

THE ROLE OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM: A SPECIFIC FOCUS ON VICTIM OFFENDER MEDIATION AND VICTIM IMPACT STATEMENTS

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CHAPTER 1

INTRODUCTION

1.1 General introduction

It is submitted that if one had to identify the main role-players in the criminal justice system, the most commonly identified would be the accused, their legal representative, the prosecutor and the presiding officer. However there is one crucial role-player that is often forgotten, namely the victim. If it was not for the victim or complainant opening the docket and initiating the criminal process, the accused, legal representative and other parties would not even feature. Within our current legal system the victim seems to be one of the neglected and overlooked parties, when in actual fact they should be seen as a vital role player in the criminal justice process.

This dissertation's purpose is to discuss and analyse the current state of victims' rights within our criminal justice system. Furthermore it aims to discuss the recent emergence of the restorative justice principle, how it functions, how it's applied as well as the benefits and shortcomings. Two forms of restorative justice will be discussed in detail namely: victim-offender mediation and victim impact statements, how it functions, how our law recognises the principles and its reception in case law. As a state prosecutor working for the National Prosecuting Authority practical examples of real life situations will be provided. This serves to illustrate the workings of the principles of restorative justice within the criminal justice system currently.

Submissions will be made as how to officially recognise the above-mentioned concepts in our law so that they can be acknowledged by all role players within the criminal justice system and be properly and consistently applied. This will serve to afford victims a greater role in the criminal justice system. This above-mentioned consistency will lead to a more efficient criminal justice system. It will also ease the current competing tension between the rights of victims and the rights of accused and create a fair balance between victim, offender and society.

1.2 Tension between the rights of accused and the rights of victims

Within the criminal process there are two competing interests namely; the rights of the accused versus the rights of victims of crime. The accused has the right to a fair trial and various other rights as contained in the Constitution.¹ Victims of crime should be entitled to have rights of their own and should be seen as one of the major role players in the criminal justice system. What is questionable is which rights should be seen to take preference, the rights of the victim or the rights of the accused. Furthermore is it submitted whether it is indeed possible to create a workable balance between the two that will be suitable to all interested parties. This dissertation aims to answer and set forth suggestions on how to create that balance. It is said “Victims’ rights cannot be promoted at the cost of the curtailment of the fundamental rights of others.”²

It is submitted that restorative justice can assist in easing this tension between competing rights. A way of perceiving restorative justice is that it balances out a number of competing interests, for example it balances accused’s rights and victim’s needs, it furthermore aids with rehabilitation of accused and protection of the public, as well as balancing retributive justice and therapeutic forms of justice.³

1.3 No express recognition of victims in the Constitution

In the analysis of the Constitution it is very clear that arrested, detained and accused persons are entitled to numerous rights as contained in section 35 of the Constitution. Arrested, detained and accused persons are thus expressly catered for and protected by our Constitution. Upon further inspection of the Constitution it can be noted that victims of crime or the so called ‘silent parties’ in the criminal justice system are not granted any direct recognition by the Constitution. What this serves to portray in the perception of the general public is that all these rights that the

¹ The Constitution of the Republic of South Africa (hereinafter referred to as the Constitution).

² Meintjies-Van der Walt L “Towards victims’ empowerment strategies in the criminal justice process” (1998)

11 South African Journal of Criminal Justice 157 at 159.

³ Liebmann M (2007) *Restorative Justice: How it works* London: Jessica Kingsley Publishers at 33.

accused are granted seem to facilitate criminal conduct⁴. It is said that “While our Constitution contains two-and-a-half pages on the rights of suspects and the accused, it is silent on the rights of victims of crime.”⁵

1.4 The current state of the criminal justice system as well as improving the efficiency of the criminal justice system

The South African Interim⁶ and Final Constitution brought about tremendous change within our country especially within the criminal justice system. Although only enacted for about fifteen years, it has had a vast impact. The criminal justice system today is incredibly overburdened and this is due to the fact that crime is currently rampant in South Africa.⁷ It is submitted that due to the overburdening the whole justice system is slowed down and matters take longer to be finalised.

Furthermore, due to high level of crime the result in a large amount of victims of crime. It has been said that there are “High levels of dissatisfaction regarding the usual treatment victims receive at the hands of the criminal justice system.”⁸ It is submitted this high level of dissatisfaction is probably caused by the fact that with the numerous matters in court there is very little time to give each and every victim the attention they require. Thus it is submitted that viable options and solutions are required in order to improve the efficiency of the criminal justice system.

It has been stated, prior to the emergence of restorative justice in our law that:

“If restorative justice is to be recognised in South Africa – and in the light of the serious challenges faced by our country’s criminal justice system and the perennial overcrowding of our correctional institutions there can be little doubt that its application and integration into our law is essential.”⁹

⁴ Meintjes-Van der Walt (1998) 11 *SACJ* 159.

⁵ Camerer S “What about the victims?” *De Rebus* Archived issues (1999) January Feature Articles at 1.

⁶ Constitution of the Republic of South Africa Act 200 of 1993.

⁷ Meintjes-Van der Walt (1998) 11 *SACJ* 157.

⁸ Strang (2002) *Repair or Revenge: Victims and Restorative Justice* Oxford: Clarendon Press at 19.

⁹ *S v Tabethe* [2009] JOL 23082 (T) at 8 par 39.

1.5 Problems and alternatives: restorative justice, victim-offender mediation and victim impact statements

As discussed above the current problems faced are that of severely overburdened courts and overcrowded prisons. This point is illustrated by the fact that on the South African national public holiday Freedom Day in 2012, the state president provided a special remission of sentences for certain offenders as an aim of reducing the amount of overcrowding in prisons.¹⁰ Due to the overcrowding in prisons and the environment, rehabilitation of offenders is a challenge. Furthermore as mentioned above the victims are the forgotten third parties in the whole process. Due to these above-mentioned problems workable solutions have been established.

It is submitted that what was required was an alternative solution whereby victims received the recognition they were entitled to, offenders were able to receive rehabilitation, processes were shortened and court rolls were reduced. The ideal of restorative justice thus made its way into our law. Restorative justice¹¹ takes on many different forms. Two of the forms which go hand in hand are that of victim-offender mediation and victim impact statements.¹² In several decisions which will be discussed in detail the restorative justice ideals and principles made use of were a combination of both of the above. In the cases of *Maluleke*¹³ as well as *Tabetha*¹⁴ victim offender and victim impact statements were made use of.

¹⁰ <http://www.dcs.gov.za/>

¹¹ Defined and discussed at par 2.2.

¹² Bekker JC et al “Indigenous legal systems and sentencing: *S v Maluleke* 2008 1 SACR 49 (T)” (2009) *De Jure* 239 at 245.

¹³ *S v Maluleke* 2008 1 SACR 49 (T).

¹⁴ *S v Tabetha* [2009] JOL 23082 (T).

CHAPTER 2

VICTIMS' RIGHTS, RESTORATIVE JUSTICE IN GENERAL AND THE HISTORY OF RESTORATIVE JUSTICE

2.1 Victims' rights

Twenty five years ago there was no such thing as victims' rights movements, victims were the "forgotten third parties" in the criminal justice system.¹⁵ What led to the emergence of the victims' movement was the rise in criminal activities and the fact there was suddenly an influx of victims.¹⁶ The same can be true from a South African perspective, over the past few years there has been a vast increase in criminal activities. Seemingly, the introduction of restorative justice into our law and its emergence in case law seemed to coincide with this increase in criminal activities.

It is stated "Although the state achieved its monopoly in criminal law enforcement centuries ago, in recent years activists have worked to swing the pendulum back toward greater involvement by victims in the criminal process."¹⁷ Victim offender mediation can be seen to be a product or result of the "victims' rights" movement.¹⁸

2.2 Restorative justice

There are two types of justice namely retributive and restorative justice. While retributive justice focuses on the accused alone and punishing him for the criminal acts he has done, restorative justice focuses on the accused, victim and the general community and how to ensure all their interests are served.¹⁹ To come up with a

¹⁵ Strang (2002) 27.

¹⁶ Strang (2002) 27.

¹⁷ Roche D (2004) *Restorative Justice* Trowbridge Wiltshire: The Cromwell Press at 205.

¹⁸ Roche (2004) 205.

¹⁹ Naude *et al* "Restorative justice: a global overview of its functioning and effectiveness" (2003) 16(5) *Acta Criminologica* at 1.

single definition of restorative justice is a difficult task, this is due to the fact it can take many different forms and be implemented in various ways.²⁰

The United Nations Commission on Crime Prevention and Criminal Justice defines it as follows.²¹

Restorative justice: “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. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.²²”

However it is submitted the definition that covers restorative justice adequately stems from Canadian Law:

“Restorative justice is an approach to justice 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 crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime, and seek a solution that affords healing, reparation and reintegration, and prevents future harm.²³”

²⁰ Tshehla B “The restorative justice bug bites the South African criminal justice system” (2004) 17 *South African Criminal Law Journal* 1 at 6.

²¹ Tshehla (2004) 17 *SACJ* 7.

²² Skelton A et al “Restorative justice: A contemporary South African review” (2008) 21(3) *Acta Criminologica* 37 at 38.

²³ Tshehla (2004) 17 *SACJ* 7.

2.3 How victims' rights extension led to restorative justice

While it is all very well to recognise an ideal of victims' rights it is another process to implement these rights. It is submitted that due to the fact that there was an emergence of victims' rights, there had to be a manner in which to recognise and enforce these rights. It is further submitted by making use of restorative justice principles the victims' rights can be enforced, promoted as well as protected. Restorative justice was thus a method through which victims' rights could practically be extended. It is stated "Innovation in criminal justice systems is being driven largely by the victims' movement and calls for greater consideration of the victims of crime."²⁴

Due to outrage on the part of the public with regard to crime rates, violent crime and the growing recognition of victims' rights the South African Law Commission researched and published a paper dealing with restorative justice.²⁵ In this paper the response of the public regarding restorative justice issues and various topics regarding recognition of the victim was requested.²⁶

It is submitted that it is abundantly clear that there is a direct correlation between the extension of victims' rights and restorative justice.

2.4 Restorative justice versus rehabilitation

In the process of rehabilitation the focus is only on the offender. It is stated that rehabilitation "Focuses almost entirely on the offender, with little concern being paid to the victim."²⁷ In restorative justice, the focus is on both the victim and offender. The aim being to restore the parties as far as possible to the position they were in before the specific criminal offence took place.

