Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

APPEAL NO. AR 326/2009

In the matter between:

W D
Appellant

and

THE STATE **Respondent**

JUDGMENT

GORVEN J

1. The appellant in this matter, who was 39 years old at the time of sentence, was charged with three counts of indecent assault on sisters aged 6, 7 and 11 years old respectively committed during 2007. He pleaded guilty to all three counts and submitted a statement in terms of s112 of the Criminal Procedure Act, No 51 of 1977 ("the Act"). This statement was accepted as accurate by the State and the appellant was duly convicted. No previous convictions were proved.

2. The learned magistrate in the regional division of Durban sentenced the appellant to 10 years' imprisonment on each count which provided an effective sentence of 30 years' imprisonment. The appellant was granted leave to appeal against the sentence but has been in prison since being

sentenced on 17 November 2008.

3. The appellant called Dr Lynette Roux ("Roux") as a witness on sentence. She is a Clinical Psychologist with 22 years' experience, including specialisations in child psychology and psycho-social matters with respect to criminal matters, divorce and sexual abuse. Her experience included conducting sex-abuse assessments on children, preparing reports and testifying in court as well as assessing sexual offenders, preparing reports and testifying in court to assist in sentencing. She gave evidence that she had compiled a report and this was introduced as exhibit B. She had conducted an assessment on the appellant by way of at least three interviews and a number of tests which took place over a six week period. She had read the statements of the three children and their parents (which were never introduced in evidence). She gave evidence of the findings at which she arrived.

4. Among the most important findings were that a distinction must be drawn between fixated and regressed offenders. Fixated offenders have a persistent, continual and compulsive attraction to children, have not developed past the point where they find children attractive and have a high incidence of recidivism. Regressed offenders, on the other hand, have the behaviour emerge in adulthood. The behaviour is a departure from the offender's attraction to adults. The children victimised are those to whom the offenders have easy access. They are not fixated on children and are at a lower risk of re-offending if treated. They are capable of feeling remorse for their actions. The appellant fitted into the category of regressed offender.

5. She testified that the distinction must also be drawn between an opportunistic and predatory sexual offender. The latter place themselves in a position where they can meet potential victims and have the opportunity to interact with them in an unsupervised way. Opportunistic offenders do not specifically place themselves in a position to identify victims but use the opportunity to engage in criminal sexual activity after an opportunity arises. The appellant fell into the category of opportunistic offender.

6. She also testified that, according to the tests, the appellant is able to accept and exhibit socially acceptable norms and has the personality structure to control his behaviour accordingly most of the time. He is not a physically aggressive person although he feels some hostility to authority figures. He is suffering from chronic depression which has not been treated. He has poor coping skills. He understands that what he did was wrong and feels remorse and a strong sense of guilt for his behaviour. This remorse was borne out by his guilty plea.

7. She summarised her findings as follows:

> As Mr D has admitted to being repeatedly sexually involved with three pre-pubescent girls he can be classified as a paedophile. Furthermore, as he has previously been sexually attracted to and involved with adult women and as there is evidence that he had been under stress during the period of time that he committed the crimes, he can be classified as being a regressed sexual offender. It is evident from the children's statements as well as Mr D's account of the events that the criminal behaviour was of a nonviolent type and he furthermore fits the category of a nonviolent child molester. Lastly from the statements obtained from the three victims as well as their parents and Mr D's

> account of the events, it appears that he did not actively seek out his victims but found himself in circumstances that made his victims available to him. Therefore he can be classified as being an opportunistic paedophile.

