

Substantive equality, restorative justice and the sentencing of rape offenders

AMANDA SPIES*

ABSTRACT

This article explores the concept of substantive equality and how, as a constitutional value, it requires the consideration and application of restorative justice principles in the sentencing of rape offenders. With sexual violence being a difficult and controversial area in which to apply restorative justice principles, there is a need to understand the necessity for its application and analyse how it has been applied by South African courts. The argument is made that restorative justice should be seen as a method that gives effect to substantive equality values, allowing for a victim's needs and context (including that of the offender) to be taken into account in handing down a just sentence.

1 Introduction

The high court decision in *S v Seedat*¹ has put the spotlight on the use of restorative justice principles in the sentencing of rape offenders. To date, this principle has not been considered in many rape cases which raises the question as to its applicability and suitability in these matters. This article intends to explore the concept of restorative justice as it relates to the sentencing of rape offenders in South African law.

The analysis that follows will focus on the concept of substantive equality and how, as a constitutional value, it requires the application of restorative principles in the criminal justice system, particularly in rape cases.² By considering restorative justice principles as part of the judicial landscape, direction could be provided to questions on how

* LLB LLM (UP) PhD (Wits), Associate Professor, Department of Public, Constitutional and International Law, University of South Africa.

¹ *S v Seedat* 2015 (2) SACR 612 (GP) (hereinafter *Seedat*). [Editor's note: The approach adopted to sentencing in the high court was not approved on appeal by the Supreme Court of Appeal in *S v Seedat* 2016 JDR 1820 (SCA)].

² Section 1 of the Constitution of the Republic of South Africa, 1996 (herein after the Constitution) states 'The Republic of South Africa is one, sovereign democratic state founded on the following values: (a) Human dignity the achievement of equality and the advancement of human rights and freedoms.'

to be fair to accused persons, while not treating victims and witnesses as inferior.³

2 The application of restorative justice principles in sexual violence matters

Restorative justice is a term that is not easily defined. In its simplest form, it is seen as an alternative to punitive methods of punishment and focuses on repairing the harm caused by crime, thereby restoring the parties to a state of 'wellness or wholeness' that was disturbed as a result of the crime.⁴ Generally, there exist different legal contexts in which restorative justice is applied. The first, and for what the concept is probably best known, is the diversion from normal criminal proceedings.⁵ Here the focus would be on victim-offender reparation through mediation or community conferencing where victims, offenders and a facilitator meet to discuss the effects of a particular crime and, to make a plan as to how to go about repairing the damage and minimise the likelihood of further harm.⁶ Other contexts in which restorative justice is applied include the application of restorative justice principles as a component or condition of sentence as a viable sentencing option, and as a post-sentence component in considering early release.⁷

With the level of victim participation in traditional criminal justice systems being minimal, there has been an acknowledgment that victims might need to confront the offender to relay how the crime impacted on him/her, despite a formal trial or even a guilty plea.⁸ Ultimately, restorative justice emphasises victim participation and offender accountability through reparations and rehabilitation rather than punishment and incarceration.⁹

Many scholars have questioned and critiqued the application of this method of justice, especially concerning more serious crimes (such as

³ C Boyle 'The role of equality in criminal law' (1994) 58 *Saskatch L Rev* 203 at 216.

⁴ B Tshela 'The restorative justice bug bites the South African criminal justice system' (2004) 17 *SACJ* 1 at 6.

⁵ K Daly 'Restorative justice and sexual assault: An archival study of court and conference cases' (2006) 46 *Brit J Criminology* 334 at 335.

⁶ MP Koss, KJ Bachar & CQ Hopkins 'Restorative justice for sexual violence: Repairing victims, building community, and holding offenders accountable' (2003) 989 *Annals NY Academy Sci* 384 at 388.

⁷ Daly op cit (n5) 335.

⁸ A Skelton & M Batley *Charting Progress, Mapping the Future: Restorative Justice in South Africa* (2006) 13.

⁹ Koss, Bachar & Hopkins op cit (n6) 388.

rape).¹⁰ They have argued, especially in diverting from the criminal justice system, that victims may not be able to advocate effectively on their own behalf and may feel coerced into accepting a restorative justice outcome.¹¹ The strongest and most common argument is that a serious offence requires a serious response.¹²

For these reasons, the application of restorative justice in sexual violence matters has mostly been applied post-conviction and as part of the sentencing of offenders to ensure that a message is sent that such crimes will not be tolerated and to deter future perpetration.¹³ The idea that punishment will deter criminal behaviour forms an integral part of most criminal justice systems.¹⁴

The doctrine of deterrence is based on a primitive cost-benefit formula.¹⁵ If the 'cost' of lawbreaking is high, citizens will choose not to break the law, and if the 'cost' is too low, it will be flouted.¹⁶ Whilst it is almost seen as common sense that the threat of punishment would deter most individuals most of the time from committing crime, this threat is grossly ineffective for crimes that are of the greatest concern to popular conceptions of the criminal law, such as acts of personal and sexual violence.¹⁷ There are many reasons that can account for this. Some have pointed to the fact that a theory of rational choice is largely irrelevant to acts motivated by non-rational impulses or that are a result of circumstances more compelling than the concern over the possibility of detection and prosecution.¹⁸

The need for a restorative justice approach to gendered and sexualised violence has mainly emerged as a result of the high levels of violence

¹⁰ B Hudson 'Restorative justice and gendered violence: Diversion or effective justice' (2002) 42 *Brit J Criminology* 616.