²⁴ Hargovan H "Restorative approaches to justice: 'compulsory compassion' or victim empowerment" (2007) 20(3) *Acta Criminologica* 113 at 114.

²⁵ Meintjies-Van der Walt (1998) 11 *SACJ* 160.

²⁶ SA Law Commission Issue Paper 7 Project 82 *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)*. Meintjies-Van der Walt (1998) 11 *SACJ* 158 and 160.

²⁷ Skelton *et al* (2008) 21(3) *Acta Criminologica* 47.

A problem experienced is that with the overcrowding in prisons rehabilitation of offenders is very difficult to implement.²⁸ A further reason to prefer restorative justice as opposed to rehabilitation is that it has various advantages. To list a few: repeat offending has been reduced, the victims post-traumatic stress symptoms have also been reduced, costs involved in the justice system have been reduced because many matters are diverted away from the normal justice system and finally victims and offenders have been greatly satisfied with the implementation of restorative justice, more so than with the normal justice system.²⁹

What makes restorative justice so valuable is that it both forward and backward looking, meaning that it deals with the effects of the crime that had happened and how future offending can be eliminated.³⁰ Rehabilitation however is not as forward looking.³¹ Despite the above-mentioned the Department of Correctional Services have said “Rehabilitation is central to all our activities.”³²

It has been stated “A highly professionalised approach to rehabilitation is entirely unfeasible, given our current crime levels and scarce professional human resources.”³³ What makes restorative justice stand out is that the victim is the key party and that accused are to take full responsibility for their actions.³⁴ It is therefore submitted restorative justice is to be preferred over rehabilitation.

2.5 Why accused has a right to dignity when they have violated the victims' right to dignity

South Africa is said to have one of the most comprehensive Constitutions in the world. “Everyone has inherent dignity and the right to have their dignity respected and protected.”³⁵ Therefore no matter the gravity of the offence the accused has committed they are entitled to protection under the Constitution. It is said “Far too

²⁸ Skelton et al (2008) 21(3) *Acta Criminologica* 47.

²⁹ Skelton et al (2008) 21(3) *Acta Criminologica* 40.

³⁰ Skelton et al (2008) 21(3) *Acta Criminologica* 47.

³¹ Skelton et al (2008) 21(3) *Acta Criminologica* 47.

³² Skelton et al (2008) 21(3) *Acta Criminologica* 46.

³³ Skelton et al (2008) 21(3) *Acta Criminologica* 48-49.

³⁴ Skelton et al (2008) 21(3) *Acta Criminologica* 49.

³⁵ Section 10 of the Constitution of the Republic of South Africa.

much emphasis is placed on the well-being and rights of the offender.³⁶” It is submitted that it may be seen as unfair that an accused has a right to dignity even if they have violated a victim’s right to dignity in an extreme manner.

The following serves as an example:

“The complainant was asleep in her home, thinking she was safe, when the two accused broke in, attacked her and raped her. They violated her privacy and dignity and showed her no respect for her as a fellow human being. And as if that was not enough, they made her walk the streets at night only half dressed in a t-shirt to show them where her sister was.³⁷”

From the above it is clear this was a serious violation of the victim’s dignity. It is submitted that what needs to take place is a balance between the accused’s right to dignity and the victims right to dignity, neither one should be seen as more important than the other. No matter the gravity of the offence the accused has committed they are still entitled the right to dignity under our Constitution. The role restorative justice can indirectly play is to restore the victims’ right to dignity that is impaired when an offence is committed against them.

2.6 *Zinn triad and the extension by Isaacs as well as the impact of Matityi*

In *S v Zinn*³⁸ the duty of a presiding officer when imposing a sentence was laid down: “What has to be considered is the triad consisting of the crime, the offender and the interests of society.³⁹” The above-mentioned was the position from 1969 onwards.

In 2002 the Cape Provincial Division handed down a decision in *S v Isaacs*.⁴⁰ This particular case also dealt with the factors to consider when imposing sentences. What is of particular importance about the *Isaacs* decision is that the court held: “The

³⁶Davis L et al “Sensitising students on offenders rights, victim rights and the administration of justice” (2002) 15(2) *Acta Criminologica* 106.

³⁷As per Judge Goldstein in *S v Ncheche* 2005 (2) SACR 386 (W) at 391 F-G.

³⁸*S v Zinn* 1969 (2) SA 537 (A).

³⁹*S v Zinn* 1969 (2) SA 537 (A) at 540 G-H.

⁴⁰*S v Isaacs* 2002 (1) SACR 176 (C).

triad itself reflected an outmoded view of punishment in that it neglected to take into account the interests of the victim which might well differ from those of society.^{41”} This case served to highlight that there are actually four factors to consider when considering an appropriate sentence; the personal circumstances of the accused, the nature and seriousness of the offence, the interests of society and the interests of the victim.

In *S v Matyityi*⁴² a decision handed down by the Supreme Court of Appeal, victims' rights were afforded an even more prominent roll. This case is seen to be as 'squaring of the triad'. The facts of the matter were briefly as follows: there were two separate incidents which took place at a secluded beach. The first incident involved a man being robbed and assaulted, his cash, bank cards, cell phone and car were taken and he was tied to a tree. In the second incident one of the victims was raped and the other was killed, the deceased was the boyfriend of the victim who was raped. The trial court misdirected itself by saying the rape complainant had suffered no injuries from the incident. The court held as follows:

“To the extent that he may have been referring to permanent physical injuries one can hardly quarrel with that conclusion. But, with respect, to restrict the enquiry to permanent physical injuries...is to fundamentally misconstrue the act of rape itself and its profound psychological, emotional and symbolic significance.”^{43,}

In paragraph sixteen and seventeen the court gives an in depth analysis of victims rights and the position in South Africa. “An enlightened and just penal policy requires consideration of a broad range of sentencing options...it also needs to be victim centred.”^{44”} The judgment proceeds to highlight that restorative justice is the basis of victim empowerment in South Africa.

⁴¹ *S v Isaacs* 2002 (1) SACR 176 (C) at 177 B-C.

⁴² *S v Matyityi* [2010] JOL 26275 (SCA).

⁴³ *S v Matyityi* [2010] JOL 26275 (SCA) at 5 par 10.

⁴⁴ *S v Matyityi* [2010] JOL 26275 (SCA) at 9 par 16.

The court held as follows:

“By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim the court will only have half of the information necessary to properly exercise its sentencing discretion.^{45”}

It is submitted that this case can be praised due to the fact the Supreme Court of Appeal has finally recognised and taken into account the rights of victims.

2.7 Recognition of restorative justice through case law

Recently restorative justice has begun to receive recognition by our courts and presiding officers. The first case was that of *Shilubane*.⁴⁶ The accused was sentenced to nine months imprisonment without the option of a fine after he was convicted of theft of seven chickens to the value of two hundred and sixteen rand. The matter went on review due to the shocking gravity of the sentence when compared to the fact that the accused was a first offender, had pleaded guilty and had shown remorse. This was the first decision by which restorative justice officially began to make its way into our law.

The court held “I have little doubt in my mind that, in line with the new philosophy of restorative justice, that the complainant would have been more pleased to receive compensation for his loss.^{47”} The court held further:

“Unless presiding officers become innovative and pro-active in opting for other alternative sentences to direct imprisonment, we will not be able to solve the problem of overcrowding in our prisons...There is abundant

⁴⁵ *S v Matyityi* [2010] JOL 26275 (SCA) at 10 par 17.

⁴⁶ *S v Shilubane* [2005] JOL 15671 (T).

⁴⁷ *S v Matyityi* [2005] JOL 15671 (T) at 3 par 4

empirical evidence that retributive justice has failed to stem the ever-increasing wave of crime.⁴⁸,

The landmark case in which restorative justice received true recognition is that of *Maluleke*.⁴⁹ The facts were briefly as follows: the accused was charged with the crime of murder, the victim was a young person who broke into the accused's house. The deceased had been found in the accused's house and his death had been caused by an assault upon him. The accused was from a small community and the deceased was well known to the accused, he was in fact her extended family. The mother of the deceased came to testify on the hurt and loss the family had gone through. The defence asked if she would consider seeing a representative from the accused's family to try and restore the damage done and the relationship between the two families.⁵⁰ She agreed to this provided the accused told her the reason for murdering her child.⁵¹

The accused was sentenced to eight years imprisonment wholly suspended for three years on condition he apologised to the deceased's family and mother according to traditional custom. Due to the unique circumstances of this situation the chance to introduce restorative justice into sentencing was created.⁵²

The court held the following:

"While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime...they overlook important requirements for the delivery of justice, namely; considering the needs of victims, helping offenders to take responsibility on an individual level and nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.⁵³"

⁴⁸ *S v Matyityi* [2005] JOL 15671 (T) at 3 par 5.

⁴⁹ *S v Maluleke* 2008 (1) SACR 49 (T).

⁵⁰ *S v Maluleke* 2008 (1) SACR 49 (T) at 52 par 19.

⁵¹ *S v Maluleke* 2008 (1) SACR 49 (T) at 52 par 20.

⁵² *S v Maluleke* 2008 (1) SACR 49 (T) at 52 par 25.

⁵³ *S v Maluleke* 2008 (1) SACR 49 (T) at 52 H-I.

The presiding officer highlights that *Shilubane*⁵⁴ was the only judgment he was able to find from South Africa where the advantages of restorative justice are recognised.⁵⁵ It is submitted that this serves to highlight the newness of this concept and the lack of formal recognition thereof.

The court quite correctly stated:

“It is obvious that restorative justice cannot provide a single and definitive answer to all the ills of crime and its consequences...properly considered and applied, may make a significant contribution in combating recidivism...and assist their ultimate reintegration into society.⁵⁶”

It further held:

“In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender, and the community and offender. It may provide a whole range of supple alternatives to imprisonment. This would ease the burden on our overcrowded correctional institutions.⁵⁷”

It is submitted that the case of *Maluleke* aided the recognition and application of restorative justice in our law to a great extent.

⁵⁴ See par 2.7.1..

⁵⁵ *S v Maluleke* 2008 (1) SACR 49 (T) at 54 par 32.

⁵⁶ *S v Maluleke* 2008 (1) SACR 49 (T) at 54 C-D.

⁵⁷ *S v Maluleke* 2008 (1) SACR 49 (T) at 54 E-F.

