

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES:

ANTOINETTE SAAYMAN

Appellant

VS

THE STATE

Respondent

- Case Number: **CA&R 82/2007**
- High Court: **EASTERN CAPE DIVISION**

DATE OF HEARING: **5 December 2007**

DATE DELIVERED: **7 December 2007**

JUDGE(S): **PICKERING J, NEPGEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Accused(s): **Mr. S. Budlender and Ms. A Skelton**
- for the State(s): **Ms. U.L. de Klerk**

Instructing attorneys:

- Accused(s): **Legal Resources Centres, Grahamstown**
- State(s): **Specialised Commercial Crimes Court**

CASE INFORMATION –

- *Nature of Proceedings:* ***Review***

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: CA&R 82/2007

In the matter between

ANTOINETTE SAAYMAN

Appellant

VS

THE STATE

Respondent

JUDGMENT

PICKERING J:

In his *History of the Criminal Law of England*, published in 1883, Sir James Fitzjames Stephen, a Judge of the Queen's Bench Division of the High Court of England, expressed strong views in favour of the death penalty for the offences of murder and rape. Turning to the crime of fraud he said the following in Vol 1 at p 479:

"If by a long series of frauds artfully contrived a man has shown that he is determined to live by deceiving and impoverishing others, or if by habitually receiving stolen goods he has kept a school of vice and dishonesty, I think he should die."

In the light of these views it is perhaps not difficult to imagine that a seemingly incorrigible recidivist, with 203 previous convictions for fraud and one for theft, would have received scant sympathy from Stephen J should she have appeared before him charged with six further counts of fraud. It is therefore

no doubt fortunate for the accused in this matter that, rather than Stephen J, she appeared before the regional magistrate, Port Elizabeth, in the Commercial Crimes Court.

There she pleaded guilty to and was duly convicted of the six counts of fraud with which she was charged, the total sum of the actual loss sustained by the various complainants being R13 387,21. An aggravating feature of the frauds committed by her was that they led to certain of the complainants, whose identities she had stolen, being black-listed by the Credit Bureau, thereby occasioning to those complainants a considerable degree of embarrassment and inconvenience.

In sentencing the accused the regional magistrate stated, *inter alia*:

“So alles in ag genome is ek dan tevrede dat die volgende gepas sal wees enersyds dan om u te weerhou daarvan om soortgelyke misdrywe in die toekoms te pleeg, andersinds ook om vir u as straf te dien, en dat u dan nou sekere verpligtinge sal moet nakom as deel van u vonnis, en dan ook verder is om ‘n mate van restitusie aan die klaers te probeer bewerkstellig sodat hulle dan ook in ‘n mate verligting kan kry uit die vonnis wat die hof vandag vir u sal oplê.”

Accused was thereafter sentenced to undergo 2 years imprisonment the whole of which was suspended for 5 years on condition, *inter alia*, that she undergo correctional supervision for a period of 18 months including 16 hours per month community service comprising cleaning duties at the Kabega Park Police Station. A further condition of suspension was the following:

“Dat u die klagsters op aanklag 1 en 3, synde Liezl Lamont, Estèe Foster en Helen Rossouw in die openbaar en as volg om verskoning sal vra vir die ongerief en vernedering wat hulle ervaar het as gevolg

van u optrede, naamlik deur op Dinsdag, 28 November 2006 om nege uur in die oggend en hier in die voorportaal van die handelshof te Port Elizabeth onder toesig van die ondersoekbeampte, Inspekteur Fokazi, vir vyftien minute lank te staan met 'n wit plakkaat waarop u in duidelik leesbare ink die volgende sal aanbring. Ek haal dan aan die woorde wat u daarop moet aanbring.

'Ek, Antoinette Saayman, gevonnissen op klagtes van bedrog, vra hiermee verskoning vir enige ongerief wat my optrede veroorsaak het vir Liezl Lamont, Helen Rossouw en Estèe Foster.' "

Accused applied for leave to appeal against this latter condition of suspension only. Leave to appeal was refused by the regional magistrate.

In his judgment refusing such leave the regional magistrate stated, with regard to a contention that the condition of suspension imposed by him was unprecedented, that that did not render his sentence shockingly inappropriate nor "*at odds with the concept of restorative justice.*" He stated further that what the Court was attempting to achieve was "*to try and restore the relations between the parties by assisting the accused to tender an apology in public to the complainants.*" He reiterated that he had been motivated in imposing such a condition by the inconvenience and humiliation occasioned to the complainants in consequence of accused's fraudulent acts and by the fact that accused had, until the sentencing stage of the trial, tendered no apology whatsoever to any of them. He then added that the accused's list of previous convictions was such that an effective sentence of 2 years imprisonment would have been appropriate but that he had "*decided to go the other route in the interests of the accused and decided to balance the interest of the accused as well as the interests of the complainants in the matter by adding that condition.*"

The accused thereafter noted an appeal to this Court with the requisite leave having been granted to her on petition to the Judge President of this Division. Before the date of hearing of the appeal, however, accused, for undisclosed reasons, instructed her attorneys to withdraw the appeal and they duly did so.