¹¹ Daly op cit (n5) 337.

¹² Hudson op cit (n10) 622.

¹³ C McGlynn 'Feminism, rape and the search for justice' (2011) 31 *Ox J Legal Stud* 825 at 826.

¹⁴ DL Martin 'Retribution revisited: A reconsideration of feminist criminal law reform strategies' (1998) 36 *Osgood Hall LJ* 151 at 161.

¹⁵ For an introductory discussion on the doctrine of deterrence see JP Gibbs *Crime, Punishment, and Deterrence* (1975) 2; SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 165; JL Miller & AB Anderson 'Updating the deterrence doctrine' (1986) 77 *J Crim Law & Criminology* 418; E Luna 'Punishment theory, holism, and the procedural conception of restorative justice' 2003 *Utah L Rev* 205.

¹⁶ Martin op cit (n14) 161.

¹⁷ Martin op cit (n14) 161; Miller & Anderson op cit (n15) 418.

¹⁸ Martin op cit (n14) 162; Miller & Anderson op cit (n15) 418.

despite several efforts to reform the law and its legal processes.¹⁹ Feminists have long viewed the criminal justice system – the system that women access to gain protection from or recourse against violence – as the ultimate gendered institution, often reinforcing ‘deeply sexist assumptions about women, their sexual and social identities and their relation to the social (male) world’.²⁰

Scholars have begun questioning the reliance on the criminal justice system and the reform of its legislation as a strategy to address violence against women, as it has only strengthened neoliberal punitive attitudes by focusing on individual responsibility and risk-avoidance which effectively reproduces many rape myths and stereotypes.²¹ With the criminal justice system strengthening the ‘real rape’ myth, it has become more important for women’s voices to be heard in demonstrating the harm of sexual violence and questioning the effectiveness of retributive accountability in addressing this violence.²² Clare McGlynn argues that in supporting greater penal accountability:

‘Sexual offenders have been stigmatized and characterized as beyond the law-abiding majority, thereby justifying their punishment, but more significantly, generating the idea that they are different from ordinary men.’²³

The focus has therefore been on controlling the threat of dangerous men instead of challenging the ‘culture and attitudes which condone

¹⁹ S Curtis-Fawley & K Daly ‘Gendered violence and restorative justice’ (2005) 11 *Violence Against Women* 603 at 604; Koss, Bachar & Hopkins op cit (n6) 387. Within the South African context minimum sentencing has been implemented for rape offences in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 (hereinafter ‘the Criminal Law Amendment Act’ or ‘the minimum sentencing legislation’); s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (hereinafter ‘the Sexual Offences Act’) extended the definition of rape to ‘any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of rape’. Penetration includes penetration of the genital organs, anus or mouth of a person and includes penetration by an object. The cautionary rule in sexual offence matters was abolished in *S v Jackson* 1998 (1) SACR 470 (SCA).

²⁰ L Artz & D Smythe ‘Feminism vs the State?: A decade of sexual offences law reform in South Africa’ (2007) 54 *Agenda* 6 at 8.

²¹ McGlynn op cit (n13) 837.

²² In 1986, Susan Estrich described what she called a ‘real rape’. According to her, a ‘real rape’ would be perpetrated by a stranger in an alleyway with excessive violence to overcome the woman’s resistance, and if conforming to this narrow criterion, it would be considered ‘real’ enough to be taken seriously by the criminal justice system. However, in reality, most rapes deviate from this script, with offenders often being known to victims and the actual physical violence used being minimal. See S Estrich ‘Rape’ (1986) 95 *Yale LJ* 1087 at 1092; also see R Chennells ‘Sentencing: The real rape myth’ (2009) 23 *Agenda* 23 at 25; K Daly ‘Sexual assault and restorative justice’ in H Strang & J Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 62 at 63.

²³ McGlynn op cit (n13) 837.

sexual violence' with strong punitive methods of punishment seen as the only way to achieve public condemnation of harm.²⁴ What is needed is an understanding of the social inequalities and power that drive sexual violence, as rape is perpetrated against those with less social power, with gender being the most significant point of stratification.²⁵

Claire McGlynn argues that restorative justice should not only be considered in a post-conviction context, but in de-linking the culture of criminal justice systems where the recognition of harm is equated with a prison sentence which totally obscures the possibility of securing justice through other means; this possibly includes total deviation from the criminal justice system.²⁶

Other feminist scholars critique the consideration of restorative justice in rape matters in any form, arguing that it could displace the relationship of accountability, reproducing the imbalance in the power of the crime.²⁷ However, the counter could also be argued, as restorative justice focuses on the victim and could enable parties to be more equally represented, thereby empowering standpoints which would otherwise be excluded.²⁸ Within a punitive system there is always tension between recognising the harm done to the victim and protecting the rights of offenders.²⁹ The key to understanding restorative justice is the realisation that restorative justice is not aimed primarily at the offender, but also at dealing with the victims' needs.³⁰

Within the South African context, restorative justice has only been applied in a handful of cases and only as part of sentencing considerations which points to the infancy of these considerations within our criminal justice system necessitating a deeper understanding of these concepts and their application.³¹ The high attrition rate in rape cases and the re-victimisation of rape victims within the criminal justice system has heightened the call for the application of restorative justice principles in sexual violence matters.³²

The discussion below focuses on the development and application of restorative justice principles within the South African context

²⁴ Ibid.