CHAPTER 3

VICTIM-OFFENDER MEDIATION

3.1 Definition and general information

A form of restorative justice can take is victim-offender mediation. This is defined as follows:

Victim-offender mediation: “This is a process in which an impartial third party helps the victim(s) and offender(s) to communicate, either directly or indirectly. The mediation process can lead to greater understanding for both parties and sometimes to tangible reparation.⁵⁸”

Victim offender mediation is not another form of justice but rather something that can compliment and combine with the current criminal justice system.⁵⁹ “It focuses on caring, dialogue, forgiveness, reconciliation, accountability and reintegration, and the community plays a crucial role in the mediation process.⁶⁰” What is unique about victim-offender mediation is that in different areas and countries it is implemented in different manners, this is due to the fact it depends on the culture and beliefs of people implementing it.⁶¹

3.2 At what stage victim-offender mediation can be utilised

Victim offender-mediation can be used at various stages of the criminal justice process. Firstly it can be used as an alternative to the normal criminal court; this would be at the pre-trial stage. The prosecutor in a case is *dominus litus* which means that they have a discretion and are entitled to decide how a particular case

⁵⁸ Liebmann (2007) 27.

⁵⁹ Naude B et al “Protocol and ethical guidelines on restorative mediation” (2003) 16(5) *Acta Criminologica* 23.

⁶⁰ Naude et al (2003) 16(5) *Acta Criminologica* 23.

⁶¹ Naude B et al “Restorative mediation practices” (2003) 16(5) *Acta Criminologica* 10 at 11.

should be dealt with.⁶² The implication of this is that a prosecutor will identify a case they find suitable for victim-offender mediation, consult with the victim to ensure they agree to the mediation and also inform the accused or his legal advisor that they are considering mediation.⁶³

The decision to implement victim-offender mediation depends on each individual prosecutor but criminal cases usually considered are those of common assault, assault with intent to do grievous bodily harm where the injuries inflicted are not too serious or crimes against property such as malicious injury to property.⁶⁴ People considered are usually first offenders, young adults or people in relationships with one another such as family and close friends. The matter is referred to a social worker who conducts the mediation, should the mediation be successful the social worker sends a completion report to the prosecutor and the matter is withdrawn.⁶⁵ The matter is thus diverted from the normal criminal process; the accused is not prosecuted and has no criminal record.⁶⁶

A further stage it can be used at is during the trial. This is if the presiding officer exercises their discretion and the situation allows for it. If one looks at the case of *Tabethe*⁶⁷ the presiding officer Judge Bertelsmann requested that a victim-offender programme be organised for the accused and the victim. It is submitted that although this was an unusual stage for this programme to be implemented, in this particular situation it served a valuable purpose.

The final stage it can be used at is the sentencing phase. Victim-offender mediation can be used as a condition of sentence if the presiding officer so wishes. In the case of *Maluleke*⁶⁸ this is exactly what Judge Bertelsmann did. As a condition of suspension of sentence he ordered that the accused apologised to the mother and family of the deceased according to traditional custom. This was not a formal controlled mediation but can be seen as an informal victim-offender mediation

⁶² Skelton et al (2008) 21(3) *Acta Criminologica* 43

⁶³ Skelton et al (2008) 21(3) *Acta Criminologica* 43.

⁶⁴ Skelton et al (2008) 21(3) *Acta Criminologica* 43.

⁶⁵ Skelton et al (2008) 21(3) *Acta Criminologica* 43 and 44.

⁶⁶ Skelton et al (2008) 21(3) *Acta Criminologica* 44.

⁶⁷ *S v Tabethe* [2009] JOL 23082 (T).

⁶⁸ *S v Maluleke* 2008 (1) SACR 49 (T).

process. The eventual outcome is the same, namely restoring the relationship between the parties and promoting healing.

The following practical example can be given from a real life court situation that occurred. An accused and the victim had been in an altercation which led to the accused stabbing the victim in the face with a broken beer bottle and as a result thereof the victim lost his left eye. During the trial it became apparent that the reason for the altercation was the fact that the victim had called the accused “a silly Venda” and further said “all Venda’s are rude and disrespectful.” After hearing this, the presiding officer informed the victim and offender that apart from handing down a sentence she was also instructing them to go see the social worker for victim-offender mediation to resolve the issues and cultural differences they seemed to have between each other.

3.3 Victim-offender mediation as applied in case law

Victim-offender mediation although recognised in case law has much less recognition than victim impact statements. The reason for this being that in most of the cases the mediation diverts the matter from the normal criminal court process; the matters do not proceed to trial as they are withdrawn after the successful mediation. Therefore if the cases do not go to trial there can be no reported cases and precedents on these types of situations.

As mentioned above two decisions that saw the application of victim-offender mediation are those of *Tabethe* and *Maluleke*.⁶⁹ It is submitted what is interesting is that both these decisions come from the Transvaal Provincial Division and Judge Bertelsmann was the presiding officer that handed them down.

3.4 Victim-offender mediation and violent crimes

Victim-offender mediation is often used in minor crimes such as assault or malicious injury to property, in these cases the mediation is used as a diversion process from

⁶⁹ See above at par 3.2. Maluleke discussed at 2.7.2 Tabethe 4.2.3.

the normal criminal system.⁷⁰ If the mediation process is held after the sentence has been handed down, then possibly more serious and violent crimes can also be referred for mediation.⁷¹

What seems to be less common is the use of mediation in violent crimes. It remains an undecided question as to whether mediation in violent crimes could serve a valuable purpose. Most of the research done on victim-offender mediation in violent cases can be credited to *Mark S. Umbreit*.⁷²

What can be said about mediation and violent crimes is that it will not be beneficial to every situation but can be successful if applied in select cases.⁷³ When applying mediation in cases as such care should be taken, this is due to the fact the process should not cause more trauma for the victim.⁷⁴ Victims need to be sure it is what they really want and they can handle the situation on an emotional level.

From studies it has been shown that victim-offender mediation when applied to violent crimes has in certain cases been very beneficial to both the accused and the victim.⁷⁵ It has been said that “Only after meeting the person who killed her husband, face-to-face, that she was able to move beyond the bitterness in her heart and to gain a greater sense of peace.”⁷⁶ It is therefore clear that in some situations this mediation might make the victim’s life easier and help them to get through the difficult situation brought upon them by the offence.

While mediation may be much easier to apply in minor offences, sight should not be lost of the fact that it can be beneficial if used with regard to violent crimes. This however should be done with circumspection and judged on a case by case basis.

⁷⁰Naude *et al* (2003) 16(5) *Acta Criminologica* 14.

⁷¹ Wright M and Galaway (eds) (1989) *Mediation and Criminal Justice: Victims, offenders and community* Newbury Park: Sage Publications at 11.

⁷² Umbreit MS *et al* “Victim-offender dialogue in violent cases: a multi-site study in the United States”(2007) 28(2) *Acta Juridica* 22-39; Wright & Galaway (eds) (1989) 99.

⁷³Umbreit *et al* (2007) 28(2) *Acta Juridica* 38.

⁷⁴ Umbreit *et al* (2007) 28(2) *Acta Juridica* 38.

⁷⁵ Wright & Galaway (eds) (1989) 101.

⁷⁶ Wright & Galaway (eds) (1989) 107.

3.5 Victim-offender mediation and an apology

While apology might not go hand in hand with the adversarial legal system it does with the concept of restorative justice.⁷⁷ An apology serves to play a vital and prominent role in victim-offender mediation. The concept of apology is also well recognised in case law, as mentioned above with the case of *Maluleke*⁷⁸ where an apology to the mother and family of the victim was seen to be so important that it was made a condition to a suspended sentence. In the further case of *Tabethe*⁷⁹ an apology also played a prominent role, this was due to the fact the victim was satisfied with a sincere apology given by the victim and such was seen to be a mitigating factor on the accused's behalf.

It has been said "Apology has therapeutic potential as part of a broader process in which the perpetrator acknowledges the emotions, including anger, expressed by the victim."⁸⁰ It also tries to focus on the healing of the victim rather than on the punishment for the accused.⁸¹ It is therefore submitted that a sincere apology plays a vital role in restorative justice processes.

3.6 Role of prosecutors in the application of victim-offender mediation

It is submitted that within our criminal justice system there is room for informal mediation. This however is decided on a case by case basis and will be dependent on the particular prosecutor. In a particular situation especially where the accused and the complainant are known to each other, a prosecutor can even mediate a matter between the two parties. The outcome would be an apology to the wronged party, returning stolen property, or repairing or replacing a damaged item. The matter is thus resolved outside of court and the complainant is restored to their

⁷⁷ Swart M "Sorry seems to be the hardest word: apology as a form of symbolic reparation" (2008) 24 *South African Journal on Human Rights* 50 at 53.

⁷⁸ *S v Maluleke* 2008 (1) SACR 49 (T).

⁷⁹ *S v Tabethe* [2009] JOL 23082 (T) discussed fully below at par 4.2.3.

⁸⁰ Winkel FW et al "Victim-offender dialogue: An analogue study examining the impact of apology on anger" (2010) 23(1) *Acta Criminologica* 1 at 2.

⁸¹ Winkel et al (2010) 23(1) *Acta Criminologica* 2.

original position, which might not always be the outcome should the matter have gone on trial.

It has been stated that “Prosecutors should be encouraged to view their relationship with the victim as being analogous to the attorney client relationship, rather than regarding (and treating) victims as mere witnesses or disposable ‘evidence material’.⁸²” It is submitted that a prosecutor has insight into the docket before any other parties and should therefore identify matters for possible victim-offender mediations as soon as possible. What is required is a pro-active prosecutor, who supports and applies the processes of victim-offender mediation and the ideals of restorative justice.

3.7 Requirements in order for victim-offender mediation to function

It is submitted victim-offender mediation is a very beneficial tool to make use of, furthermore there is not much effort required in order to implement it. Some of the most important requirements for it to function are as follows: firstly to ensure its success all role players in the criminal justice system need to be informed and trained regarding the process.⁸³ Mediators also need to be trained on what exactly is required of them when conducting a mediation session.⁸⁴ For example offenders need to acknowledge liability for the offence and be willing to participate in the process and victims should be protected and treated with sympathy in order to avoid harm towards them, these are important points that all mediators need to be aware of.⁸⁵

Other than education of all the role players what is required are social workers and mediators in order to conduct the victim-offender mediation. Currently the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)⁸⁶ plays a very important role in providing social workers and services.

