

# Concessions on custodial sentences

## Learning from the New Zealand approach to restorative justice

Emma Charlene Lubaale\*

elubaale@yahoo.co.uk

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*South African courts, in at least two reported cases, have dealt with restorative justice (RJ) in sentencing offenders (i.e. State v. Thabethe (Thabethe); and State v. Seedat (Seedat). In both cases, the Supreme Court of Appeal gave limited regard to RJ, with the presiding judges '[cautioning] seriously against the use of restorative justice as a sentence for serious offences'. However, in countries such as New Zealand, courts have handed down custodial sentences in cases of serious offences while giving due regard to RJ at the same time. The purpose of this article is to highlight some of the strategies that New Zealand courts have invoked to ensure that a balance is struck between retributive justice and RJ. On the basis of this analysis, a conclusion is drawn that RJ can play a role in criminal matters by having it reflect through reduced sentences. With such a strategy, courts can strike a balance between the clear and powerful need for a denouncing sentence on the one hand, and RJ on the other.*

Restorative justice (RJ) has been understood and conceptualised differently by different scholars.<sup>1</sup> Courts have also conceptualised and invoked this approach varyingly.<sup>2</sup> A golden thread that runs through these different conceptualisations is the understanding that RJ makes healing and redress of the harm caused by offending, restoration, compensation and communication a priority.<sup>3</sup> Although RJ is devoid of a universally accepted definition, some concepts overlap across the literature. Notably, it constitutes an approach different from the retributive approach to justice, the latter being understood as a predominantly accusatory

system of justice and the former constituting a new approach, which places emphasis on healing and redress of the harm caused by crime.<sup>4</sup> As a number of criminal justice systems are predominantly accusatorial, RJ continues to reside on the peripheries. Worthy to note, however, RJ is not novel to the criminal justice systems of South Africa and New Zealand. There is an abundance of jurisprudence clearly demonstrating the preparedness of the courts in these countries to invoke RJ in criminal matters. It is pertinent to note, however, that despite the fact that RJ has featured in criminal matters in both New Zealand and South Africa, it has been received and invoked differently.<sup>5</sup> South Africa, as will be demonstrated in the cases of *S v. Thabethe (Thabethe)*<sup>6</sup> and *S v. Seedat (Seedat)*,<sup>7</sup> appears to be taking the extreme position – that

\* Emma Charlene Lubaale is a senior lecturer at the School of Law of the University of Venda. She holds an LLB from Makerere University, and an LLM and LLD from the University of Pretoria.

RJ has no place and should not constitute an option in cases of serious offending. New Zealand, on the other hand, appears to be taking a middle ground – ensuring that a balance is struck between retributive justice and RJ.

Much has been written about RJ and whether or not it should have a role in criminal justice. Invoking RJ often brings the notion of punishment sharply into focus, in particular raising questions about whether RJ, if invoked, would be compatible with punishment.

According to Terblanche, the ‘purposes of punishment should be dealt with as part of the interests of society component of the Zinn triad’.<sup>8</sup> The components of the Zinn triad are prevention, retribution, reformation and deterrence. This approach can, however, be criticised for not according due regard to the rights of victims. RJ, therefore, brings with it interesting possibilities with regard to the gaps in conventional systems of justice.

Not surprisingly, literature abounds on the need for criminal justice systems to prioritise RJ in criminal matters. The entire literature cannot be canvassed; however, some of it will suffice. Batley advances the viewpoint that RJ should have a role and place in all offences, including the serious.<sup>9</sup> Batley and Skelton urge criminal justice practitioners to explore pragmatic models with a view to making RJ a reality.<sup>10</sup> Van der Merwe and Skelton see no reason why custodial sentences should not co-exist along with RJ, contending that the views of victims need to be given due weight by ensuring, among others, that RJ is blended with a ‘just deserts’ approach.<sup>11</sup> Du Toit and Nkomo discuss the role that congregations can play in advancing RJ.<sup>12</sup> Although they do not discuss the issue from a criminal justice perspective, the points they advance are relevant. They argue that, while the seriousness of offending needs to be acknowledged,

equal emphasis needs to be placed on ‘encouraging a movement towards a unified future’.<sup>13</sup> The authors place various elements of RJ into perspective, including the notion of reparation. They take the view that ‘the term “reparations” acknowledges that a monetary or material compensation cannot make up for losses such as a death of a family member or the trauma of torture, but suggests it is rather a symbolic gesture and an acknowledgement of wrongdoing, which is proposed as the starting point of reconciliation.’<sup>14</sup> In their opinion, therefore, reparation is an element not to be underestimated in so far as dealing with offending is concerned.