²⁵ CA MacKinnon *Women's Lives, Men's Laws* (2005) 241; McGlynn op cit (n13) 837.

²⁶ McGlynn op cit (n13) 837.

²⁷ B Hudson 'Restorative justice: The challenge of sexual and racial violence' (1998) 25 *J Law and Society* 237 at 247; also see Daly op cit (n5) 336.

²⁸ Hudson op cit (n27) 247.

²⁹ Hudson op cit (n27) 241; see s 35 of the Constitution, which sets out the constitutional rights of arrested, accused and detained persons.

³⁰ Skelton & Batley op cit (n8) 13.

³¹ McGlynn op cit (n13) 841.

³² Hudson op cit (n10) 622; A Skelton & M Batley 'Restorative justice: A contemporary South African Review' (2008) 21 *Acta Criminologica* 37 at 49.

and analyses its relevance and application in the sentencing of rape offenders. In critiquing how the courts have considered the restorative justice principles in the sentencing of rape offenders, the author argues that the concept of substantive equality requires its consideration which could pave the way for challenging conventional understandings of justice.

3 Restorative justice and the sentencing of rape offenders in South African law

Within the South African context, the application and necessity of restorative justice principles within the criminal justice system has long been on the government's agenda. In the late 1990s the South African Law Commission, in two separate papers on sentencing practices in South African courts, made mention of the need for restorative justice alternatives to current sentencing practices.³³ In 2011, these recommendations were strengthened with the Department of Justice and Constitutional Development adopting a National Policy Framework on Restorative Justice, defining the principle as

'... an approach to justice that aims to involve the parties and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation'.³⁴

Despite initial support for the implementation of restorative justice in South African law, the South African legislature has been slow in adopting it – mostly restricting its application to juvenile offences.³⁵

The lack of commitment could be attributed to the high levels of violent crime in South Africa, with government, in an attempt to quell the

³³ South African Law Commission Issue Paper 11 'Sentencing Mandatory Minimum Sentences' (1997); South African Law Commission (Project 82) 'Sentencing: A New Sentencing Framework' (2000); J Naser 'Restorative justice – A new dimension of sentencing in South African courts' (2001) 14 *Acta Criminologica* 46.

³⁴ *Department of Justice and Constitutional Development* 'Restorative justice: The road to healing' (2011) 3.

³⁵ Skelton & Batley op cit (n32) at 42; A Skelton 'Restorative justice as a framework for juvenile justice reform: A South African perspective' (2002) 42 *Brit J Criminology* 496; the Probation Services Act 116 of 1991 defines restorative justice as within the context of juvenile offence as 'The promotion and reconciliation, restitution, and responsibility through the involvement of a child, and the child's parents, family members, victims and the communities concerned.' The Child Justice Act 75 of 2008 defines restorative justice as 'a means and approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent recurrence of the incident and promoting reconciliation'.

public's fears, implementing harsher punishments for serious crimes.³⁶ The Criminal Law Amendment Act 105 of 1997 clearly illustrates the limbo government finds itself in with mandatory minimum sentences being prescribed for serious offences, unless substantial and compelling circumstances require a deviation.³⁷ As previously stated, the use of restorative justice principles in rape matters is controversial and mostly implemented as part of the sentencing procedure. The position in South Africa is no different.

The National Policy Guidelines for Victim Empowerment³⁸ recognises that victims of crime may play a role in sentencing proceedings. The guidelines allow for a victim to give evidence or provide a statement in court to ensure that the court is aware of the impact the crime had on the victim. The Criminal Procedure Act 51 of 1977 provides that a court may consider any evidence it deems fit in order to hand down a proper sentence, which should allow for victim impact statements to be considered in handing down an appropriate sentence.³⁹ The applicable minimum sentencing legislation also creates an opportunity for a victim's evidence to be taken into account as a substantial and compelling reason to deviate from the prescribed minimum sentence.⁴⁰

Despite sexual violence being a difficult and controversial area in which to apply restorative justice principles, a select few judgments have reflected victim participation during the sentencing stage.

³⁶ A Skelton 'Tapping indigenous knowledge: Traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' 2000 *Acta Jur* 228.

³⁷ Sections 51 & 52 of the Criminal Law Amendment Act; M Batley 'A call to agents of change in the justice system: Guidelines in the use of restorative justice in sentencing for magistrates, judges, prosecutors and probation officers' *Open Society Foundation of South Africa* (2014) 5.

³⁸ Department of Social Development 'National Policy Guidelines for Victim Empowerment' (2009) Appendix 2 Service Charter for Victims of Crime para 2.

³⁹ Section 274 of the Criminal Procedure Act 51 of 1977 provides: '(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. (2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.' A van der Merwe & A Skelton 'Victims' mitigating views in sentencing decisions: A comparative analysis' (2015) 35 *Ox J Legal Stud* 355 at 360.