⁸² Camerer (1999) 2.

⁸³ Naude et al (2003) 16(5) *Acta Criminologica* 23.

⁸⁴ Naude et al (2003) *Acta Criminologica* 16(5) 23.

⁸⁵ Naude et al (2003) *Acta Criminologica* 16(5) 28.

⁸⁶ Hereinafter referred to as NICRO and discussed fully below at par 5.2.

It is possible for prosecutors to conduct these mediations, however it is submitted that an independent party would result in a more fair approach and the perception to the accused, victim and general perception that the process is fair. It is said the management of this victim-offender mediation should be independent to the criminal justice system.⁸⁷

3.8 Advantages and shortcomings

Victim-offender mediation has various advantages and shortcomings. The main advantages are it can be used for anyone: young or old offenders, men and woman and furthermore it can also be applied for numerous offences. It is said “Restorative justice mediation is a flexible, transportable paradigm.⁸⁸” Furthermore it is submitted it helps to heal old wounds and helps with the rehabilitation process for victim as well as offender.

An article written by a Magistrate in Greytown *Van Rooyen*⁸⁹ involved a practical example of victim-offender mediation. Various advantages were obvious from the process. One to highlight is that the process seemed to instil peace between the parties, disputes were settled for good and no parties returned to court after the process had been conducted.⁹⁰ In conclusion he remarked the mediation process resulted in “more serious offences getting preferential treatment and resulting in a court roll where matters are finalised without undue delay.⁹¹”

It is submitted victim-offender mediation can prevent further dockets being opened. Issues that parties may have could be personal and motivated by vengeance, these issues could also be due to ongoing problems between parties. Mediation could ensure the issue is resolved once and for all, instead of having a continuous cycle of

⁸⁷ Wright & Galaway (eds) (1989) 12.

⁸⁸ Naude et al (2003) 16(5) *Acta Criminologica* 11.

⁸⁹ Van Rooyen GH “Blessed are the peacemakers: victim-offender mediation in the criminal justice system-a practical example” (1999) 12 *South African Criminal Law Journal* 62-64.

⁹⁰ Van Rooyen (1999) 12 *SACJ* 64.

⁹¹ Van Rooyen (1999) 12 *SACJ* 64.

dockets being opened. Victim-offender mediation has also served to reduce recidivism to criminal ways.⁹²

To illustrate above a real life situation that occurred at court can be made use of. Two brothers are involved in a fight, after the fight the one brother is so enraged he decides to take revenge and proceeds to take a pair of scissors and cut up his brother's clothes. A docket is opened, the accused comes to court and faces a charge of malicious injury to property. It is submitted victim-offender mediation would be the quickest and simplest route in order to resolve this matter and at the conclusion of the mediation the parties' relationship will possibly be restored.

Apart from the process being beneficial to the victim as well as the accused one of the most important advantages is the impact on the court roll. The overburdened court rolls are eased, matters are diverted away from the normal criminal process and prosecutors are able to give their time and attention to more serious matters. The same point was also highlighted by *Van Rooyen*⁹³ above.

Victim-offender mediation can be said to have the following possible shortcomings. Offenders must acknowledge that they did indeed commit the crime and be willing to take part in the mediation; even more important is that victims must be willing to take part in the mediation process.⁹⁴ Situations where prosecutors refer the matter for victim-offender mediation without first consulting with the victim should be avoided.

The following practical example serves to illustrate the above-mentioned. The control prosecutor suggested a victim-offender mediation between two men, the offence committed was assault with intent to do grievous bodily harm. The prosecutor proceeded to court and withdrew the case on the basis a mediation was going to be conducted. The victim later came forward and said that he did not wish for a victim-offender mediation to be conducted, he wished for the matter to follow the normal trial procedure. It can therefore be noted that it is vital for the prosecutor

⁹² Naude et al (2003) 16(5) *Acta Criminologica* 14.

⁹³ See n 91.

⁹⁴ Naude et al (2003) 16(5) *Acta Criminologica* 28.

to first enquire and consult with the victim if they would be willing to resolve their matter through the mediation process.

It is submitted there will be times the victim-offender mediation will not be successful. This is due to the fact the process involves a compromise from both sides, the victim to come to terms with the incident and to forgive and be willing to accept an explanation or apology. On the other hand the accused needs to take responsibility for what they have done and give a sincere apology to the victim.

Furthermore the behaviour of the accused at the mediation may run the risk of causing further harm and damage to the victim. Further emotional trauma and the opening of old wounds for the victim might occur by seeing the offender.⁹⁵ Another risk is that offenders show a false sincerity in the matter in the hope that it will cause them to receive more lenient sentences.⁹⁶

It can be submitted however that the advantages of victim-offender mediation far outweigh the shortcomings. Through proper application and management the shortcomings can be avoided.

⁹⁵ Naude *et al* (2003) 16(5) *Acta Criminologica* 28.

⁹⁶ Wright & Galaway (eds) (1989) 10.

CHAPTER 4

VICTIM IMPACT STATEMENTS

4.1 Definition and general information

For a better understanding of this chapter some of the essential terms have been defined as follows:

Victim impact statement:

“Victim impact statement means a written statement by the victim or someone authorised to make a statement on behalf of the victim, which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.”⁹⁷”

Victim:

“The person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffered injury as a result of the offence.”⁹⁸ Therefore family members and people close to the direct victim also play a role in the process.

Victim-impact statements usually are made use of during the sentencing phase of the criminal process. It is submitted that this phase is an incredibly difficult one. A balance needs to be struck between the personal circumstances of the accused, the impact of the offence on the victim as well as the various principles of sentencing such as prevention, deterrence, retribution and so forth.⁹⁹

⁹⁷ Muller K et al “Recognising the victim in the sentencing phase: The use of victim impact statements in court” (2006) 22 *South African Journal on Human Rights* 647 at 650.

⁹⁸ Van der Hoven AE “The criminologist as an expert witness in court” (2006) 19(2) *Acta Criminologica* 152 at 163.

⁹⁹ *S v Khumalo and Others* 1984(3) SA 327 (A).

Presenting evidence on the harm or injury a victim has suffered due to an offence has played a part in sentencing in criminal matters for a number of years, although not in a very organised and consistent manner.¹⁰⁰ Over the last few years it has gained far more exposure and the importance of involving the victim in the process has been realised.¹⁰¹ The Supreme Court of Appeal in the case of *Rammoko*¹⁰² recognised and supported victim impact statements as vital in order to make a fair decision on sentence.¹⁰³

4.2 Application in case law

In the case of *Van Wyk*¹⁰⁴ the complainant a 22 year old woman was raped repeatedly. Further charges faced by the accused were those of theft, kidnapping and assault. The facts were briefly as follows: the complainant was returning home after an evening out when the accused armed with a knife came across her, repeatedly raped her and forced her to have oral and anal sex and then proceeded to march her to her flat at knifepoint.¹⁰⁵

A report about the effect of this incident on the complainant was submitted to court. It contained *inter alia* the following:

“Complainant reported for the first three months after the assault she withdrew from her friends and boyfriend and described a state of prolonged shock...She experienced a set of psychological symptoms: sleeplessness, anxiousness, nightmares, severe appetite and weight loss, inability to be alone, associative symptoms, avoidance of males and depressive affective states...She also developed panic attacks...accompanied by visual, olfactory and auditory flashbacks to the alleged rape incident...Particularly

¹⁰⁰ Van der Merwe A “A critical evaluation of the use of victim impact statements in child sexual abuse cases” (2006) *De Jure* 422.

¹⁰¹ Van der Merwe (2006) *De Jure* 422-423.

¹⁰² *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

¹⁰³ van der Merwe (2006) *De Jure* 423.

¹⁰⁴ *S v Van Wyk* 2000 (1) SACR 45 (C)

¹⁰⁵ *S v Van Wyk* 2000 (1) SACR 45 (C) at 46 G-H.

depressed and made a suicide attempt by overdosing on her sisters sleeping pills.¹⁰⁶”

Mr Bouwer who represented the state also made available to the court poems that had been written by the complainant which served to help see the true suffering felt by a victim of rape.¹⁰⁷ After hearing all the factors as well as the helpful testimony regarding how seriously it had affected the victim, the accused was sentenced to life imprisonment for the rape.

It can be submitted the way this incident affected the complainant and the fact it was presented to court greatly affected the outcome in this matter. The personal factors of the accused were far outweighed by the serious effects of this incident on the complainant. Had it not been for the evidence of the report compiled on the complainant, the court would merely have had the accused personal details to rely on. The court could then only have considered those personal details in isolation and could have decided that substantial and compelling circumstances existed and then deviated from the minimum sentence of life. This illustrates the importance in obtaining the full facts on both the accused and victim, which results in a fair and balanced criminal justice system that recognises and protects all.

A further case to illustrate this would be that of O¹⁰⁸, the accused a gymnastics coach and misused his position by fondling young boys. This case involved three charges of indecent assault and one charge of attempted indecent assault, the victims being four boys between the ages of eight and twelve.¹⁰⁹. There was no evidence led as to how this incident had affected the boys, such as whether there had been psychological or physical harm.¹¹⁰

¹⁰⁶ *S v Van Wyk* 2000 (1) SACR 45 (C) at 50 I-51 A-C.

¹⁰⁷ *S v Van Wyk* 2000 (1) SACR 45 (C) at 51 D-F.

¹⁰⁸ *S v O* 2003 (2) SACR 147 (C).

¹⁰⁹ *S v O* 2003 (2) SACR 147 (C) at 147 F-G.

¹¹⁰ *S v O* 2003 (2) SACR 147 (C) at 150 A-B.

It is submitted the court incorrectly held as follows:

"That the accused had to be sentenced on the factual basis that none of his victims had suffered any injury or material harm as a result of his actions. If the State had wished to present aggravating circumstances in that respect, it had been free to do so."¹¹¹"

It is submitted the above can be harshly criticised and respectfully disagreed with. The fact that there were no victim impact statements or any information of the effects of this incident on the victims does not mean that there was no harm suffered by them. Mere silence on the effects of the crime does not at all equate with a victim expressly saying they had suffered no mental or physical harm.

There could have been various reasons why the evidence of the victims was not supplied. It could have been an oversight on the side of the state to not include the victims. Furthermore the victims or their parents could have decided against them testifying or giving information due to the fact that they are of such a young age and doing so might have been emotionally detrimental to them. It is submitted that the above judgment is the reason why there needs to be more recognition of the victim in the criminal justice system.

