IN THE HIGH COURT OF SOUTH AFRICA /RB

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 13/06/06

CASE NO. CC 83/04

In the matter between:
THE STATE
and
JOYCE MALULEKE AND OTHERS **Accused**

JUDGMENT ON SENTENCE

BERTELSMANN J

1. The accused, who was accused no 1 during the trial, was convicted in the High Court of the Northern Circuit of the Transvaal Provincial Division, sitting at Lephalele, of murder. She had been charged together with several other accused. The victim was a young person who broke into her house in a small village in the Limpopo Province.

2. The other accused were acquitted.

3. The accused had caused the death of the deceased by participating actively, together with her husband, in a sustained assault upon the deceased after he had been apprehended in her home into which he had broken with the apparent intent to commit theft.

4. Her husband, who was originally charged with her, died before the start of the trial.

5. The accused lives in a small, close - knit community. The deceased was in fact part of her extended family and well known to her.

6. The sentencing of the accused presented particular problems. On the one hand, she is guilty of a very serious offence, the result of a sustained and brutal attack upon a youthful transgressor who was

trussed up before the assault started and could neither defend nor protect himself.

7. On the other hand, the accused has four minor children who are dependent on her. She is unemployed, and her only income is a child grant.

8. She is a widow and does not receive a pension because her husband was under suspension from the police at the time of his demise.

9. The accused is a first offender. There is no suggestion that there exists any danger of the crime being repeated, nor is there any indication that the accused is a person normally given to violent conduct.

10. There was evidence that she regretted and still regrets the death of the victim.

11. She therefore is clearly not a person against whom society needs to be protected.

12. In spite of these considerations, the crime of murder calls for a severe sentence. This does not mean that incarceration is the only option. Community service coupled with suitable conditions has been imposed upon accused who were convicted of the intentional taking of another's life before, eg ***S v Potgieter*** 1994(1) SACR 61 (A).

13. During evidence in mitigation, the defence investigated the question whether the accused had, prior to the trial, complied with the traditional custom of her community of apologizing for the taking of the deceased's life by sending an elder member or members of her family to the family of the deceased.

14. I should hasten to add that no expert evidence was given in regard to this traditional custom, but the fact of its existence was not challenged by the prosecution. On the contrary, it was accepted that the traditional custom prevailing in the accused's community demanded that, in the event of an unlawful killing of a member of the community, the family of the perpetrator send a senior representative to the family of the deceased to apologize and to attempt to mend the relationship between the families disturbed by the death of the deceased.

15. Normally, a non-traditional court applying traditional law cannot take judicial cognisance of such law but requires expert evidence in order to determine its existence.

16. In this particular instance, however, the custom was common cause.

17. When the accused was asked whether she had complied with this custom, she answered in the negative.

18. As far as this Court is aware, the failure to comply with this custom would normally be regarded as adding insult to injury by the family of the victim. The state and the defence approached the issue on the same basis during the trial.

19. The state called the victim's mother to inform the court of the hurt and loss that the deceased's family had suffered. In cross-examination, counsel for the defence enquired from her whether she would be prepared to receive a senior representative from the accused's family in order to attempt to restore the broken relationship between the families.

20. The deceased's mother answered in the affirmative, adding
"But she must tell me why she killed my child."

21. This answer enabled the Court to involve the community in the sentencing and rehabilitation process.

22. The Court sentenced the accused to 8 (eight) years imprisonment, all of which was suspended for a period of 3(three) years on condition that, inter alia, the accused apologized according to custom to the mother of the deceased and her family within a month after the sentence having been imposed.

23. The Court would not have sent the accused to jail in the light of the strong mitigating factors that were present in this instance, even without the possibility of introducing an observance of custom into the sentencing and rehabilitation process.

24. But once this opportunity presented itself, a suitable sentence could be imposed that also created an opportunity to begin to heal the wounds that the commission of the crime caused to the family of the deceased and to the community at large. As it happened, the accused and the deceased's mother started talking to each other before the Court had formally adjourned.

25. The particular circumstances of this case created the opportunity to introduce the principles of restorative justice into the sentencing process.

26. Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasizes the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism.

> "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. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:
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> - 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.
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> Considering that crime rates in South Africa remain high and that government's focus appears to be on punishment rather than justice, a different approach is needed."***(Per Mike Batley and Traggy Maepa in: Beyond Retribution – Prospects for Restorative Justice in South Africa, page 16).***

27. A thorough analysis of the attention that restorative justice has enjoyed in South Africa is contained in "The restorative justice bug bites the South African criminal justice system", an article by ***Boyane Tshehla in South African Criminal Law Journal 2004 (17)***, page 1 and further.

28. Various definitions are quoted in this article of what restorative justice is aimed at, and the author says on page 7:

> "the most comprehensive definition comes from Canada and goes thus: ***(by Robert Cormier)***
> '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 the crime – victim(s), offender and community – to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.'"

29. The author underlines that restorative justice shifts the focus of the criminal process from retribution to healing and re-establishing societal bonds. It concentrates on the development of the offender into a responsible member of society, through the process of acknowledging the hurt suffered by the victim and society, and taking steps to eliminate the effects of the crime upon these individuals and the community at large.