⁴⁰ In terms of s 51 of the Criminal Law Amendment Act 105 of 1997 read with Schedule 2, the prescribed sentence for the crime of rape is divided into two categories. First, a part one offence, which prescribes a sentence of life imprisonment if the victim is raped more than once or gang raped; if the offender raped before; if the offender raped knowing he was HIV positive; or if the victim was younger than 16, disabled or severely injured. Second, a part three offence, which includes all rapes other than those in part one prescribing a sentence of 10 years for a first offender; 15 years for a second offender and 20 years for a third or subsequent offender. If substantial and compelling circumstances exist that could justify the imposition of a lesser sentence, the judicial officer may consider these to retain judicial discretion in the sentencing of offenders.

The judgments below reflect the judicial system's consideration of restorative justice principles in the sentencing of rape offenders and provide a framework from which to analyse courts' understanding and application of the principle.

3.1 *S v Thabethe*⁴¹

In *S v Thabethe (Thabethe)* the high court had to consider restorative justice principles in the sentencing of a rape offender. The court, in considering an appropriate sentence, made use of a victim impact statement, in addition to which the victim testified that she was deeply hurt by the violent act, but that she felt a lengthy jail sentence would not be appropriate as the accused showed intense remorse and she and her family were financially dependent on him.⁴²

Based on the victim's testimony, the court requested a victim-offender conference overseen by the probation officer and the Restorative Justice Centre.⁴³ The programme was seen to be successful and the victim felt that the accused had shown adequate remorse.⁴⁴ In reaching its sentencing decision, the court considered a long list of substantial and compelling circumstances of which the victim's preference formed a part in finding enough reason to deviate from the prescribed minimum sentence.⁴⁵

A sentence of ten years' imprisonment was imposed, suspended for five years on condition that he is not found guilty of a similar offence; that he should remain employed; that at least 80% of his income be devoted to the support of the victim and her family; that he partake in a sexual offenders programme; and that he perform 800 hours of community service.⁴⁶

The state appealed the sentence to the Supreme Court of Appeal and argued that restorative justice is not an appropriate sentence in rape cases and that the personal circumstances of the accused were over-emphasised at the expense of the victim's trauma.⁴⁷ The Supreme Court of Appeal adopted the conventional views concerning the suitability of restorative justice principles in rape trials and found that:

'Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious

⁴¹ *S v Thabethe* 2009 (2) SACR 62 (T) (hereinafter *Thabethe*).

⁴² *S v Thabethe* supra (n41) at para [20].

⁴³ *S v Thabethe* supra (n41) at para [26]; Van der Merwe & Skelton op cit (n39) 361.

⁴⁴ *S v Thabethe* supra (n41) at para [30].

⁴⁵ *S v Thabethe* supra (n41) at para [35].

⁴⁶ *S v Thabethe* supra (n41) at para [41].

⁴⁷ *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) paras [12]-[13].

offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness to lead them to impose restorative justice in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.⁴⁸

The SCA upheld the appeal and imposed a sentence of ten years' imprisonment.⁴⁹

3.2 *S v Matyityi*⁵⁰

Between the high court and appeal decision in the *Thabethe* matter, the case of *S v Matyityi (Matyityi)* was heard by the SCA. Here the state appealed a sentence of 25 years' imprisonment for the rape of a woman and the murder of her partner as it argued the sentence was too lenient.⁵¹

In reconsidering the substantial and compelling circumstances that allowed a deviation from the prescribed minimum sentence of life imprisonment, the SCA considered the fact that the accused pleaded guilty and apologised through his counsel to the victims of his crime.⁵² The court stressed that sentencing should be victim-centred and that victims should be allowed to participate in their court trials:

'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. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim.'⁵³

⁴⁸ *Director of Public Prosecutions, North Gauteng v Thabethe* supra (n47) at para [20].

⁴⁹ *Director of Public Prosecutions, North Gauteng v Thabethe* supra (n47) at para [30].

⁵⁰ *S v Matyityi* 2011 (1) SACR 40 (SCA).

⁵¹ *S v Matyityi* supra (n50) at para [8].

⁵² *S v Matyityi* supra (n50) at para [13].

⁵³ *S v Matyityi* supra (n50) at para [17].

Although the court did stress the rights of victims to participate in the sentencing process, there was no evidence or information available of this victim's participation.⁵⁴ The court ultimately found that there were no substantial and compelling circumstances that could have warranted a lesser sentence and upheld the appeal, imposing a sentence of life imprisonment.⁵⁵

The SCA's decision in *Thabethe* referred to *Matyityi* and the importance of victim participation, but found that although a victim's input is important, it is not decisive in sentencing an offender.⁵⁶ Although the victim's participation and restorative considerations is but one of the factors to consider in handing down a sentence, it is as if the courts do not engage with these considerations at all. As restorative justice and its application in these types of matters are new, one would expect a more robust analysis in its consideration and application, but it seems as if the courts are just throwing it into the pot of substantial and compelling circumstances in 'giving' effect to the National Policy Guidelines on Victim Empowerment.