8. She went on to testify that studies have shown that paedophiles do not respond well to being incarcerated and that some who had been incarcerated had later started to resort to violence. The conclusion in the studies is that the incarceration itself acts as a catalyst for the later aggression on victims. It is not possible to cure paedophilia – at best it is possible to rehabilitate offenders in the sense that they are forever in a state of rehabilitation. The prognosis is therefore a controversial issue. Research shows that certain characteristics make their rehabilitation more successful, in particular the ability to feel and show compassion towards others. She found that the appellant demonstrated these characteristics, along with insight into his behaviour and some understanding of the negative effect that it had on the children. Treatment programmes were most successful when they involved group therapy within the context of a supportive family. This was confirmed by therapists who run the Child Abuse Treatment and Training Services ("CATTS") programme. She considered the appellant to be a good candidate for that programme.

9. She testified that incarceration, whilst it may serve the short-term need for society to be protected, may result in the appellant being more of a threat to society than he was previously. Incarceration would be likely to exacerbate some of the issues requiring therapeutic intervention and would rule out family therapy. As regards recidivism, this is lessened where offenders attend and

co-operate with treatment programmes. Since the appellant had voluntarily sought to enter the CATTS programme, for which he had to pay himself, and since he was remorseful and had insight into his behaviour, there were indications that therapeutic interventions could succeed and minimise the possibility of recidivism. Further factors in lowering the rate of recidivism are the support of a family or family members and whether the offender was gainfully employed. The appellant had a supportive brother and was employed by him. In addition, he had voluntarily removed from Durban where the offences were committed having told the mother of the children and was living with his brother and working on a construction site where contact with children was minimal.

10. She recommended three interventions, viz.:

10.1 Psychopharmacological intervention for the appellant's depression.

10.2 That he be given the opportunity to participate in a sexual offender's programme of a group therapy nature and strongly recommended the CATTS programme.

10.3 Individual psychotherapeutic intervention of an intensive nature for a period of three years.

11. The State cross-examined Dr Roux but no features emerged which detracted

from her evidence. The State accepted a report on the suitability of the appellant for a sentence of correctional supervision by a psychologist in the employ of the department of correctional services, Durban which confirmed that the appellant was a suitable candidate for correctional supervision. In addition the appellant's attorney handed up a letter from CATTS stating that the appellant had attended two assessment sessions and had been admitted to the adult sexual offender programme which would commence with group sessions in January 2009. The State called no witnesses.

12. The learned magistrate misdirected himself in certain respects. He stated that Dr Roux had conceded that she only considered the personal circumstances of the appellant. This is not correct. She testified that the incarceration of the appellant was likely to be to the detriment of society as increasing the possibility of recidivism. She also dealt exhaustively with the best way to avoid recidivism and applied this to the appellant. The magistrate also held that Dr Roux had only been aware of some of the allegations in the charges. Her evidence, however, was that she had read the statements of the children and their parents and that the appellant had himself informed her of the allegations in the charges. He found that, because Dr Roux cited authority for that part of her report dealing with rates of recidivism, she could not herself conclude that the appellant fell into a certain category. This has no foundation whatsoever. He said that he had not been persuaded to consider a non-custodial sentence when it was clear that he was of the view that a non-custodial sentence equated to a lenient sentence. He emphasised that only a sentence of incarceration would act as a deterrent without considering other means of

deterrence. For these and other misdirections, this court is at large to set aside the sentence and impose an appropriate sentence.

13. In addition to the misdirections, I am of the view that the sentence is so shockingly inappropriate as to warrant interference on appeal. The learned magistrate claimed to have looked at comparative cases in arriving at sentence. In reality, he appears to have considered only one unreported case without saying anything more than that this involved one count, the accused in that matter did not plead guilty and had received a sentence of 15 years' imprisonment which had been upheld on appeal. He did not mention whether, in that matter, similar expert evidence had been led or point to any other factors which would provide a proper comparison. There was a clear bias to the punitive and deterrent aspects in his reasons for sentence.

14. The Constitutional Court has held that, whilst deterrence was previously considered the main purpose of punishment with other objects being accessory[1], the introduction of correctional supervision as a sentencing option has resulted in a shift from retribution to rehabilitation[2]. This still requires an assessment of the traditional triad of the personal circumstances of the appellant, the nature of the crimes under review and the interests of society. It is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact, and without the negative influences of prison.[3]

[1] *R v Karg* 1961 (1) SA 231 (A).