A case in which the wishes of the victim played an extreme role would be that of *Tabetha*.¹¹² The facts were briefly as follows: a fifteen year old girl was raped eighteen days before her sixteenth birthday by her mother's boyfriend. It should be noted that due to the fact the victim is under sixteen years of age a minimum sentence of life imprisonment is usually applicable in such circumstances.¹¹³ In this matter the victim herself testified on the impact the offence had on her.¹¹⁴ She stated *inter alia*, the following:

¹¹¹ *S v O* 2003 (2) SACR 147 (C) at 150 H-I and 161 I – 162 C.

¹¹² *S v Tabetha* [2009] JOL 23082 (T).

¹¹³ Criminal Law Amendment Act 105 of 1997 section 51(1) read with Part I of Schedule 2.

¹¹⁴ *S v Tabetha* [2009] JOL 23082 (T) at 3 par 19.

“...still deeply hurt by the fact that she had been subjected to a violent offence by a man she had trusted. On the other hand she pleaded to the court that the accused should not be sent to jail because the entire family, including herself, depended upon his income...She herself was still attending school and needed his support to continue her education.¹¹⁵”

The court of its own accord requested that a victim-offender programme be implemented between the victim and accused.¹¹⁶ A meeting was arranged between the two whereby the accused apologised and the victim accepted the apology.¹¹⁷

After the above meeting the victim said she was satisfied with the programme and the apology and yet again said she did not want the accused to be sent to prison.¹¹⁸ The court found that various substantial and compelling circumstances existed *inter alia*, the accused continued to support the family, the family was completely dependent on the accused, the victim herself requested for him not to be sent to jail and that both the accused and victim were part of a successful victim-offender programme.¹¹⁹

The sentence imposed on the accused was ten years imprisonment suspended for five years on various conditions *inter alia*: at least eighty percent of his income must be used for the support of the victim and her family, the support must carry on even if the accused and the victim's mothers relationship ends and the accused is to perform eight hundred hours of community service.¹²⁰

It is submitted that this judgment can be commended due to the fact that restorative justice receives recognition and plays a prominent role. However it can be submitted that perhaps the presiding officer went too far with the requests and wishes of the family as well as restorative justice. From the point of view of the family the sentence handed down is favourable to them. On the other hand however, the

¹¹⁵ *S v Tabethe* [2009] JOL 23082 (T) at 3 par 20.

¹¹⁶ *S v Tabethe* [2009] JOL 23082 (T) at 4 par 26.

¹¹⁷ *S v Tabethe* [2009] JOL 23082 (T) at 4 par 30.

¹¹⁸ *S v Tabethe* [2009] JOL 23082 (T) at 5 par 33.

¹¹⁹ For these and further factors see *S v Tabethe* [2009] JOL 23082 (T) at par 35 point a-x.

¹²⁰ For these and further conditions see *S v Tabethe* [2009] JOL 23082 (T) at 8 and 9 par 41 point a-h.

sentence perhaps did not coincide with the general public view of justice and fairness. Various question marks can be raised on whether this is the appropriate sentence for such a serious crime and if it is possible this decision could have been a result of relying too much on what the victim's wishes were.

The case of *Rammoko*¹²¹ canvasses the topic of needing to be aware of the impact of a rape on the victim. This case involved the rape of a thirteen year old girl. What was quite disturbing about this case is that there was no investigation was done or evidence led as to the effects the incident had had on the young girl or what after-effects will manifest in future.¹²² The mother of the victim testified, however nothing in her testimony dealt with how her daughter had been impacted by the rape either.¹²³ In matters of this nature it is vital to hear from the victim, a parent of the victim, a psychologist or even a school teacher what the current effect is on the victim and what the possible future effects would be.¹²⁴

It is submitted the question that requires to be answered is whose duty it was to ensure this vital evidence on the impact on the victim was led. What the court held is that this duty is not that of counsel for the state in isolation but that a presiding officer also has a responsibility to illicit information in this regard.¹²⁵

Therefore it can be submitted that there was an oversight on the side of the state as well as the presiding officer. The state in the sense that it did not serve and protect the victim to the best of their ability and the presiding officer in the sense that they did not make use of the provisions entitled to themselves in terms of section 274 of the Criminal Procedure Act.¹²⁶

What is apparent from our case law is that victim impact statements find their application mostly in instances of sexual offences. A prime example would be that of

¹²¹ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

¹²² *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 203 G-H.

¹²³ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 203 I-J to 204 A.

¹²⁴ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205 E-F.

¹²⁵ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205 F-G.

¹²⁶ The Criminal Procedure Act 51 of 1977. This topic is discussed more fully below at par 4.6.

*Abrahams*¹²⁷, where the victim a fourteen year old was raped by her father. The mother of the victim as well as a social worker led evidence on the impact of the incident on the victim; the evidence of both went unchallenged.¹²⁸

The court held that “An appropriate assessment entailed the obvious conclusion that the complainant had been deeply and injuriously affected by the rape. This was an aggravating factor and in failing to accord it greater weight the Judge had misdirected himself.”¹²⁹

On appeal the court heard evidence from the mother of the victim as well as the social worker on the impact of the rape on the victim.¹³⁰ “The social worker’s uncontested evidence was that Doreen herself could not be called because a second testimony, nearly a year after her first, would have damaging effects.”¹³¹

The mother’s testimony on the impact on the victim included *inter alia*, the following: she did not want to be in her own room, she had trouble sleeping, her schoolwork had deteriorated in that she had failed exams for the first time in her life and she had also withdrawn from all her neighbourhood friends.¹³² Furthermore the social workers testimony on the impact included *inter alia*, the following: the victim could not seem to work through her rape, she was having bad dreams about the event and was showing anti-social behaviour towards family members, friends and acquaintances.¹³³

Due to the presiding officer failing to take proper account of the aggravating factor of the impact on the victim, the accused sentence of seven years imprisonment was altered to twelve years imprisonment. It is submitted that one cannot disagree that this was the correct decision.

¹²⁷ *S v Abrahams* 2002 (1) SACR 116 (SCA).

¹²⁸ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 117 A-B.

¹²⁹ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 117 B-C.

¹³⁰ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 120 F-G.

¹³¹ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 120 G.

¹³² For these factors and the others see *S v Abrahams* 2002 (1) SACR 116 (SCA) at 123 F-J.

¹³³ For these factors and the others see *S v Abrahams* 2002 (1) SACR 116 (SCA) at 124 A-B.

It is submitted that the evidence of the impact on the victim is viewed in different ways by various presiding officers. If one goes further to compare differences in presiding officers' approaches to restorative justice the case of *Tabethe*¹³⁴ can be referred to. In *Tabethe*¹³⁵ the presiding officer took the evidence and wishes of the victim in such high regard that he imposed a suspended sentence for a case of rape whereas in contrast the interests of the victim were overlooked in *Abrahams*.¹³⁶

It is very important to note that the role of the victim plays a very different part in each and every judgment. It is submitted that due to the fact that all presiding officers differ in opinion, restorative justice will never be able to be uniformly applied and have the same impact in all cases. To illustrate this one presiding officer would give a suspended sentence and another would give a harsh fine.

A final case where victim impact statements were discussed is *Ncheche*.¹³⁷ This case is of importance due to its contrast to that of *Rammoko*.¹³⁸ This was also a case of rape where the minimum sentence of life imprisonment was applicable. It was stated:

“The High Court had failed to hear evidence on the effect of the rape on the complainant and, consequently, in considering whether ‘substantial and compelling circumstances’ existed or not, it had failed to take into account the emotional *sequelae* for the complainant.¹³⁹”

A minor complication in this matter was that the complainant had since the incident passed away and could thus not provide the court with the much needed evidence.

¹³⁴ *S v Tabethe* [2009] JOL 23082 (T) as discussed fully above at par 4.2.3.

¹³⁵ *S v Tabethe* [2009] JOL 23082 (T) as discussed fully above at par 4.2.3.

¹³⁶ *S v Abrahams* 2002 (1) SACR 116 (SCA).

¹³⁷ *S v Ncheche* 2005 (2) SACR 386 (W).

¹³⁸ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) as discussed in full above at par 4.2.4.

¹³⁹ *S v Ncheche* 2005 (2) SACR 386 (W) at 386 F-G.

Judge Goldstein however held that:

“It seems to me that cases of rape may be so serious that, regardless of the emotional *sequelae* for the complainant, they justify life imprisonment and the finding of the absence of substantial and compelling circumstances justifying a lighter sentence¹⁴⁰”.

4.3 Victims’ Charter

In the South African legal system a victims’ charter has been developed. The purpose of this charter is as follows: “The Services Charter for Victims of Crime in South Africa (2004) specifically refers to restorative justice and the importance of placing victims at the centre of the system.¹⁴¹” The Victim Empowerment Policy is a policy document that aims to inform victims of their rights and furthermore it aims at encouraging better responses by the various role players in the state service to people who have been victims of crime.¹⁴²

This policy consists of two important documents namely, *The Services Charter for Victims of Crime* and *Minimum Standards of Services for Victims of Crime*.¹⁴³ The former sets out responsibilities for members of criminal justice agencies involved with victims and how to avoid victims being subject to secondary victimisation.¹⁴⁴ Furthermore, it serves to set out victims’ rights such as the right to receive and offer information, the right to protection and the right to assistance to state but a few¹⁴⁵. The *Minimum Standards of Services for Victims of Crime* is a document that contains specific regulations and guidelines, these regulations apply to role players in the criminal justice system such as police and prosecutors and state how victims need to be treated.¹⁴⁶

¹⁴⁰ *S v Ncheche* 2005 (2) SACR 386 (W) at 394 F-G.

¹⁴¹ Hargovan (2007) 20(3) *Acta Criminologica* 114.

¹⁴² Hargovan (2007) 20(3) *Acta Criminologica* 116.

¹⁴³ Hargovan (2007) 20(3) *Acta Criminologica* 117.

¹⁴⁴ Hargovan (2007) 20(3) *Acta Criminologica* 117.

¹⁴⁵ Hargovan (2007) 20(3) *Acta Criminologica* 117.

¹⁴⁶ Hargovan (2007) 20(3) *Acta Criminologica* 117.