Because of our concern as to the constitutionality of the condition imposed by the regional magistrate we indicated that we wished to deal with the matter on review. We therefore requested the Legal Resources Centre, on behalf of the accused, as well as the Director of Public Prosecutions, on behalf of the State, to appear at the hearing and to furnish us with the benefit of their argument. We are indebted to the Legal Resources Centre for having acceded to our request. We are particularly indebted to counsel who argued the matter, Mr. Budlender with Ms. Skelton for the accused and Ms. De Klerk of the Specialised Commercial Crime Unit for the State, for their able assistance.

Counsel for the accused submitted that the relevant condition of suspension was offensive in two respects, firstly, inasmuch as it was inconsistent with the accused's rights to human dignity and to freedom from inhuman, cruel or degrading punishment, and, secondly, inasmuch as it was contrary to the principles of restorative justice which the regional magistrate had sought to apply.

Before turning to deal with these submissions I wish to stress that, in my view, the sentence as a whole imposed by the regional magistrate was both thoughtful and comprehensive inasmuch as it had as its intended focus the rehabilitation of the accused, the concerns of the community at large, as well as the interests of the victims. Given the nature of the offences committed by the accused as well as her unenviable record of deceitful conduct stretching over a lengthy period of time, an effective period of imprisonment may well

have been justified. It was, however, in the execution of the regional magistrate's laudable intent to deal with the harm occasioned to the victims and their need for an acknowledgment by the accused of her wrongdoing that, so it was submitted by Mr. Budlender, the regional magistrate went wrong.

The sentence imposed by the regional magistrate must be considered against the backdrop of s 10 of the Constitution which provides:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

In this regard Mr. Budlender referred to Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) where the following was stated at para 35 by O'Regan J, who delivered the judgment of the Full Court:

"The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."

Compare too: S v Makwanyane and Another 1995 (3) SA 391 (CC) at para 95.

Section 12(1)(e) of the Constitution provides:

“(1) Everyone has the right to freedom and security of the person, which includes the right –

....

(e) not to be treated or punished in a cruel, inhuman or degrading way.”

In S v Dodo 2001 (3) SA 382 (CC) Ackermann J stated with regard to the provisions of s 12(1)(e) as follows at para 35:

“In the phrase ‘cruel, inhuman or degrading’ the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has anyone of these three characteristics. This imports notions of human dignity ... The human dignity of all persons is independently recognised as both an attribute and a right in s10 of the Constitution, which proclaims that (e)veryone has inherent dignity and the right to have their dignity respected and protected’. It is also one the foundational values of the Constitution and is woven, in a variety of other ways into the fabric of our Bill of Rights. While it is not easy to distinguish between the three concepts ‘cruel’, ‘inhuman’ and ‘degrading’, the impairment of human dignity, in some form and to some degree, must be involved in all three.”

The importance placed upon human dignity by the Constitution was underlined in the following terms in S v Williams and Others 1995 (3) SA 632 (CC) at para 76 – 77:

“The enactment of the Constitution has created a framework within which significant changes can be brought about in the criminal justice system. The rights entrenched in chap 3 are available to ‘every person’; that includes children and adults, women and men, prisoners and detainees. The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading: very stringent requirements would have to be met by the State before these rights can be limited.

In addressing itself specifically to punishment, the Constitution ensures that the sentencing of offenders must conform to standards of decency recognised throughout the civilised world. Thus it sets a norm: measures that assail the dignity and self-esteem of an individual will need to be justified; there is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role of the protectors and guarantors of those rights to ensure that they are available to all. In the process it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that ‘... even the vilest criminal remains a human being possessed of common human dignity.’”

Having regard to the principles set out above I agree with Mr. Budlender’s submission that it is in no way consistent with the right to human dignity to require a convicted person to stand in public, under the watch of a policeman, carrying a placard proclaiming his or her guilt. The regional magistrate considered that in imposing such a condition he was “*assisting accused to apologise*”, an aspect to which I will return more fully hereunder. For the

present it suffices to say that it is, in my view, incontestable that the effect of the condition, if carried out, would be to expose the accused to public ridicule and humiliation and as such would amount to degrading punishment.