30. Batley and Maepa underline that a supple restorative justice approach creates promising possibilities of introducing customary law principles into the formal criminal justice system:

> "Although restorative justice may be considered a fairly new approach to criminal justice, a number of countries such as Canada and New Zeeland have discovered that the ethnic heritage of their indigenous people has much to offer the modern criminal justice system. This heritage typically addresses major shortcomings in the modern system, such as the need to ensure that an offender really does acknowledge personal responsibility, that he or she is reintegrated back into the society, and that the needs of those who have been affected by crime are addressed.
>
> Although it is generally not well integrated into the South African criminal justice system, our African heritage is relevant. While there are a number of differences between ethnic groups in this country, some of the central features of African legal systems that become evident are:
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> - A concern to shame the offender and then to reincorporate him or her back into the community once the initial expression of community repugnance has been demonstrated;
> - Avoiding as far as possible the segregation of the offender or his or her marginalisation into a sub-community of similar social rejects;
> - A recognition that the supernatural plays a part in justice;
> - A focus on community affairs aimed at reconciling the parties and restoring harmonious relations within the community, and
> - Ensuring that the families of the involved parties are always fully involved." (*loc. cit.)*

31. Restorative justice in South Africa is still in its infancy. Anecdotal evidence exists of successful pilot projects that have been launched to help offenders to take responsibility for their actions and to begin a reconciliation process with the victims, such as the project at the Rooigrond prison in the North-West Province, where rape offenders sentenced to long terms of imprisonment were reconciled with their victims and a healing process was thereby started. The victims and the offenders met within the confines of the prison after advance counselling. The offenders apologized to the victims in an effort to enable the latter to find closure of the relevant incident and its consequences. Acceptance of the apology should encourage the offenders in their rehabilitation.

32. I have been able to find only one South African judgment in which there has been a conscious recognition of the advantages of restorative justice: **S v Shilubane 2005 JOL 15671 (T)**, by Bosielo J, Shongwe J (as he then was) concurring. It is obvious that restorative justice cannot provide a single and definitive answer to all of the ills of crime and its consequences. Restorative justice cannot ensure that society is protected against offenders who have no wish to reform, and who continue to endanger our communities.

33. But on the other hand restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby.

34. 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 the offender. It may provide a whole range of supple alternatives to imprisonment. This would ease the burden on our overcrowded correctional institutions.

35. Restorative justice has received more attention in *inter alia* Zimbabwe than in South Africa to date. In ***S v Shariwa [2003] JOL 11015 (ZH)***, Ndou J, said the following:

> "the convicted person should not be visited with punishment to the point of being broken. … Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime. … Imprisonment, originally a mere matter of detention until a debt is paid or a trial determined, has now become the most usual punishment for most crimes, except for minor offences for which non - custodial sentences are imposed. This is so because despite the various associations of benevolent men and women and experts in penology, no practical alternative has worked in most jurisdictions. In our jurisdiction there has been a paradigm shift. First, over the years our superior courts have emphasised that a sentence of imprisonment is a severe and rigorous form of punishment, which should be imposed only as a last resort and where no other form of punishment will do. Second, there have been concerted efforts to shift from the more traditional methods dealing with crime and the offender towards a more restorative form of justice that takes into account the interests of both society and the victim, ie community service…"

36. The learned judge deals with sentencing guidelines in Zimbabwe, which determine that community service should be considered in all cases warranting an effective prison sentence of 24 months or less

37. These sentiments are echoed by Bosielo J in ***S v Shilubane 2005 [JOL 15671(T)]*** The learned judge says

> "The accused herein stole 7 fowl from the complainant which according to his admissions, he cooked. Self - evidently the loss of the complainant amounts to R216.00 (two hundred and sixteen rand) which is the value of the seven fowls reflected on the charge sheet. I have little doubt in my mind that, in line with new philosophy of restorative justice, that the complainant would have been more pleased to receive compensation for his loss. An order of compensation coupled with a suspended sentence would, in my view, have satisfied the basic triad and the primary purposes of punishment…
>
> 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. Inasmuch as it is critical for the maintenance of law and order that criminals be punished

> for their crimes, it is important that the presiding officer impose sentences which are humane and balanced. There is abundant empirical evidence that retributive justice has failed to stem the ever-increasing wave of crime. It is furthermore counter-productive if not self-defeating, in my view, to expose an accused like the one, *in casu*, to the corrosive and brutalising effect of prison life for such a trifling offence. The price which civil society stands to pay in the end by having him emerge out of prison a hardened criminal, far outweighs the advantages to be gained by sending him to jail…
>
> I am of the view that courts must seriously consider alternative sentences like community service as a viable alternative to direct imprisonment, particularly where the accused is not such a serious threat to the society that he requires to be taken away from society for its protection."

See further ***Zulu v S 2003 JOL 116 at 7 (ZH)***.

38. The incorporation of the principles of traditional justice into the South African criminal justice system must be approached with circumspection. While it is generally appreciated that African legal systems did not know prisons, it would be dangerous indeed for a judge not versed in traditional customs to make assumptions that could to be prove grievously wrong and the incorrect application of which would do more harm than good.

39. Experience in Canada, New Zeeland and also, in particular, in Australia has, however, shown that the introduction of traditional, indigenous legal systems into at least part of the criminal justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victims' hurts, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large.

40. There appears to be little reason why similar results could not be achieved in South Africa.

41. 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.

E BERTELSMANN
JUDGE OF THE HIGH COURT

CC83/04

HEARD ON: 06/06/2005
FOR THE STATE: ADV E MGUNI
INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA
FOR ACCUSED NO 1, 2 AND 3: MR E M MOKGOTO
INSTRUCTED BY: LEGAL AID BOARD MAKHADO
FOR ACCUSED NO 4 AND 5: MR MC MOGASHOA
INSTRUCTED BY: LEGAL AID BOARD MAKHADO