The judgments set a clear precedent that South African courts are cautious when considering and applying restorative justice principles in rape matters. This caution could be ascribed to the courts fearing that their decisions would be regarded as too lenient in light of the exceptionally high levels of violence against women and children in our country without really considering what constitutes justice for a rape victim.⁵⁷

3.3 *S v Seedat*

The latest decision concerning the application of restorative justice principles in a rape trial is the case of *Seedat*. Seedat, a 63-year-old male, was accused of raping one of his clients when he delivered certain goods to her home.⁵⁸ Seedat received a seven-year custodial sentence with the court considering his age and ill health as substantial and compelling enough to deviate from the prescribed minimum sentence.⁵⁹

During the trial the victim testified that she did not wish the accused to be sent to prison, but that she rather wanted to be financially

⁵⁴ Ibid; Van der Merwe & Skelton op cit (n39) 363.

⁵⁵ *S v Matyityi* supra (n50) at para [24].

⁵⁶ *Director of Public Prosecutions, North Gauteng v Thabethe* supra (n47) at para [21].

⁵⁷ Van der Merwe & Skelton op cit (n39) 363.

⁵⁸ *S v Seedat* supra (n1) at paras [1]-[3].

⁵⁹ *S v Seedat* supra (n1) at para [31].

compensated.⁶⁰ Based on this testimony, the accused appealed his sentence, arguing that the court should have considered the proposed restorative justice alternative as suggested by the victim.⁶¹

The high court stressed the seriousness of the offence and found that in considering substantial and compelling circumstances, which would allow a deviation from the prescribed minimum sentence, there is no reason why a restorative justice approach cannot be followed in the sentencing of a rape offender.⁶² The court placed great emphasis on its sentencing discretion and found that it is within this discretion, taking into account substantive and compelling factors, that restorative justice can find application:

'It is trite that in determining what an appropriate sentence should be, the court will take in to account *inter alia* the gravity of the offence, the interests of society, the retributive aspects, rehabilitation, deterrence, and the interests of the victim, in cases such as *in casu*, and the interests and personal circumstances of the offender. It is generally a balancing exercise the court embarks upon, without overemphasising one aspect against the others.'⁶³

The appeal was upheld, imposing a five-year suspended sentence with a compensatory amount of R100 000 payable to the victim.⁶⁴

The *Seedat* judgment has been criticised for its application of restorative justice as the accused showed little remorse (he pleaded not guilty) and did not expressly acknowledge wrongdoing.⁶⁵ Although forgiveness, spurred on by remorse and apology, does emerge in a restorative process, it is neither a key value nor aim of restorative justice, which application should not be denied in its absence.⁶⁶

The importance of the high court decision in *Seedat* lies in the fact that the court confirmed the sentencing discretion of judicial officers and that the court within this discretion carefully considered the victim's needs, alongside all the other relevant factors, to hand down an appropriate sentence. With its decision, the high court was able to see the need for and relevance of applying restorative justice principles in rape matters.

⁶⁰ Ibid. The victim wanted the accused to buy her a Toyota motor vehicle including an immediate monetary payment of R5000, followed by monthly payments of R2 500 to the total of R245 000.

⁶¹ *S v Seedat* supra (n1) at para [33].

⁶² *S v Seedat* supra (n1) at paras [38]-[42].

⁶³ *S v Seedat* supra (n1) at para [47].

⁶⁴ The court ordered a first instalment of R 10 000 to be paid, whereafter monthly instalments of R2 500 are payable until the full amount of R100 000 has been paid; *S v Seedat* supra (n1) at para [47].

⁶⁵ M Watney 'The role of restorative justice in sentencing of adult offenders convicted of rape' 2015 *TSAR* 844 at 854-855.

⁶⁶ Skelton & Batley op cit (n32) 38.

The Director of Public Prosecutions appealed the high court decision in *Seedat* on the basis that it was incompetent and invalid, especially in relation to the court considering a restorative justice alternative instead of a custodial sentence.⁶⁷

The Supreme Court of Appeal in its judgment did not analyse the appropriateness or application of restorative justice principles in serious matters, but merely quoted the dicta in *Thabethe* that cautioned against the use of restorative justice in rape matters.⁶⁸ According to the Supreme Court of Appeal the victim's views should not be the only factor that is considered when sentencing an offender, but that a clear message should be sent to the public and other potential rapists that such crimes will not be tolerated:

'Criminal proceedings need to instil public confidence in the criminal justice system with the public including those close to the accused, as well as those distressed by the audacity and horror of crime. ... Indeed the public would justifiable be alarmed if courts tended to impose a suspended sentence coupled with monetary compensation for rape.'⁶⁹

Whilst it is absolutely correct to state that a victim's views are but one of the factors that should be considered in sentencing an accused, it has become a practice of our courts to pay lip service to these needs and completely ignore any consideration or implementation of alternative methods of justice other than justice that is retributive in nature, even if this may be to the benefit of the victim and society if properly applied.

As stated before, courts should consider the social inequalities and power that drive sexual violence and with such an understanding consider restorative justice as a viable sentencing option which might not only give effect to a victim's need but also contribute to addressing the unique nature of these societal crimes.⁷⁰

The Supreme Court of Appeal's arguments were strictly interpretative in nature, finding that s 297(1) of the Criminal Procedure Act 51 of 1997 did not allow for a suspended sentence, as a minimum sentence was prescribed and that only a postponement was allowed for and not a suspension of sentence.⁷¹ It further relied on s 297(4) of the same Act which only allows for a part of a sentence to be suspended and

⁶⁷ *Seedat v S* (731/2015) [2016] ZASCA 153 (3 October 2016) at para [19].