In previous centuries in Europe the element of public humiliation often constituted an important component of an accused's sentence and offenders were sentenced to "*shaming punishments*" such as the stocks or the pillory. An offender condemned to the stocks would be obliged to sit with his ankles locked through two holes in the centre of a board. The stocks were typically positioned in the most public place available and persons placed therein would be subjected to a variety of abuses "*ranging from having refuse thrown at them, paddling and tickling and roasting of the bare feet, to being stoned.*" (En.Wikipedia.org)

The pillory consisted of a wooden framework, with holes for the offender's head and hands, set up on a platform in busy public places. An offender would normally be locked in a standing position in the pillory for one hour whilst "*the crowd expressed their disapproval of the offence by pelting the offender with rotten eggs and vegetables, blood and guts from slaughter houses, dead cats, mud and excrement, and even bricks and stones.*" (Criminal Punishment at the Old Bailey www.oldbaileyonline.org) The last recorded use of the stocks in the United Kingdom of Great Britain was in 1872. The pillory was abolished in 1837. It lives on, however, in the English language as a verb meaning "*to attack or ridicule publicly.*" See: *Concise Oxford English Dictionary*.

It was not only criminal offenders in days gone by who were subjected to public humiliation. In his book *All Jangle and Riot: A Barrister's History of the Bar*, R. Hamilton recites the instance of a barrister who in 1565 was found guilty by the Court of prolix pleading after he had filed an unduly lengthy replication. He was not only fined 10 pounds and sentenced to a term of

imprisonment but a hole was made through his replication which was then hung around his neck and he was “*ordered to go from bar to bar.*”

We have come a long way from the days when the use of the stocks or the pillory was considered to be appropriate and a sentence condemning an accused to a spell in either would be inimical to our modern day values and would clearly not survive constitutional scrutiny. Yet the type of condition imposed by the regional magistrate would, in my view, be not too far removed therefrom in its demeaning effect upon an accused, albeit that the present day accused would be spared the accompanying physical and verbal abuse.

In the course of the application for leave to appeal the regional magistrate referred to the fact that the condition of suspension was intended to keep the accused out of prison and posed the question “*if you weigh the two against the other which is now more humiliating would you say, the one to go to prison for two years or to rather afford the accused the opportunity of rehabilitating outside of prison on the condition that she apologises to the complainants?*” Whilst a prison sentence may be a subjectively humiliating and embarrassing experience for an accused it does not, however constitute an impairment of the accused’s dignity such as to render it a punishment of a cruel, inhuman or degrading nature. Society accepts that offenders are sent to prison in certain circumstances but appreciates further that once there they are entitled to be treated with dignity.

In an article by Professor Braithwaite of the Australian National University, Canberra, *Setting Standards for Restorative Justice: British Journal of Criminology* (2002) 42 at 563-577, referred to by Mr. Budlender, the learned author distinguishes between shaming that is “*stigmatizing*” and shaming that is “*reintegrative*” and stresses the importance of the prohibition of any degrading or humiliating form of treatment. At p565 he states as follows:

“At the same time, there is such a thing as practice masquerading as restorative justice that is outrageously poor – practice that would generate little controversy among criminologists that it was unconscionable, such as ... where a child agreed to wear a t-shirt announcing ‘I am a thief.’ Such practices are an even greater threat to the future of restorative justice.”

Ms. De Klerk, however, referred in turn to an article by L.L. Claassen: “Shaming as a form of restorative justice – a possible South African application”: *Primus*, vol 1, June/July 2006 where with reference to Professor Braithwaite’s classification of shaming punishments the learned author states as follows:

“Stigmatic shaming is what American Judges employ when they make an offender post a sign on his property saying ‘a violent felon lives here’, or a bumper sticker on his car saying ‘I am a drunk driver’. Stigmatic shaming is designed to set the offender apart as an outcast for the rest of the offender’s life. By labelling him or her as someone who cannot be trusted to obey the law, stigmatic shaming says the offender is expected to commit more crimes.”

The learned author then continues to state at p25 as follows:

“It is submitted that nothing prevents the court in terms of section 297(1)(a)(i)(hh) [of Act 51 of 1977] from ordering the accused to comply with ‘American styled shaming conditions.’ These conditions may depend on the offence the accused has been convicted of. Although this kind of shaming is regarded as stigmatizing it may serve several purposes. It may serve as a warning to society that the accused may be dangerous. It may serve as a deterrent to other

would be offenders in that it instills fear in their minds of suffering a similar fate.”