[2] *S v Williams* 1995 (2) SACR 251 (CC).

[3] *S v E* 1992 (2) SACR 625 (A) at 633 *a-b*.

15. The learned magistrate, in addition to the positive misdirections referred to above, overlooked at least four factors. First, the fact that correctional supervision was introduced in order to distinguish between two types of offenders, those who should be removed from society and imprisoned and those who, although deserving of punishment, should not be so removed.[4] He failed to make this initial enquiry at all. In the second place, he characterised correctional supervision as being lenient. His rejection of it saw it as having no deterrent effect. Our courts have held that it is not a lenient option but one meeting different factors.[5] There are aspects of correctional supervision which are highly punitive, including a condition of house arrest where the offender lives within the community but, to everyone's knowledge, is allowed to leave the property only in limited circumstances. In addition, most sentences of correctional supervision require community service to be rendered which, again, exposes the offender to the gaze of members of the community in trying circumstances. Thirdly the learned magistrate overlooked the positive measures which can be used to require active co-operation in his rehabilitation on pain of being sent to prison. These measures also reduce the long-term danger to society of recidivism by allowing for the rehabilitation of the offender. In so doing, he overlooked the evidence of Dr Roux to the effect that the interests of society would be better served by a sentence of correctional supervision coupled with conditions requiring the appellant to take advantage of the interventions recommended by her than would incarceration.

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[4] *S v R* 1993 (1) SA 476 (A) at 488G. This dictum was approved by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) at para [58].

[5] *S v R (supra)* at 488C-D, *S v M (supra)* at para [63]

Fourthly, he overlooked the provisions of s276(3)(a) of the Act which provides that a court is not prohibited from imposing a suspended period of imprisonment along with correctional supervision. This can be used to act as a deterrent to recidivism.

16. During argument it was pointed out to both sets of counsel that they had not dealt with other comparable cases and had not even made available the one case referred to by the magistrate. An opportunity was given to them to address these issues and I am grateful that each provided supplementary written argument which was more helpful in this regard. Ms Kander also provided a copy of the judgment to which the magistrate referred.

17. In the light of the above, I now turn to consider sentences passed in some comparable cases. In doing so I am aware that each case has its own set of unique facts and cannot serve as anything more than a rough guide to what might be an appropriate sentence in the present matter.

18. In *Naicker v S*[6] the appellant was convicted on three counts. The first was of indecent assault on his 7 year old step daughter, the second of assaulting her as a means of ensuring that she did not disclose the sexual abuse and the third of assault of her brother. He pleaded not guilty and maintained his innocence even on appeal. Ms Kander submitted that the appellant in the present case had no option but to plead guilty since there were three competent child witnesses. She also submitted that the disclosure took place

[6] The unreported judgment referred to by the magistrate, NPD Appeal No. 1128/04.

when the matter was reported to the police but not by the appellant. What she overlooks, however, is that the appellant made the disclosure to the mother of the complainants and voluntarily left for Johannesburg. The fact that three witnesses were available does not mean that a conviction was guaranteed. As was said by Van den Heever JA[7]:

> Even where an offence is brought to light, our adversarial system often results in the courts failing the victims.

19. In *S v E*[8] the appellant was a compiler and organiser of musical programmes at a broadcasting corporation who had been convicted in a regional court of 10 counts of immoral or indecent acts. The convictions related to the period between 1983 -1988 at the start of which period the appellant was 35 years of age. The appellant's modus operandi was to invite teenage boys (all complainants were between the ages of 14 and 17) to his home where he would show them pornographic videos and then indulge in masturbation with them. The appellant was a first offender. The regional magistrate was of the opinion that in spite of the mitigating factors and the appellant's urgent need for non-custodial treatment a prison sentence was called for as nothing less would be a sufficient deterrent to others. The magistrate accordingly took the 10 counts as one for the purpose of sentence and sentenced the appellant to four years' imprisonment all of which, save for six months, was conditionally suspended. The Appellate Division held that the magistrate had misdirected himself in finding that the appellant's problem resulted in him having no control and was not in the nature of an illness and that his prognosis was not

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[7] In *S v D* 1995 (1) SACR 259 (A) at 260g-h.