⁶⁸ *Seedat v S* supra (n67) at para [38], quoting *S v Thabethe* supra (n41) at para [20].

⁶⁹ *Seedat v S* supra (n67) at para [39].

⁷⁰ MacKinnon op cit (n25) 241.

⁷¹ *Seedat v S* supra (n67) at para [35].

not a sentence in its entirety.⁷² The appeal was upheld and the accused sentenced to four years' imprisonment.⁷³

It is clear that the Supreme Court of Appeal's judgment is very formalistic, and greatly relied on the interpretation of certain provisions of the Criminal Procedure Act. There is no analysis of the suitability and applicability of restorative justice principles in rape matters. Legal interpretation in common-law countries has a tendency to be formalistic, technical and rule bound, especially in South Africa considering its apartheid history.⁷⁴ Justice Langa has described this approach to legal reasoning as:

'This formal reasoning prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society.'⁷⁵

Much of this formalistic reasoning is based on traditional legal method that relies on relevant and persuasive legal evidence to determine facts; and on set precedent to provide a framework for analysis which then should lead to a rational legal decision.⁷⁶

Feminist legal method, which embraces a substantive understanding of equality (analysed below), challenges this traditional and formalistic legal method that is often employed by judicial decision-makers.

In terms of this understanding, the focus should be on the context and impact in which rights violations or denials occur (sexual violence within our society), with attention focused on the capability of law to represent multiple interpretations that should be taken into account when making a legal decision (the consideration of restorative justice principles in the sentencing of rape offenders).⁷⁷

Despite the high court's decision in *Seedat* setting a positive precedent for the application of restorative justice principles in rape matters, the decision of the Supreme Court of Appeal did little to recognise the voice of victims in the criminal justice system or the consideration of restorative justice principles as a sentencing option. Neither the Criminal Procedure Act nor the minimum sentencing legislation prohibits its consideration or application.

⁷² *Seedat v S* supra (n67) at para [37].

⁷³ *Seedat v S* supra (n67) at para [43].

⁷⁴ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 147 at 168.

⁷⁵ Justice P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 357.

⁷⁶ MJ Mossman 'Feminism and legal method: The difference it makes' (1987) 3 *Wisc Women's LJ* 147 at 153.

⁷⁷ MJ Mossman 'Feminism and the law: Challenges and choices' (1998) 10 *Canad J Women & L* 1 at 3.

The question that should be asked is how we encourage the adoption of restorative justice principles in judicial decision-making, the answer to which could lie in incorporating equality values fully and substantively into criminal law and especially sentencing practice.⁷⁸

4 A substantive understanding of the right to equality and the importance of context in relation to restorative justice

The adoption of the South African Constitution and the acknowledgement of the principle of equality as one of its founding values paved the way for unprecedented change in the South African legal system.⁷⁹ The principle of equality is not only recognised as a value, but also as a right, prohibiting discrimination on a number of grounds.⁸⁰ The Constitutional Court has made it clear that the right to equality is applicable in the sentencing of offenders and that arbitrary considerations should be avoided at all costs.⁸¹

Legal feminists called for a substantive interpretation of the right to equality – one in which the courts would assess equality claims in relation to women’s lived inequalities, which are rooted in deep social and economic differences.⁸² Such an interpretation requires attention to context and, in relation to gender equality, an understanding of the patriarchal nature of our society, and the social and economic disparities that exist, which increase women’s vulnerability to, for example, violence and the intersecting nature of inequalities.⁸³

For a substantive understanding of equality, the focus of a legal inquiry should also be on the impact of an act and on the nature of the harm created.⁸⁴ Albertyn and Goldblatt articulated the importance of

⁷⁸ RC Way ‘Attending to equality: Criminal law, the charter and competitive truths’ (2012) 57 *Supr Ct L Rev* 39 at 40.

⁷⁹ Section 1 of the Constitution.

⁸⁰ Section 9 of the Constitution.

⁸¹ *S v Makwanyane* 1995 (2) SACR 1 (CC) as discussed and interpreted by Terblanche op cit (n15) 122-123.

⁸² C Albertyn ‘Equality’ in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 82 at 82; C Albertyn & B Goldblatt ‘Equality’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2ed (OS 03-07, 2008) 35-1 at 35.6.

⁸³ Albertyn & Goldblatt op cit (n82) 35-4.