It can be submitted that these documents need to be communicated to victims and made readily available. It is further submitted that at this current stage it is unclear as to how many victims are even aware of these documents or aware of their rights. A real life example of a case can be provided regarding the police and their duty towards victims as contained in the charter. The case was that of culpable homicide whereby a woman was tragically killed by a drunk driver who lost control of her vehicle. The deceased was merely walking on the sidewalk before she was tragically killed. The incident occurred in 2008 and after lengthy investigations the matter was struck off the court roll and after being withdrawn a few times, the matter made its way back to court. The significance of this matter is that through this entire process, the investigating officer failed to give the so called victims being the children and family of the deceased any updates on the progress of the case. Furthermore, the matter was set down for trial and he failed to inform the family of the deceased about it and let them know they were entitled to come to court. This situation highlights the fact that the duties the police owe to victims of crime are not being applied.

The knowledge of the matter only came to the attention of the family when they heard a rumor that the accused had been convicted and come to court to consult with the prosecutor and provide their side of the story as to how the incident had affected them. The situation was thus rectified in that the matter had been postponed for sentencing and the prosecutor was able to send the son and sisters of the deceased to the social workers in order for them to consult and draft a report on the impact the incident had on the victims of the crime.

4.4 Implications of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Legislation has been enacted as a tool to implement and recognise victims' rights.¹⁴⁷ An example of such is the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Section 66 (2) (a)¹⁴⁸ states as follows:

¹⁴⁷ Hargovan (2007) 20(3) *Acta Criminologica* 117.

¹⁴⁸ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

“The National Director of Public Prosecutions must, in consultation with the Minister and after consultation with the National Commissioners of the South African Police Service and Correctional Services and the Directors-General: Health and Social Development, issue and publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in sexual offence cases, in order to achieve the objects of this Act as set out in section 2 and the Preamble, particularly those objects which have a bearing on complainants of such offences, including the following:

(viii) The information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant”.

Section 66¹⁴⁹ deals with national instructions and directives. This section serves to ensure the enforcing of the Act in line with the set out objective and purpose for which it was drafted.¹⁵⁰ It guides officials such as the police and prosecutor as to how to implement the Act.¹⁵¹ Section 66(2)(a)¹⁵² specifically places an obligation on the prosecution with regard to directives to be issued, most relevant to this specific discussion is the information to be presented to court for sentencing purposes.¹⁵³

It ensures the Act is enforced properly and parties are well aware of their duties and obligations. These national instructions must be followed by the relevant parties and are binding.¹⁵⁴ The fact that the national directives are published in the *Gazette* ensures that there is transparency and makes parties accountable for their actions.¹⁵⁵

¹⁴⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁵⁰ Smythe D and Pithey B (eds) (2011) *Sexual Offences Commentary Act 32 of 2007* Cape Town: Juta and Co at 26-1.

¹⁵¹ Smythe & Pithey (eds) (2011) 26-5.

¹⁵² See above n 152.

¹⁵³ Smythe & Pithey (eds) (2011) 26-5.

¹⁵⁴ Smythe & Pithey (eds) (2011) 26-7.

¹⁵⁵ Smythe & Pithey (eds) (2011) 26-8.

The National Instruction also specifically provides for the following regarding the impact on the victim, section 21(3)¹⁵⁶ states:

“The investigating officer must take a further statement from the victim before the victim testifies in court. The purpose of this statement is to bring the effect (impact) of the sexual offence on the life of the victim to the attention of the prosecutor. The investigating officer must enquire from the victim how the incident has affected his or her life and relationships with loved ones. This will include any affects on the personality and health of the victim as a result of the sexual offence. If appropriate, an impact statement from a psychologist, social worker or forensic social worker or any other person must also be obtained.”

It is submitted that it is a highly positive step that our legislature in a small manner decided to recognise victims’ interests. It is further submitted that there should be no need for the legislature to enact legislation in order for the victims’ rights to be recognised, it should just be natural for the prosecutor or state advocate to recognise the impact on the victim and to bring it to the attention of the court in order to hand down a sentence which is fair to all parties involved.

4.5 Benefits of victim impact statements as well as obstacles faced

As with any concept or idea there are certain aspects perceived to be disadvantages or so called obstacles to overcome. The following are some of the obstacles faced with victim-impact statements. A perception by the general public regarding these victim-impact statements is that hearing all the details of how badly the incident affected the life of the victim might be very aggravating on sentence and lead to much harsher sentences being imposed.¹⁵⁷ Research has however shown that instead of affecting how the severe the sentence is, it rather plays a role in the proportionality of the sentence and the balance between victim and offender.¹⁵⁸

¹⁵⁶ Smythe & Pithey (eds) (2011) Annexure 2 National Instructions-20.

¹⁵⁷ van der Merwe (2006) *De Jure* 425.

¹⁵⁸ van der Merwe (2006) *De Jure* 425.

A further obstacle faced is should the victim have to testify in court, especially in the case of a young child or a vulnerable woman it may cause further trauma to the victim.¹⁵⁹ However there is no obligation on a victim to make a victim impact statement, it is a matter of choice, should they feel they will suffer further trauma or not handle the situation they can elect not to make the statement. As discussed above in the *Abrahams* case¹⁶⁰ regarding the trauma to the victim it was stated “The social workers uncontested evidence was that Doreen herself could not be called because a second testimony, nearly a year after her first, would have damaging effects.”¹⁶¹

It is however submitted the positive aspects with regard to victim-impact statements far outweigh the negative aspects. Regarding some of the positive features of victim-impact statements one of the main features would be that victims often benefit from being able to provide their input and have their side of the story heard.¹⁶²

From first hand practical experience in court, it can be noted that victims are indeed very interested in their cases and want to play an important part therein. In practical situations, there have been discussions and offers to a complainant to testify during sentencing and none of them have declined and they have been nothing but grateful to participate and enjoyed the opportunity. It has been said “A major complaint of victims has been the fact that they are not encouraged to feel part of the criminal justice proceedings in their cases.”¹⁶³

A practical example can be provided of where a victim has testified regarding the impact of the offence during sentence. The facts of the matter were briefly as follows: the victim had been in a township outside a hair salon in a busy area. The accused unknown to the victim had come out of nowhere with a butchers knife, grabbed the complainant and asked “if she was looking for trouble” she then

¹⁵⁹ van der Merwe (2006) *De Jure* 434.

¹⁶⁰ *S v Abrahams* 2002 (1) SACR 116 (SCA).

¹⁶¹ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 120 G.

¹⁶² Erez E “Who’s afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice” (1999) *Criminal Law Review* 545 at 551.

¹⁶³ Strang (2002) 12.

proceeded to stab her on the hand and the wrist. The victim then fell down to the ground and while helplessly lying on the ground the accused proceeded to stab her again in the shoulder. The victim was called to testify during sentencing and she told the court that she had been incredibly embarrassed by the situation as this had taken place in a public place in the area she lived.

She further told the court that she had been incredibly taken aback by the situation as she had done nothing to the accused. Finally she told the court that her two small children had been with her during the attack and were traumatised by seeing their mother being attacked and still to the day when they see the scars on her arm remember the incident and asked her about it. All the circumstances taken into account from both sides by the court, resulted in the court sentencing the accused to one year direct imprisonment. In contrast, if this situation had not come to the attention of the presiding officer the accused would more than likely have received a much lighter sentence. Therefore it can be concluded that victims of crime want to participate in their cases and victim-impact statements provides them with this opportunity.

A further advantage can be noted, although in a situation the victim might have suffered a financial or material loss, there are times that the emotional loss or trauma they went through might have been greater.¹⁶⁴ Victims look for so called ‘emotional restoration’ and this is what their victim impact statement provides them with.¹⁶⁵

It is submitted that this process can be easily adapted to fit any circumstance and can be done as a simpler method if there are time constraints. It does not only have to be a formal victim impact statement drafted by a social worker. As the prosecutor, there is nothing stopping him or her from calling the victim to testify in aggravation of sentence.

¹⁶⁴ Strang (2002) 18.

¹⁶⁵ Strang (2002) 18.

4.6 Practical implications, what we need to successfully implement and apply victim impact statements

In order to ensure success in involving the victim in the process, all the major role players need to work hand in hand namely the prosecutor, the accused's legal representative as well as the presiding officer.¹⁶⁶ The final determination rests with the presiding officer, therefore with their acceptance and support the impact on the victim can begin to play a greater role in sentencing and the process can become more balanced and reflective of all role players. What is also required is proper training for all role players and a general awareness regarding the advantages, value and principles of victim impact statements.

Section 274 of the Criminal Procedure Act¹⁶⁷ makes provision for evidence on sentence and states the following; 274(1) "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."

The case law has held the following:

"The placing of important information, for example the effect of a rape of the complainant, before the sentencing court is not the responsibility of State counsel alone. The presiding officer, who must satisfy herself or himself before imposing the prescribed sentence that no substantial and compelling circumstances are present, also bears some responsibility."¹⁶⁸

It is therefore clear the presiding officer also has a duty towards the victim. It is submitted that it is a duty of the prosecutor to involve or include the interests of the victim as well as the impact of the offence on the victim during their address on aggravation of sentence. When a plea of guilty is tendered, the circumstances and facts of the situation are not as visible as when a trial has been conducted. It is in this situation that the impact on the victim plays a very important role, to tell the other

¹⁶⁶ Erez (1999) *Criminal Law Review* 555.

¹⁶⁷ The Criminal Procedure Act 51 of 1977.

¹⁶⁸ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 200 J – 201 A-B.

side of the story.¹⁶⁹ Should the defence or accused be giving a plea of guilty, the prosecutor should either during sentencing call the victim to testify or alternatively place before the court the circumstances which did not come to light from the section 112(2)¹⁷⁰ plea. Another duty the prosecutor owes to the victim is that should a matter be withdrawn due to the fact there is no reasonable prospect of success, this should be explained in detail to the victim.

It is submitted that with these above-mentioned duties, what needs to be identified is that the decision rests with the victim. The prosecution or the presiding officer should not force or influence the victim to make a statement. Should they not elect to make a statement their choice should be respected. However as stated, a lack of evidence regarding the impact on the victim should not be seen as there was no impact.¹⁷¹

As discussed with victim-offender mediation we also need the support of social workers and NICRO in order to draft and facilitate these victim-impact statements.¹⁷²

4.7 Pre-sentence report versus victim impact statement

In certain instances during the sentencing phase a pre-sentence report is requested. The role of the pre-sentencing report is to provide the presiding officer with a better insight into the accused and possibly the reason he was motivated to commit the offence.¹⁷³ Some of the factors that are taken into consideration in this report are things such as remorse, character of accused, whether the accused can be rehabilitated, mental state, cultural factors and intelligence to list a few.¹⁷⁴ To highlight and to better understand the impact on the victim and the suffering they endured because of the offence, victim impact statements must be included and play a very important role in the pre-sentence report.¹⁷⁵ In the pre-sentence report,

¹⁶⁹ van der Merwe (2006) *De Jure* 433.