It does not appear that the learned author has given any consideration to the question of whether or not the type of “*shaming conditions*” to which he refers with apparent approval would be constitutional. Whatever the position in American law may be, a matter on which I pass no comment, I have no doubt whatsoever that a shaming condition which had the effect of setting the offender apart as an outcast from society would not pass constitutional muster in our jurisdiction. In this regard Mr. Budlender referred us to an as yet unpublished paper by Mike Batley: *Restorative Justice: An Essential Foundation for Advancing the Utilisation of Non-custodial Sentences*. The learned author takes issue at page 20 – 21 with the views of Claassen, pointing out that he appears to have overlooked the fact that “*the dignity and worth of both victims and offenders is integral to restorative justice*” and that “[T]he tragic backgrounds of many offenders, their consequent low levels of self-esteem and inability to manage their feelings of shame in constructive ways are often significant factors in their anti-social and criminal behaviour and their inability to break out of these patterns. To further humiliate and degrade them will in all likelihood reinforce these patterns, not change them, however satisfying they may appear to members of the public and judiciary caught up in the high tide of popular punitiveness.”

In the result I agree with Mr. Budlender that the condition of necessity impacts detrimentally on and violates the accused’s rights to human dignity and freedom from cruel, inhuman or degrading punishment.

This is not to say that the rights of the accused trump the interests of the victims and the legitimate needs of society. Offenders must be appropriately punished. In imposing punishment upon an accused, however, a Court is constrained by the Constitution to impose a sentence which does not violate

the accused's rights as set out in s12(1)(e). In Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC) Chaskalson CJ referred to a decision of the Supreme Court of Canada in Sauvé v Canada (Chief Electoral Officer) 2002 SCC 68 where McLachlin CJ, writing for the majority, stated at para 52 as follows:

“ ...[T]he right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognised goal of sentencing.”

As set out above, the regional magistrate stated that the condition was an attempt by him to “*restore the relations*” between the accused and her victims by “*assisting the accused to tender an apology in public to the complainants.*”

Mr. Budlender referred in this regard to the unreported judgment of Bertelsmann J in S v Maluleke CC83/04, TPD, dated 13 June 2006. In dealing with the principles of restorative justice Bertelsmann J stated at para 26 as follows:

“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.”

At paras 27 and 28 the learned Judge states as follows:

“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. 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 Cormler)

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 of the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm."

See too: Mike Batley and Traggy Maepa: Beyond Retribution – Prospects for Restorative Justice in South Africa, page 16 and S v Shilubane 2005 JOL 15671 (T).

At para 32 Bertelsmann J sounds the following *caveat*:

"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."

The learned Judge then continues as follows at paras 33 and 34:

"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 the ultimate integration into society thereby. 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.” (My emphasis)

I respectfully agree. I would merely add that if restorative justice is indeed to make a significant contribution to sentencing options then it must be applied only in appropriate circumstances and must be developed in a constitutionally acceptable manner.

In Dikoko v Mokhatla 2006 (6) SA 235 (CC) Sachs J, with reference to Skelton: The influence of the theory and practice of restorative Justice in South Africa, with special reference to child justice (unpublished doctoral thesis, Pretoria University, 2006) stated as follows at para 114:

“The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends on the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate.”

In M v S (Centre for Child Law Amicus Curiae 2007 (12) BCLR 1312 (CC)

Sachs J stated at para 62 as follows:

“Another advantage of correctional supervision is that it keeps open the option of restorative justice in a way that imprisonment cannot do. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.”

At para 71 Sachs J continued as follows:

“To start with, her offer to repay the persons she defrauded appears to be genuine and realistic. It would have special significance if she is required to make the repayments on a face-to-face basis. This could be hard for her, but restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing.”

Having regard to the authorities set out above Mr. Budlender submitted, correctly in my view, that it was desirable for purposes of restorative justice that, where possible, there should be an encounter between the offender and the victim enabling the offender to apologise personally to the victim by, as Sachs J put it, *“looking the victim in the eye and acknowledging wrongdoing.”* This obviously cannot be achieved by requiring an accused to stand holding a placard publicly proclaiming her guilt. It is clear also that the active and willing participation of the victim in the process of restorative justice is required. In the present case the regional magistrate failed to involve the victims in the process and their attitude thereto is unknown. Furthermore, it does not appear that the victims were even made aware of the condition and there is no reason to suppose that they would have been present on the date specified in order to note the apology. It is in any event somewhat difficult to understand how the relationship between the accused and the victims could be *“restored”* by an apology tendered in the absence of and without the knowledge of the victims.

In all the circumstances it is regrettable that the regional magistrate missed the opportunity of imposing a condition of suspension which was compatible with restorative justice.

Be that as it may, the condition of suspension cannot stand. In the exercise of this Court's inherent powers of review the condition of suspension requiring the accused to stand in the foyer of the Commercial Crimes Court holding a placard proclaiming her guilt is set aside.

J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

J.J. NEPGEN
JUDGE OF THE HIGH COURT

Counsel for the accused: Mr. S. Budlender and Ms. A Skelton

Accused's attorneys: Legal Resources Centres, Grahamstown

Counsel for the State: Ms. U.L. de Klerk
Specialised Commercial Crimes Court