⁸⁴ Albertyn & Goldblatt op cit (n82) 35-37; C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* 253 at 259. The Constitutional Court recognised the importance of taking account of context, impact and disadvantage in furthering equality ideals. In *Brink v Kitzboff* NO 1996 (4) SA 197 (CC) at para [42] the Court stated: ‘Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters

a substantive understanding of the right to equality and how such an understanding should influence a court's considerations below:

'A legal commitment to substantive equality thus requires a retreat from legal formalism. Importantly, the assessment of context and impact should be guided by the purpose of the right and its underlying values. While an analysis of the context in which the alleged violation occurs enhances a court's understanding of the legal claim, a clear exposition of the purpose of the right to equality, and of the constitutional values that underpin it, provide the court with crucial signposts to a decision most faithful to the Final Constitution.'⁸⁵

In its first judgment pertaining to unfair discrimination, the Constitutional Court recognised the importance of taking account of context, impact and disadvantage in furthering equality ideals.⁸⁶

It is therefore crucial when bringing an equality claim, and as the author argues for consideration in sexual violence matters, to provide a court with contextual evidence to make sure it is able to arrive at a decision, conscious of its consequences and impact. Ann Shalleck stresses the importance of properly contextualising issues from a feminist viewpoint and identifies key issues that litigators should focus on:

'First, contextualizing involves focusing on the particularity and uniqueness of each situation by attending to the richness and complexity of detail found within it. Second, it relies upon the recognition of multiple perspectives for understanding any particular situation, both at the level of individual participants, as well as the communities those participants belong to. Third, contextualizing involves identifying the different norms, practices and values that the multiple communities have. Fourth, it acknowledges that the interests of individual participants and their communities might be different. Fifth, disparities in power among the participants and their communities are acknowledged. Sixth, it recognizes that individuals exist not in isolation, but in multiple relationships. Those relationships are important in understanding not only a particular event, but also in the structure of law. Seventh, it considers the ways that individuals exist within and in opposition to institutions. Eighth, it draws upon knowledge from other disciplines to help interpret the meaning of particular actions. Psychology, sociology, economics, literature, history may all be used.'⁸⁷

What is evident from the current high levels of violence, and specifically sexual violence, is the need for explicit recognition of the

realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination.'

⁸⁵ Albertyn & Goldblatt op cit (n82) 35-37 (footnotes omitted).

⁸⁶ *Brink v Kitsboff NO* 1996 (4) SA 197 (CC) at para [42].

⁸⁷ AC Shalleck 'Feminist legal theory and the reading of *O'Brian v. Cunard*' (1992) 57 *Miss L Rev* 371 at 387-388.

power relations in South African society requiring a shift or at least an acknowledgement of inequalities.⁸⁸

The consideration of constitutional rights, especially the right to equality and the notion of substantive equality, is key in recognising and acknowledging the complex social contexts in which the criminal justice system operates, as well as the social particularity of participants.⁸⁹ Rosemary Cairns Way questions the absence of equality values in criminal justice systems.⁹⁰ According to her, the absence

‘[r]eflects a deeply entrenched prioritizing of liberal values, operating in combination with an unacknowledged sense that equality analysis is difficult, uncertain and likely to increase rather than decrease the complexity of already complicated questions’.⁹¹

Sheila McIntyre and Christine Boyle argue that criminal law norms are fundamentally inconsistent with substantive equality principles, which highlights the necessity of its application in addressing sexual violence through law.⁹² For them the criminal law’s rigid focus on the individual, which is grounded in the presumption of innocence, leads to a contest of credibility embedded in social patriarchy:

‘Unless the state proves beyond a shadow of a doubt that the individual accused knowingly or recklessly violated the sexual integrity of another, the presumption of innocence will not be displaced. In so quintessential a contest of credibility as a rape prosecution, it dictates a less openly acknowledged corollary: the presumption that the accuser is suspect – mistaken about identity, unreliable of memory, deluded or psychically brainwashed as to key events, wilfully lying or simply inherently shady of character and sexual disposition. Male supremacist, racist, heterosexist and classist ideologies about all women’s or some “types” of women’s mental (in) capacities and sexual proclivities dovetail neatly with these acknowledged and unacknowledged presumptions.’⁹³

Adopting substantive values in criminal adjudication could allow for the interpretation and application of legal principles more conscious of its impact on the parties involved.⁹⁴ In this sense, restorative justice could be seen as a method giving effect to substantive equality values,

⁸⁸ L Artz & D Smythe ‘Introduction: Should we consent’ in L Artz & D Smythe *Should We Consent?: Rape Law Reform in South Africa* (2008) 1 at 15.

⁸⁹ Way op cit (n78) 44.

⁹⁰ R Way ‘Incorporating equality into substantive criminal law: Inevitable or impossible’ (2005) 4 *JL & Equality* 203.

⁹¹ Way op cit (n90) 239.

⁹² S McIntyre & C Boyle ‘Tracking and resisting backlash against equality gains in sexual offence law’ (2000) 20 *Canad Woman Stud* 72 at 78.

⁹³ Ibid.

⁹⁴ Mossman op cit (n77) 5.

which would allow for the victim's needs and context (including that of the offender) to be taken into account in reaching a just decision.