Commentators, however, bemoan the slow pace at which courts have warmed up to RJ. Skelton, for instance, submits that, although the Constitutional Court of South Africa has embraced RJ, some flaws remain; for instance, courts’ exclusive emphasis on court-ordered apologies.<sup>15</sup> This tends to undermine the broader perspective through which RJ can be viewed. Gxubane is critical of criminal justice practitioners’ tendency to place some cases, especially serious ones, beyond the realm of RJ.<sup>16</sup> He attributes this practice to the misguided view that RJ and punishment are diametrically opposed, and as such cannot co-exist. This assumption is puzzling in light of certain commentators’ argument that some punishment is necessary to enhance the effectiveness of RJ.<sup>17</sup> Louw and Van Wyk have concluded that ‘in general legal practitioners find restorative justice to be suitable in the South African context’.<sup>18</sup> They are equally concerned that ‘undue emphasis is placed on retribution and on the extensive use of imprisonment in the current justice system, despite the availability of restorative options’.<sup>19</sup> A cross-cutting concern in the literature, therefore, is the limited regard accorded to RJ. It remains unclear, however, how this concern can be addressed in a system inclined towards retribution.

This article explores some viable strategies for incorporation of RJ in a criminal justice system such as South Africa's, which is potentially retributive. This is achieved by drawing insight from the approach of the courts in New Zealand. Following this introduction, the article briefly discusses the position of the Supreme Court of Appeal of South Africa on RJ in cases of serious offending, using *Thabethe* and *Seedat* as examples. It then critically analyses selected court decisions in New Zealand, demonstrating how courts dealt with RJ in cases of serious offending and ensured that RJ complemented denouncing sentences for serious offending. The strategies adopted by New Zealand courts are highlighted. Since New Zealand's courts, like South Africa's, are predominantly accusatory, the article explores what South Africa's justice system can learn from New Zealand's with regard to RJ.

### **Restorative justice in South Africa: the *Thabethe* and *Seedat* cases**

The *Thabethe* case that came before the High Court concerned an accused (*Thabethe*) who was found guilty of the rape of the complainant, his 15-year-old stepdaughter.<sup>20</sup> The rape occurred at a time when the accused and the complainant's mother were living together as companions. During this companionship, the accused covered the living expenses of all family members, including the complainant.<sup>21</sup> The accused pleaded guilty to raping the complainant and was accordingly convicted. During the proceedings, the complainant testified that although she was hurt by the accused, she wished that he would not be sentenced to a custodial sentence since her entire family was financially dependent on him.<sup>22</sup> As the true wishes of the complainant could not be established during trial proceedings, the court considered a victim/offender programme.<sup>23</sup> Neither the prosecution nor the defence objected to the programme.<sup>24</sup>

The programme involved the victim, the offender, a probation officer and the Restorative Justice Centre of Pretoria.<sup>25</sup> It was successfully concluded, during which the complainant reiterated her wish that the convict not be given a custodial sentence.<sup>26</sup> The court found the case fit for application of RJ and, on this basis, handed down a 10-year term of imprisonment, suspended for five years.<sup>27</sup> With the sentence suspended, it meant that after five years the convict would no longer be at risk of imprisonment.

The High Court's approach is to be welcomed in how it embraced RJ. This approach affirms calls by scholars to accord due regard to RJ in criminal matters. However, it is also to be faulted for giving limited regard to the denouncing role of custodial sentences in cases of serious offending. Giving due regard to RJ does not necessarily suggest that custodial sentences should be disregarded. Rather, a proper balance needs to be struck between punishment and RJ. By not considering custodial sentences at all, the High Court failed to strike a proper balance between RJ and the denouncing role that custodial sentences play.