¹⁷⁰ The Criminal Procedure Act 51 of 1977.

¹⁷¹ See par 4.2.2

¹⁷² See par 5.2.

¹⁷³ van der Hoven (2006) 19(2) *Acta Criminologica* 159.

¹⁷⁴ van der Hoven (2006) 19(2) *Acta Criminologica* 160.

¹⁷⁵ van der Hoven (2006) 19(2) *Acta Criminologica* 161.

should the social worker consult with the victim, only a small portion on the impact on the victim is included. It is submitted from experience that this is very rare for the social worker to include a part on the victim.

It is submitted that the pre-sentence report emphasises and focuses on the accused. The victim impact statement is however different in that it focuses on the victim. It is submitted that there should be an equal balance; the most appropriate method in order to satisfy all parties is to request a pre-sentence report as well as a victim impact statement.

CHAPTER 5

SUGGESTIONS FOR REFORM

5.1 Formal recognition of victim-offender mediation and victim impact statements by way of legislation or amendment to Criminal Procedure Act

It is submitted that although restorative justice and more specifically victim-offender mediation and victim impact statements are currently recognised, there needs to be a more formal method of recognition. There have been various submissions regarding the method whereby this recognition should take place.

As mentioned before there are no express rights for victims of crime provided for in the Constitution.¹⁷⁶ It has been said:

“Eventually, legislative intervention may be required to recognise aspects of customary law-but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal justice system.”¹⁷⁷

Camerer¹⁷⁸ states as follows: “A new chapter, devoted entirely to victims and their rights, should be added to the Criminal Procedure Act.”¹⁷⁹ She further states:

“Most importantly, victims should have the right to be present and to make submissions...The Criminal Procedure Act should be amended to accommodate these ‘impact statements’ by victims...and the judge or magistrate will be obliged to take this into account.”¹⁸⁰

¹⁷⁶ See par 1.3.

¹⁷⁷ *S v Maluleke* 2008 (1) SACR 49 (T) at 55 par 41.

¹⁷⁸ Camerer (1999) 3.

¹⁷⁹ Camerer (1999) 3.

¹⁸⁰ Camerer (1999) 3.

Furthermore there have also been submissions for the need of a Bill of Victim Rights in South Africa.¹⁸¹ This will ensure that the rights of victims are also protected by our Constitution.

Currently restorative justice is being utilised without guidelines by legislation, it has been seen that it depends on the prosecutors themselves to be creative and think of how they can apply the principles.¹⁸² Furthermore, although there is a victim empowerment policy currently,¹⁸³ this is a mere policy and not binding legislation. It has been said “Criticisms have been directed against government...for its perceived inability to translate policies into practice.”¹⁸⁴”

What is therefore needed from government is a workable solution, either to draft new legislation dealing specifically with victims’ rights and restorative justice principles or to amend and provide extra chapters the Constitution or Criminal Procedure Act.

5.2 More faith and greater support required in the criminal justice system

It is submitted that victims need to have more faith in the criminal justice system. This could involve making themselves available and open to suggestions and help from role-players they may encounter such as police and prosecutors. There needs to be greater support from all parties involved. What should be taken into account is the South African strives for the ideal of togetherness being “*ubuntu*”. Crime is not just the parties involved in the matters problem, crime is everybody’s problem. At some point in time all members of society will be a victim of crime or have friends, families or members of their community who are victims of crime. It is submitted that crime is therefore a concern for every member of society. It has been said “However, delays encountered in the justice system erode the goals of a victim-friendly criminal justice system.”¹⁸⁵”

¹⁸¹ Davis et al (2002) 15(2) *Acta Criminologica* 106.

¹⁸² Hargovan H “Knocking and entering: restorative justice arrives at the courts” *CRIMSA Conference Special Edition* (2008) (1) *Acta Criminologica* 24 at 34.

¹⁸³ Hargovan (2007) 20(3) *Acta Criminologica* 116.

¹⁸⁴ Hargovan (2007) 20(3) *Acta Criminologica* 114.

¹⁸⁵ Hargovan (2007) 20(3) *Acta Criminologica* 118.

Currently the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) plays a major role in supporting the criminal justice system in the application of restorative justice. NICRO is a registered Non-Profit Organisation and receives funding from government, South African corporate donors, private individuals and international donors. It is submitted without the support of NICRO the ideals of restorative justice and the provision of victim-offender mediation services and the drafting of victim impact statements would be a mere unattainable dream. It has been said “Non-governmental organisations, which currently provide the majority of services, rely on international donor assistance and due to lack of resources; the survival of these services is continually under threat.¹⁸⁶,¹⁸⁷

It is submitted that we need to ensure the NICRO services are safe from the above-mentioned threats. It is also submitted that other individuals such as churches or groups of individuals could also help in small ways to provide support in applying the restorative justice methods.

5.3 Changes that could be brought about to ensure a more victim-centric approach

When suggestions are made in order to ensure a more victim-centric approach the main aspect to be highlighted would be that of sensitising people to rights of victims and making victims' rights known.¹⁸⁷ Victims should be informed about their rights and also be encouraged to play an active role in the criminal process.¹⁸⁸ It is submitted that in order to ensure the success of this approach, would be to ensure that there is the support of all the role players namely the police and prosecution as well as most importantly, the active role from the social workers.

A further way to ensure a more victim-centric approach would be to get the acceptance and understanding of the presiding officer who in most instances has the final say and choice. An example can be provided for in offences where an actual monetary loss has been suffered such as fraud, theft or malicious injury to property.

¹⁸⁶ Hargovan (2007) 20(3) *Acta Criminologica* 118.

¹⁸⁷ See par 4.3.

¹⁸⁸ Camerer (1999) 1.

A presiding officer who is aware of the needs and requirements of the victims of these crimes would be aware that most of the time what the victim wishes for is restitution¹⁸⁹. In situations like this a perfect balance is created that is fair to all parties namely a suspended sentence on condition that the accused reimburses the complainant for the monetary loss suffered.

5.4 Suggestion of victim-offender mediation for less serious crimes and victim impact statements for more serious crimes

It is submitted that for less serious crimes such as assault, *crimen injuria* and assault with intent to do grievous bodily harm victim-offender mediation would be the appropriate means to solve the situation. Parties with the aid of a social worker can resolve their differences away from the normal criminal system.

However when it comes to crimes such as rape, murder, robbery with aggravating circumstances and culpable homicide to list but a few, victim-offender mediation in itself will not be a suitable option. In these situations it is submitted that a consultation with a social worker and the drawing up of a victim impact statement would be more suitable. It is further submitted that victim impact statements should be more widely applied. In the analysis of case law it is mostly applied in sexual offences.¹⁹⁰ There is however nothing stopping it from being applied in cases of murder, culpable homicide and robbery with aggravating circumstances.

The court even held “If restorative justice is to be recognised in South Africa...then it must find application not only in respect of minor offences, but also, in appropriate circumstances, in suitable matters of a grave nature.”¹⁹¹

It is submitted that these are mere suggestions, and should be no closed list or strict guidelines as to when the above-mentioned are applied. The attractiveness of restorative justice is that it can easily be adapted to any situation, it merely depends on the specific circumstances. In the event of a situation where a combination of the

¹⁸⁹ See n 47.

¹⁹⁰ See par 4.2 and 4.4.

¹⁹¹ *S v Tabetha* [2009] JOL 23082 (T) at 8 par 39.

two principles are required, it can be utilised jointly. An example being that of a culpable homicide case, the social worker is able to draft a victim impact statement for the deceased's family members as well as hold a victim-offender mediation with the family and the accused as a means to facilitate an apology and repair the relationship which benefits the community as a whole. It is submitted there can be a successful blend of various restorative justice methods.

5.5 Accountability and a more uniform approach for the application of victim-offender mediation and victim impact statements

As with any system, it is advisable that there be a set of guidelines to create a degree of accountability. In practice, what can be noted about restorative justice is that there is a lack of uniformity which is brought about by personal preference and beliefs. For example, some presiding officers are supportive of restorative justice ideals whereas others are against its application. The same can also be said for prosecutors. The problem however stems from that the prosecutor can try to apply restorative justice principles but if the presiding officer does not support the process, it may be rendered worthless.

What is interesting to note is that most of the leading case law in which restorative justice was applied were within Gauteng province namely the cases of *Tabetha*¹⁹², *Shilubane*¹⁹³, *Ncheche*¹⁹⁴ and *Maluleke*.¹⁹⁵ Furthermore, what is also of interest is that the two leading cases in this regard were presided over by Judge Bertelsmann namely *Tabetha* and *Maluleke*.¹⁹⁶ The relevance of this is the principles of restorative justice are not being widely applied through South Africa and the judiciary should take pro-active steps in applying these principles.

Caution should also be taken when applying forms of restorative justice as there are situations where it can be misused. An example of this would be the case of

¹⁹² *S v Tabetha* [2009] JOL 23082 (T).

¹⁹³ *S v Shilubane* [2005] JOL 15671 (T).

¹⁹⁴ *S v Ncheche* 2005 (2) SACR 386 (W).

¹⁹⁵ *S v Maluleke* 2008 (1) SACR 49 (T).

¹⁹⁶ See n 187 and 190.

Saayman¹⁹⁷ where an accused was convicted of fraud and given a suspended sentence. The conditions of sentence is where the problem occurred. As one of the conditions of suspension the accused had to carry a placard with her name, her conviction as well as an apology to certain victims of the fraud and she had to carry this placard while standing in the foyer of the court for a period of fifteen minutes.¹⁹⁸

It is submitted that two major problems that can be identified and highlighted from this are firstly, this condition amounts to a violation of the accused's constitutional rights and secondly the victims were not personally involved and possibly not even present when the placard holding incident took place.¹⁹⁹ This extreme case serves to illustrate the dangers of going too far with restorative justice and misapplying it. Although the presiding officer had all the right intentions of recognising restorative justice and applying the principles it is respectfully submitted he applied and implemented it in the wrong manner.

