they deal with the needs of the victims as well providing the opportunity for the offender to be held accountable in a constructive way. The case of Saayman should not be read as a discouragement to creative restorative sentencing – indeed the court applauds such endeavours - but

nevertheless reminds us that the protection of dignity (for victims and offenders) remains a key goal in all sentencing.