The Director of Public Prosecutions appealed the above decision in the Supreme Court of Appeal, which ruled that RJ constitutes a viable sentencing option in criminal matters.<sup>28</sup> However, it was sceptical of RJ's role in cases of serious offending. It noted emphatically that in serious crimes, RJ is unsuitable because it fails to 'reflect the seriousness of the offence and the natural indignation and outrage of the public'.<sup>29</sup> In the court's view, the circumstances of the case, even though compelling, did not justify a sentence based on RJ.<sup>30</sup> The court went on to firmly 'caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society'.<sup>31</sup> The

Supreme Court of Appeal is to be commended for according due regard to the seriousness of child rape by considering a custodial sentence. However, in downplaying the role of RJ, it ended up forfeiting RJ for the goals of deterrence and denunciation (by way of custodial sentences). Accordingly, this court also failed in its task of striking a balance between RJ and retributive justice, seemingly suggesting that RJ cannot co-exist alongside retributive justice in cases of serious offending.

The case of *Seedat* also pertained to the sexual offence of rape.<sup>32</sup> The accused (*Seedat*), who was 60 years at the time the crime was allegedly committed, was charged before the Regional Court with the crime of rape of the complainant (a 57-year-old woman).<sup>33</sup> The court found *Seedat* guilty and accordingly convicted him. Before arriving at the sentence, both the prosecution and the defence led evidence. The prosecution led the evidence of a clinical psychologist who relayed the complainant's wishes that the court should not impose a community-based sentence but instead that an order for financial compensation be made on account of the trauma she suffered owing to the rape.<sup>34</sup> The state was against the complainant's request, preferring a lengthy term of imprisonment on account of the seriousness of rape.<sup>35</sup> The trial court, having taken into account the submissions of both the defence and the prosecution, sentenced *Seedat* to seven years' imprisonment.<sup>36</sup>

It can be deduced from the trial court's decision that, although the complainant desired that the sentencing process accord regard to compensation, this was not an option for the state. It is also evident that the possibility of balancing compensation and a custodial sentence was not explored by the trial court. *Seedat* appealed the trial court's decision in the High Court. The High Court had to address a number of issues, including the validity of the

sentence handed down. Although it dismissed *Seedat*'s appeal, it set aside the sentence imposed by the High Court by suspending it in its entirety for five years subject to some conditions, including a requirement that the convict pay the complainant a total of R100 000.<sup>37</sup> Notably, *Seedat* did not plead guilty, but he was nonetheless prepared to pay the said compensation.<sup>38</sup> From the foregoing decision, the High Court is to be commended for giving regard to one of the elements of RJ – the voice of the victim. However, by suspending the sentence in its entirety, the High Court failed to strike a balance between the victim's voice and the seriousness of rape.

The Director of Public Prosecutions appealed the sentence handed down by the High Court in the Supreme Court of Appeal, contending that it was incompetent and invalid because no custodial sentence was imposed.<sup>39</sup> The Supreme Court of Appeal took the view that RJ was not an appropriate sentencing option for a matter as serious as rape.<sup>40</sup> The court therefore reversed the High Court sentence, drawing on its own earlier decision in *Thabethe*.<sup>41</sup> It consequently substituted the suspended sentence with four years' imprisonment.<sup>42</sup> Although the Supreme Court of Appeal, by considering a custodial sentence, was alive to the seriousness of rape, it ended up dismissing the role of RJ altogether on account of rape being a serious crime. By not exploring the possibility of striking a balance between RJ and custodial sentences, the court excluded the goals of RJ from the sentencing agenda. In the court's view, 'a sentence entailing a businessman being ordered to pay his rape victim in lieu of a custodial sentence is bound to cause indignation with at least a large portion of society'.<sup>43</sup> The issue of concern in *Seedat* is not so much the four-year sentence ultimately handed down, but rather the total disregard of the victim's requested compensation and, more generally, the possibility of harmony between

custodial sentences and compensation. Arguably, compensation did not have to be pitted against a custodial sentence.

## New Zealand: striking a balance

The cases discussed thus far illustrate how courts tend to struggle to balance the retributive theory of justice and RJ at the sentencing stage. In both *Thabethe* and *Seedat*, because the Supreme Court of Appeal needed to affirm the gravity of the crimes (sexual offences), a sentence that excluded custodial sentence would not be an option. Some form of custodial sentence was indeed warranted, but in imposing such a custodial sentence, the Supreme Court of Appeal disregarded the outcome of the RJ process. A question worth asking is: did both the High Court and the Supreme Court of Appeal have to choose one approach over the other, or can a balance be struck to incorporate both? In the next section, New Zealand's case law is reviewed to help answer this question. This review is intentionally limited to three cases in which a balance was struck between punishment and RJ.