The fear of implementing equality within the criminal justice context could be mitigated by the realisation that an equality analysis does not have to be a constitutional analysis.⁹⁵ If equality is ignored and not thought of as an applicable value but only as an interest, it will always be weighed against more important 'rights' such as the right to a fair trial, and will continue to exert little influence in the criminal justice system.⁹⁶ Equality and its substantive nature should be the lens through which other rights are viewed and constructed, making restorative justice and its application in the criminal justice system a constitutional imperative rather than a simple consideration.⁹⁷

It is a challenge to acknowledge the complexity of law, to recognise the relationship between law and social arrangements, and to persist in seeking justice in spite of law's preference to constrict issues that separate the legal from the social effectively, so creating different categories for law and justice.⁹⁸ By considering restorative justice to be a part of the judicial landscape, direction could be provided to questions on how to be fair to accused persons, while not treating victims and witnesses as inferior.⁹⁹

5 Conclusion

This article focused on the applicability of restorative justice in the sentencing of rape offenders, exploring its consideration and application in three judicial decisions. As discussed, the application of restorative justice principles in rape trials is complex, with it only being considered during the sentencing stage and even then with not much thought or actual consideration.¹⁰⁰

The high court judgment in *Seedat* was a first in enforcing a non-custodial restorative sentence for a rape offence, with the victim's preferences considered as being key in deviating from the prescribed minimum sentence. Although the judgment was a positive step forward in the actual application of restorative justice considerations during the sentencing of a rape offender, the Supreme Court of Appeal and its formalistic reasoning did little for the development of restorative justice in moving beyond punitive outcomes to encompass broader

⁹⁵ J McInnes & C Boyle 'Judging sexual assault law against a standard of equality' (1995) 29 *Univ Brit Colum L Rev* 341 at 350.

⁹⁶ *Ibid.*

⁹⁷ *Way op cit* (n78) 54.

⁹⁸ *Mossman op cit* (n77) 3.

⁹⁹ *Boyle op cit* (n3) 216.

¹⁰⁰ *Van der Merwe & Skelton op cit* (n39) 372.

notions of justice that would benefit rape victims and the perpetrators of these crimes.¹⁰¹

Although the problems of the criminal justice system, especially in addressing systemic inequalities and violent behaviour, are multi-dimensional and often beyond the capacity of courts, it is not to say that the constitutional value of equality cannot play a crucial role in the justice system 'recognizing, acknowledging and reflecting the social contexts in which it operates, as well as the social and political particularity' of its participants.¹⁰² Restorative justice and its actual consideration and application in the criminal justice system is far more than a particular programme or process, but is a mind-set of thinking about justice that would¹⁰³

'... produce justice, avoid discrimination, protect those who most need the law's protection, keep crime in check, and maintain reasonable limits of criminal punishment'.¹⁰⁴

Considering the application of restorative justice in sexual violence matters will always produce tension. Many feminists have acknowledged the contradictory nature of engaging the criminal justice system, which is both a site of oppression and a site for protection, liberation and justice.¹⁰⁵ Although there are many theories and perspectives that analyse and discuss this tension, there are certain commonalities that pave the way towards the necessity of considering the application of restorative justice in the criminal justice system.¹⁰⁶

Hopkins et al describe these as the understanding that violence against women is socially, historically and culturally constructed.¹⁰⁷ With this understanding there should be an acknowledgement that social life and institutions are part of gender and gender relations, and with their interactions being grounded in patriarchy, our response should be grounded in women's lived experiences.¹⁰⁸ With this comes a further acknowledgment that women's lived experiences are 'culturally diverse, highly contextual and socially constructed'.¹⁰⁹ This should allow for the application of multiple options for victims of sexual violence (including restorative justice) in responding to the violation, but should also accept that certain women's preferences

¹⁰¹ McGlynn op cit (n13) 826.

¹⁰² Way op cit (n78) 44.

¹⁰³ Skelton & Batley op cit (n8) 39.

¹⁰⁴ W Stuntz *The Collapse of American Criminal Justice* (2011) 2.

¹⁰⁵ Artz & Smythe (n88) 16.

¹⁰⁶ CQ Hopkins, MP Koss & KJ Bachar 'Applying restorative justice to ongoing intimate violence: Problems and possibilities' (2004) 23 *St Louis Univ Public L Rev* 289 at 298.

¹⁰⁷ Hopkins, Koss & Bacher op cit (n106) 299.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

may differ from what would be regarded as a feminist response in addressing systemic inequalities.¹¹⁰ Whether the application of restorative justice principles in sexual violence matters will be able to address the individual preferences of women and the larger systemic issues is an open question, but is a tension according to Hopkins et al that one should be aware of when insisting that woman's voices and preferences matter.¹¹¹

When sexual violence is perpetrated there is a clear need for an intervention that provides safety and restores peace.¹¹² Ann Skelton argues that restorative justice is the most appropriate framework for denouncing crime as it is a communicative process in which the victim's role is central.¹¹³ The author agrees with this argument and also advocates that through the validation of a victim's harm, the acknowledgment of wrongfulness and an undertaking to repair that harm, we could eventually deconstruct systems of oppression that trigger, construct and maintain gendered violence.¹¹⁴ Ultimately, the consideration of restorative justice in sexual violence matters could assist a victim's need for justice and could further assist in shifting or at least acknowledging inequalities.¹¹⁵

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Martin op cit (n14) 184.

¹¹³ Skelton op cit (n36) 241.

¹¹⁴ CQ Hopkins & MP Koss 'Incorporating feminist theory and insights into a restorative justice response to sex offenses' (2005) 11 *Violence Against Women* 693 at 717.

¹¹⁵ Artz & Smythe op cit (n88) 15; MP Koss 'Restoring rape survivors: Justice, advocacy, and a call to action' (2006) 1087 *Annals NY Academy of Sci* 207 at 224.