The above can serve to illustrate a degree of accountability is required in restorative justice practices²⁰⁰. It is submitted that in order for restorative justice to function effectively there must be a set form of guidelines or framework.

It has been said "It is essential for an appropriate protocol and ethical guidelines to be established in South Africa to ensure the success of this important development in the criminal justice process.²⁰¹" *Tshehla* also agrees with this sentiment.²⁰² He further adds "In order to ensure accountability it is imperative that the state should play a leading role in developing guidelines with the relevant restorative justice practitioners.²⁰³"

The following has been highlighted with regards to restorative mediation however, it is submitted these principles are equally applicable to all forms of restorative justice.

¹⁹⁷ *Saayman v S* [2008] JOL 22778 (E) and *S v Saayman* 2008 (1) SACR 393 (E).

¹⁹⁸ *S v Saayman* 2008 (1) SACR 393 (E) at 394 A-B.

¹⁹⁹ *Saayman v S* [2008] JOL 22778 (E) at 14.

²⁰⁰ Roche D (2003) *Accountability in Restorative Justice* New York: Oxford University Press at 25.

²⁰¹ Naude et al (2003) 16(5) *Acta Criminologica* 23.

²⁰² *Tshehla* (2004) 17 SACJ 11.

²⁰³ *Tshehla* (2004) 17 SACJ 15.

“The programme must be based on a framework of sound principles that will guide discussions and the decision-making process.²⁰⁴”

With regard to accountability, it can be defined as “Explaining or answering for decisions made.²⁰⁵” It has further been said that when it comes to restorative justice parties may have overlooked the principles of accountability of the relevant programmes.²⁰⁶ Accountability furthermore “...refers to the various mechanisms used to control the actions of individuals and institutions²⁰⁷. Restorative justice has often been criticised due to an absence of accountability²⁰⁸ in its application.

It should be noted that restorative justice is an easily adaptable ideal that can be tailored to suit almost any situation.²⁰⁹ In the same manner caution should thus be taken as restorative justice could be hampered if accountability methods are too stringent.²¹⁰ It is submitted in the South African context it would be advisable for role players to be accountable to a certain extent with regard to steps taken in the application of restorative justice.

²⁰⁴ Naude et al (2003) 16(5) *Acta Criminologica* 12.

²⁰⁵ Roche (2003) 25.

²⁰⁶ Roche (2003) 25.

²⁰⁷ Roche (2003) 42.

²⁰⁸ Roche (2003) 43.

²⁰⁹ See par 3.8.1 and n 91.

²¹⁰ Roche (2003) 25.

CHAPTER 6

CONCLUSION

6.1 The purpose of this research paper

The purpose and key objectives of this paper were to examine the role of the victim within the criminal justice system, the recognition and rights they receive and how these rights are enforced and protected. Restorative justice principles were also examined. Victim-offender mediation as well as victim impact statements were canvassed in full, including but not limited to the operation, its reception in case law as well as its benefits and shortcomings. Furthermore as contained in chapter five²¹¹ submissions were made for reform and how to officially recognise and incorporate the above-mentioned concepts.

6.2 Striking features

What was striking at first was the lack of recognition victims' rights received in the past. Just over two decades ago victims were the "forgotten third parties" in the justice system.²¹² A further striking feature is victims of crime are not expressly granted recognition by our Constitution.

Subsequently, it can be seen that over the past couple of years we have seen a swift progression in victims' rights. From hardly being recognised at all, to the victims' rights movements and the introduction of restorative justice into our law. Interestingly the way these restorative justice principles and recognising victims' rights were established into our law was through case law. Case law played a vital role in this particular paper. If one takes a look at the case of *Isaacs*²¹³ therein, the established *Zinn triad*²¹⁴ was criticised for neglecting the interests of victims. The

²¹¹ See pg 39.

²¹² Strang (2002) 27.

²¹³ See par 2.6.

²¹⁴ See par 2.6.

case of *Matyityi*²¹⁵ went further and afforded a more prominent role to rights of victims. In chapter four²¹⁶ it is evident that victim impact statements and restorative justice principles are recognised and applied in our law.

6.3 Recommendations and final word

The restorative justice principles are now recognised by various role players. It is submitted that what needs to take place is a wider application and implementation of these principles. Mere recognition of victims' rights and restorative justice is insufficient, what is required is that action must be taken in order to implement the principles and ensure the success thereof.

The implementation of such principles must not be complicated and restrictive in nature. *Van der Merwe*²¹⁷ supports this view and points out and which possibly extends to all forms of restorative justice is that the processes should not be overregulated. If this should occur these practices in her words "will simply become too complicated to use efficiently."²¹⁸

It is submitted the main objective to be strived for is more flexibility than restrictive regulation of these processes. These processes and the role players require the space and flexibility to adapt and alter their actions as the situation calls for it. Very rarely will situations be the same, and that is the attractiveness of restorative justice it can be altered and adapted to cater for almost any situation or any person.

It is submitted that restorative justice and victims' rights must receive formal recognition by enacting legislation or amending the Constitution or the Criminal Procedure Act. Until this is achieved, role-players in the criminal justice system should try incorporate restorative justice ideals into the criminal justice system wherever practically possible.

²¹⁵ See par 2.6.

²¹⁶ See par 4.2.

²¹⁷ van der Merwe (2006) *De Jure* 435.

²¹⁸ van der Merwe (2006) *De Jure* 435.

The victim participation and recognition of victims' rights is an ideal that all role-players within the criminal justice system should strive for. Where there is crime, there will be victims. Therefore there will always be a need for victims' rights and more importantly restorative justice.

The *Matyityi*²¹⁹ case and the principles laid down by the Supreme Court of Appeal should not be overlooked. Victims' rights are to be afforded a more prominent role and such should be seen to be done. To echo the sentiments of our Constitution: "Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law."²²⁰

Thus ensuring equal rights for accused and victims.

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15 647 (excluding bibliography)

²¹⁹ *S v Matyityi* [2010] JOL 26275 (SCA).

²²⁰ As contained in the preamble to the Constitution.

BIBLIOGRAPHY

Case law

Rammoko v Director of Public Prosecutions 2003 (1) SACR 200 (SCA).

Saayman v S [2008] JOL 22778 (E).

S v Abrahams 2002 (1) SACR 116 (SCA).

S v Isaacs 2002 (1) SACR 176 (C).

S v Khumalo and others 1984(3) SA 327 (A).

S v Maluleke 2008 (1) SACR 49 (T).

S v Matyityi [2010] JOL 26275 (SCA).

S v Ncheche 2005 (2) SACR 386 (W).

S v O 2003 (2) SACR 147 (C).

S v Saayman 2008 (1) SACR 393 (E).

S v Shilubane [2005] JOL 15671 (T).

S v Tabetha [2009] JOL 23082 (T).

S v Van Wyk 2000 (1) SACR 45 (C).

S v Zinn 1969 (2) SA 537 (A).

Legislation

Criminal Law Amendment Act 105 of 1997.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The Constitution of the Republic of South Africa.

The Constitution of the Republic of South Africa Act 200 of 1993.

The Criminal Procedure Act 51 of 1977.

Books

Liebmann M (2007) *Restorative Justice: How it works* London: Jessica Kingsley Publishers.

Roche D (2003) *Accountability in Restorative Justice* New York: Oxford University Press.

Roche D (2004) *Restorative Justice* Trowbridge Wiltshire: The Cromwell Press.

Smythe D and Pithey B (eds) (2011) *Sexual Offences Commentary Act 32 of 2007* Cape Town: Juta and Co.

Strang H (2002) *Repair or Revenge: Victims and Restorative Justice* Oxford: Clarendon Press.

Wright M and Galaway (eds) (1989) *Mediation and Criminal Justice: Victims, offenders and community* Newbury Park: Sage Publications.

Journal articles

Bekker JC *et al* "Indigenous legal systems and sentencing: *S v Maluleke* 2008 1 SACR 49 (T)" (2009) *De Jure* 239.

Camerer S "What about the victims?" *De Rebus Archived issues* (1999) January Feature Articles.

Davis L *et al* "Sensitising students on offenders rights, victim rights and the administration of justice" (2002) 15(2) *Acta Criminologica* 106.

Erez E "Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice" (1999) *Criminal Law Review* 545.

Hargovan H "Restorative approaches to justice:'compulsory compassion' or victim empowerment" (2007) 20(3) *Acta Criminologica* 113.

Hargovan H "Knocking and entering: restorative justice arrives at the courts" *CRIMSA Conference Special Edition* (1) 2008 *Acta Criminologica* 24.

Meintjies-Van Der Walt L "Towards victims' empowerment strategies in the criminal justice process" (1998) 11 *South African Journal of Criminal Justice* 157.

Muller K *et al* "Recognising the victim in the sentencing phase: The use of victim impact statements in court" (2006) 22 *South African Journal on Human Rights* 647.

Naude B *et al* "Restorative justice: a global overview of its functioning and effectiveness" (2003) 16(5) *Acta Criminologica* 1.

Naude B *et al* "Restorative mediation practices" (2003) 16(5) *Acta Criminologica* 10.

Naude B *et al* "Protocol and ethical guidelines on restorative mediation" (2003) 16(5) *Acta Criminologica* 23.

Skelton A *et al* "Restorative justice: A contemporary South African review" (2008) 21(3) *Acta Criminologica* 37.

Swart M "Sorry seems to be the hardest word: apology as a form of symbolic reparation" (2008) 24 *South African Journal on Human Rights* 50.

Tshehla B "The restorative justice bug bites the South African criminal justice system" (2004) 17 *South African Criminal Law Journal* 1.

Umbreit MS *et al* "Victim-offender dialogue in violent cases: a multi-site study in the United States" (2007) 28(2) *Acta Juridica* 22.

Van der Hoven AE "The criminologist as an expert witness in court" (2006) 19(2) *Acta Criminologica* 152.

Van der Merwe A "A critical evaluation of the use of victim impact statements in child sexual abuse cases" (2006) *De Jure* 422.

Van Rooyen GH "Blessed are the peacemakers: victim-offender mediation in the criminal justice system-a practical example" (1999) 12 *South African Criminal Law Journal* 62.

Winkel FW *et al* "Victim-offender dialogue: An analogue study examining the impact of apology on anger" 2010 23(1) *Acta Criminologica* 1.

Websites

<http://www.dcs.gov.za/>