### The *Clotworthy* case

The case of *R v. Clotworthy* (*Clotworthy*) is celebrated in New Zealand as establishing a persuasive precedent for RJ's relevance to serious offending.<sup>44</sup> In *Clotworthy*, the offender, having spent the day drinking alcohol, stabbed another man (the victim) in an act described as one of aggression.<sup>45</sup> It was established that the stabbing was random and without explanation. The offender was charged with the offence of wounding with intent to cause grievous bodily harm, an offence punishable by up to 14 years' imprisonment.<sup>46</sup> Based on previous decisions of a similar nature, an appropriate sentence for the crime would have ranged from three and a half to six years in prison.<sup>47</sup>

The Auckland District Court welcomed an RJ meeting, where both the victim and offender

saw no point in a custodial sentence. Instead, they agreed that the offender pay the victim's substantial medical bills. The Auckland District Court was presented with this agreement and asked to hand down sentence. It sentenced Clotworthy to two years' imprisonment (suspended), and ordered him to pay \$15 000 to the victim and perform 200 hours of community service.<sup>48</sup> The state appealed this sentence. The New Zealand Court of Appeal ordered a custodial sentence of three years and ordered the convict to pay \$5 000 reparation to the victim.<sup>49</sup> It based this on the historical precedent of sentences for such crimes, and the offender's willingness to plead guilty and to pay compensation.<sup>50</sup> In handing down this sentence, the judge ruled that RJ must be 'balanced against other sentencing policies'.<sup>51</sup> The judge added that 'the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the court is directed to impose'.<sup>52</sup>

A number of points in *Clotworthy* are worth highlighting:

- Although the offence was serious, allowing a custodial sentence of up to 14 years' imprisonment, RJ was not discounted.
- The outcomes of the RJ meeting were not conclusive. The court still exercised its discretion to determine the appropriate sentence, with a view to ensuring a balance between RJ and other sentencing goals, such as deterrence.
- The outcomes of the RJ meeting were considered together with other sentencing policies.
- The outcome demonstrated that RJ can justify reduced sentences.
- The case confirms that RJ and retributive justice can be complementary.

With *Clotworthy* in mind, are the rulings in *Thabethe* and *Seedat*, to the effect that RJ has no place in cases of serious offending, defensible? Perhaps the court should have allowed RJ to inform the length of the sentence handed down. Instead, the Supreme Court of Appeal dismissed the notion of RJ as irrelevant where custodial sentences are unavoidable. This view subordinates RJ, and unnecessarily so.

Significantly, the *Clotworthy* decision has also been criticised for considering RJ too narrowly. Some contend that its focus on reparation obscures the wider goals and objectives of RJ.<sup>53</sup> In truth, the New Zealand Court of Appeal, in blending RJ (in the form of reparation) with a custodial sentence, limited RJ's potential contribution. However, it is arguably better for RJ to be applied piecemeal rather than being downplayed, as happened in *Seedat* and *Thabethe*.

### **The Police case**

The 2001 decision in *Police v. Stretch (Police)* pertained to an offender who was convicted of multiple driving offences and manslaughter in New Zealand.<sup>54</sup> Although the case involved no formal RJ referral, the families of the offender and deceased met with the intention of resolving the dispute in a restorative manner. As with *Clotworthy*, striking a balance between RJ and traditional sentencing was not straightforward. Confronted with both families' wishes, the High Court sentenced the offender to 18 months in prison.<sup>55</sup> It is worthy to note that the historical precedent of sentences for manslaughter was three and a half years.<sup>56</sup>

Dissatisfied with what it saw as a lenient sentence, the crown appealed in the Court of Appeal, which increased the sentence to two and a half years. The court recognised the value of RJ, but in light of the *Clotworthy* case, believed the 18-month sentence too lenient for manslaughter.<sup>57</sup> The court also gave due

regard to the victim's family, noting that '[i]n this context, the most compelling part of the material available to the sentencing Judge, was the clear statement of the dead girl's father that for him, and his family, a lenient sentence would most assist them in the healing process'.<sup>58</sup> The court added that:

It appears the principles of restorative justice may stand in conflict with principles of deterrence which represent the norm, but if the recognition of restorative justice in *Clotworthy* is to have practical effect, then I think a balance must be sought, no matter how difficult it might be to find that balance.<sup>59</sup>

Again, a number of points are worth highlighting:

- Invoking RJ does not require a light prison sentence.
- RJ can be invoked alongside a custodial sentence. In this case, RJ resulted in a shorter custodial sentence than that apparent in previous case law.
- The appellate court can increase the length of a custodial sentence to ensure that a proper balance is struck between RJ and other sentencing policies.

The *Police* case is of relevance to the South African *Thabethe*. Notably, when the RJ sentence handed down by the court was appealed in the Supreme Court of Appeal, the presiding judge in the latter court stated:

I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. 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 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.<sup>60</sup>

Pertinent to note, this same position was endorsed by the same court in *Seedat*, in which RJ was downplayed, having no role whatsoever in informing the length of the sentence handed down. The court in *Police* acknowledged that restorative elements are not enough to justify a light sentence (18 months for causing death), but did not rule out the role of RJ in informing the final sentence handed down. In contrast, in South Africa's *Thabethe* and *Seedat* the initial sentences were set aside without regard to RJ.

### The Cassidy case

The 2003 decision in the case of *R v. Cassidy* (*Cassidy*) pertained to the offence of manslaughter in New Zealand.<sup>61</sup> The facts leading to this decision were as follows: there was a scuffle at a bar between the victim and the bar manager, in which the victim (a customer at the bar) assaulted the bar manager. The offender, who was employed at the bar, intervened with a view to defending the bar manager. In the course of intervention, the offender, using his hand, struck the victim (i.e. the customer at the bar). The victim lost his balance, fell backwards and struck his head, resulting in his death.<sup>62</sup> The matter came before the High Court of New Plymouth, in which a formal RJ meeting was convened between representatives of the offender and the victim.<sup>63</sup> At the RJ meeting, the offender accepted full responsibility for the offence. He also expressed sorrow and deep remorse for having caused the victim's death, and apologised unequivocally to the victim's family. Following the meeting, the court was tasked with determining an appropriate sentence. Notably, the presiding judge told the offender:

I intend to give you credit for attending the restorative justice process. I know you

have said it is the hardest thing you have done and I can understand that. You did not need to do it, and you will be given credit for that. I accept there has been genuine remorse and a genuine attempt by you to assist the victim's family.<sup>64</sup>

Ultimately, having considered and balanced all the factors, the offender was sentenced to two years' imprisonment. The following is worth noting:

- Manslaughter, however serious an offence it is, did not bar the court from according due regard to RJ.
- The outcome of the RJ meeting informed the sentence handed down.

In sum, in *Cassidy*, as with *Clotworthy* and *Police*, RJ was ultimately blended with retributive justice.

### Discussion and conclusion

A position has been taken by South Africa's Supreme Court of Appeal, as apparent in *Thabethe* and *Seedat*, that RJ should not be used in cases of serious offending. This position seems to be based on the premise that RJ processes cannot rest comfortably alongside a sentencing process where the outcome is a custodial sentence or punishment. Despite the foregoing position, scholars, including those in South Africa, have long called for RJ to be accorded due regard in criminal matters. The decisions of the Supreme Court of Appeal in both *Thabethe* and *Seedat* appear to confirm Louw and Van Wyk's concern that emphasis is often placed on custodial sentences, to the detriment of RJ. The courts' trend also seems to affirm Gxubane's anxiety about criminal justice practitioners' tendency to place serious cases out of reach for RJ. Indeed, the proactive step taken by the High Court to invoke elements of RJ in both *Seedat* and *Thabethe* is commendable. However, the High Court's approach confirms Skelton's concern that in

invoking RJ, courts sometimes place exclusive emphasis on notions of RJ such as 'apologies', to the detriment of the seriousness of crime.

From *Thabethe* and *Seedat*, it may be concluded that the courts are not striking a balance between RJ and punishment. Thus, an outstanding challenge remains: how can RJ be blended into a system that potentially advances the notion of just deserts? This article has attempted to address this question by drawing on selected decisions from New Zealand courts to show that if a proper balancing exercise is invoked, elements of RJ can co-exist alongside a sentencing approach that results in custodial sentences. This can be effectively accomplished by having RJ elements inform the length of the custodial sentence handed down. The foregoing position remains defensible in light of the fact that the literature affirms that RJ does not necessarily have to exclude punishment. Thus, the adoption of such an approach has the potential for allowing the implementation of calls long made by commentators concerning RJ.

Of course, New Zealand's approach is not perfect, nor should it be transplanted to South Africa. Rather, consideration of New Zealand's case history may help to throw up imaginative solutions for sentencing judges in South Africa who are confronted with similar tensions.

Because of the reporting system of New Zealand case law, some judgements could not be accessed in full. Thus, in some cases, the author had to make recourse to case notes. This ultimately impacted negatively on the validity of the conclusions drawn and, more importantly, deprived the discussion of a more rigorous engagement with these judgements.



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## Notes

1 H Zehr, *Changing lenses: a new focus for crime and justice*, Scottsdale: Herald Press, 2005, 271; H Zehr, *The little book*

*of restorative justice*, Intercourse: Good Books, 2002, 37; T Marshall, The evolution of restorative justice in Britain, *European Journal of Criminal Policy & Research*, 4, 1996, 37; M Batley, 'Ngwana phosa dira ga a bolawe': the value of restorative justice to the reintegration of offenders, *SA Crime Quarterly*, 26, 2008, 27; A Skelton and M Batley, Restorative justice: a contemporary South Africa, *Acta Criminologica*, 21, 2008, 37; United Nations Economic and Social Council, United Nations Economic and Social Council Resolution 2002/12: Basic principles on the use of restorative justice programmes in criminal matters, 24 July 2002, E/RES/2002/12, <http://www.refworld.org/docid/46c455820.html> (accessed 1 April 2017). Notably, Zehr defines it as 'a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible'. Marshall considers it 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future', while Batley views it as 'processes [which] focus on relationships and create opportunities for individual, family and community restoration and reconciliation. In doing so they open up new social spaces for offenders and nurture social inclusion. They also help offenders accept responsibility and help all parties manage the process of release from prison.' According to the UN basic principles' definition, it means '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'.

- 2 For instance, in cases such as *S v Maluleke* 2008 1 SACR 49 (T) para 34, restorative justice (RJ) was implicitly conceptualised as an alternative to retributive justice, while in cases such as *R v Clotworthy* (1998) 15 CRNZ 651, RJ was viewed as one of the issues to be taken into account in the balancing exercise with a view to determining the appropriate sentence handed down.
- 3 Refer to definitions in endnote 1 for the cross-cutting similarities.
- 4 Ibid.
- 5 In addition to the decisions of the courts in these two countries, there is some legislative basis for the application of RJ in both countries. In the case of New Zealand, Section 7(1) of the New Zealand Sentencing Act 2002 makes room for the application of RJ. This section lists a number of purposes for sentencing, including holding an offender accountable for harm, promoting a sense of responsibility and acknowledgement of that, providing for the interests of the victim and providing reparation. Commentators contend that the foregoing goals provide a legislative basis for RJ to be invoked. In South Africa there is legislation in place that underscores the need to invoke RJ, a notable one being South Africa's Child Justice Act 2008 (Act 75 of 2008).
- 6 *S v Thabethe* 2009 (2) SACR 62 (T) [*Thabethe*].
- 7 *Seedat v S* (731/2015) [2016] ZASCA 153 (03 October 2016) [*Seedat*].
- 8 SS Terblanche, *Guide to sentencing in South Africa*, 2<sup>nd</sup> edition, Durban: LexisNexis, 2007, 4.
- 9 M Batley, 'Restorative justice in the South African context', in T Maepa (ed.), *Beyond retribution: prospects for restorative*



- justice in South Africa*, Institute for Security Studies (ISS), Monograph 111, 2005, 31.
- 10 Skelton and Batley, Restorative justice, 37.
- 11 A van der Merwe and A Skelton, Victims' mitigating views in sentencing decisions: a comparative analysis, University of Pretoria, Faculty of Law, [http://repository.up.ac.za/bitstream/handle/2263/49207/VanDerMerwe\\_Victims\\_2015.pdf?sequence=1&isAllowed=y](http://repository.up.ac.za/bitstream/handle/2263/49207/VanDerMerwe_Victims_2015.pdf?sequence=1&isAllowed=y) (accessed 22 August 2017).
- 12 NFB du Toit and G Nkomo, The ongoing challenge of restorative justice in South Africa: how and why wealthy suburban congregations are responding to poverty and inequality, *HTS Theological Studies*, 70, March 2014.
- 13 *Ibid.*, 5.
- 14 *Ibid.*
- 15 A Skelton, The South African Constitutional Court's restorative justice jurisprudence, *Restorative Justice: An International Journal*, 1, 2015, 122.
- 16 T Gxubane, Restorative justice with youth sex offenders: issues for practice, *The Social Work Practitioner Researcher*, 26, 2014, 242.
- 17 SP Garvey, Restorative justice, punishment, and atonement, *Utah Law Review*, 2003, 303; C Barton, Empowerment and criminal justice, in H Strang and J Braithwaite (eds), *Restorative justice: philosophy to practice*, Dartmouth: Ashgate, 2000, 62.
- 18 D Louw and L van Wyk, The perspectives of South African legal professionals on restorative justice: an explorative qualitative study, *Social Work*, 52, 2016, 505.
- 19 *Ibid.*
- 20 *Thabethe*, para 1, 2.
- 21 *Ibid.*, para 41.
- 22 *Ibid.*, para 20.
- 23 *Ibid.*, para 21–28.
- 24 *Ibid.*, para 27.
- 25 *Ibid.*, para 26.
- 26 *Ibid.*, para 21–39.
- 27 *Ibid.*, para 36, 41.
- 28 *Director of Public Prosecutions, North Gauteng v Thabethe* 2011(2) SACR 567 (SCA) [*Thabethe* appeal], para 22.
- 29 *Ibid.*, para 20.
- 30 *Ibid.*, para 22.
- 31 *Ibid.*, para 20.
- 32 *Seedat*.
- 33 *Ibid.*, para 1.
- 34 *Ibid.*, para 13.
- 35 *Ibid.*, para 15.
- 36 *Ibid.*, para 16.
- 37 *Ibid.*, para 18.
- 38 *Ibid.*, para 42.
- 39 *Ibid.*, para 29–38.
- 40 *Ibid.*, para 38.
- 41 *Ibid.*, para 38–43.
- 42 *Ibid.*, para 42, 43.
- 43 *Ibid.*, para 40.
- 44 *R v Clotworthy* (1998) 15 CRNZ 651 (C.A) [*Clotworthy*]. See facts of case at H Bowen and T Thompson, Restorative justice and the Court of Appeal's consideration in the Clotworthy case, The FIRST Foundation, <http://www.firstfound.org/vol.%201/bowen.htm> (accessed 25 June 2017).
- 45 *Clotworthy*.
- 46 *Ibid.*
- 47 *Ibid.*
- 48 *Ibid.*
- 49 *Ibid.*
- 50 *Ibid.*
- 51 *Clotworthy*, 661. One could glean from the ruling of the court at page 659 that the task before it was more than handing down a non-custodial sentence with a view to advancing the interests of the parties but, as the court itself ruled, '[a] wider dimension must come into the sentencing exercise than simply the position as between victim and offender. The public interest in consistency, integrity of the criminal justice system and deterrence of others are factors of major importance.'
- 52 *Clotworthy*, 661.
- 53 H Bowen and T Thompson, Restorative justice and the New Zealand Court of Appeal's decision in the Clotworthy case, *Journal of South Pacific Law*, 3, 1999; K Basire, Taking restorative justice seriously, *Canterbury Law Review*, 13, 2007, 31–58, 57.
- 54 *Police v Stretch* (2001) Unreported High Court Nelson AP9/01 (Durie J) [*Police*]; For commentary on this case, see SA Thornburn, Observing the application of restorative justice in courts of New Zealand: a brief survey of cases over 10 years, paper presented at the International Symposium on Latest Developments in International Criminal Justice Reform, Shenzhen City, 19–20 August 2005, <http://www.restorativejusticescotland.org.uk/Shenzhen.pdf> (accessed 25 June 2017).
- 55 *Ibid.*
- 56 Thornburn, Observing the application of restorative justice in courts of New Zealand, 3.
- 57 *Ibid.*
- 58 *Police*, para 44.
- 59 *Ibid.*, para 45.
- 60 *Thabethe* appeal, para 20.
- 61 *R v Cassidy*, unreported, High Court, New Plymouth, T 2/03, 10 July 2003.
- 62 *Ibid.*
- 63 *Ibid.*
- 64 *Ibid.*, para 16, 18.