[8] 1992 (2) SACR 625 (A)

good. These findings were not justified on the evidence and led the magistrate to find aggravation where he should have found mitigation. The aggravating circumstances were that the appellant had over the years not sought help for his problem; that the offences had not been committed in sudden temptation; that he had told one of the complainants not to assist the police; that he had abused the reliance placed in him by one of the complainants whose music career he had promised to advance; and that he had employed pornographic films to arouse the complainants. The court held that correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 seemed appropriate in the circumstances and the matter was remitted to the regional court for the imposition of correctional supervision.

20. In *S v R*[9] the appellant was a 25 year old primary school teacher who pleaded guilty and was convicted on 6 counts of indecent assault of his male pupils aged between 11 and 13 years over a period of 5 months. The precise nature of the offences did not appear from the report except that on one occasion he made a video recording of a naked boy while he masturbated. He also stood by while the boys committed indecent acts with each other. Despite a report by a clinical psychologist that he might be rehabilitated with comprehensive psychotherapy, which the court accepted, the court held that there could be no certainty of the possibilities of rehabilitation. In the circumstances a sentence of correctional supervision was possible but not appropriate. His convictions had been taken together for the purpose of sentence. The sentence of 5 years' imprisonment of which 2 were

[9] 1995 (2) SACR 590 (A)

conditionally suspended was held to be severe but not so inappropriate that it could be interfered with and was confirmed on appeal with an additional order that the appellant receive the proposed psychotherapy within the prison environment if possible.

21. In *S v Gerber*[10] a 30 year old first offender who pleaded guilty had sucked the private parts of his 10 year old daughter. No evidence was led to prove that he suffered from any psychological defects. No evidence was led to show that the complainant had suffered from psychological problems. The social worker testified that correctional supervision was not appropriate and this was not challenged on appeal. A sentence of 6 years' imprisonment of which 2 was suspended was reduced to 3 years' of which 1 was suspended for 5 years on the basis that it differed to such an extent that interference was justified.

22. In *S v Mohlakane*[11] the accused was the complainant's teacher and had indecently assaulted her in his office where he saw her under pretext of assisting her in passing an examination. He was sentenced to 18 months' imprisonment by the trial court. He appealed against both conviction and sentence. He approached the complainant, who was 21 years old at the time, on a Friday, told her that she had failed her geography examination but that the position could be rectified and told her to come to see him on the following Monday. She did so and he then suggested that they have sexual intercourse and proceeded to touch her breasts, thighs and elsewhere on her body. She avoided the suggestion of sexual intercourse by suggesting that

[10] 2001 (1) SACR 621 (W)

[11] 2003 (2) SACR 569 (O)

they postpone that to the following day but then reported the incident to the principal. On appeal the court found mitigating circumstances including his being a first offender, married with 3 children, had rendered valuable service to the community as a teacher, had resigned his position, had suffered shame, humiliation and contempt in the eyes of his colleagues, pupils, the community at large and possibly also his family. The probation officer had recommended correctional supervision. The trial court was held to have overemphasised the seriousness of the offence. The matter was referred back to the trial court to impose a sentence of correctional supervision and determine appropriate conditions.

23. In *S v McMillan*[12] the appellant, a 32 year old, had pleaded guilty and was convicted of indecent assault on three young boys with ages ranging around 9 to 12. On 5 occasions he had “die geslagsdele van jong seuns betas en gevryf”. He was a first offender, was married, his early youth was unhappy and he was himself molested as a child. The complainants were not sodomised or physically injured. He suffered from a sexual deviance and had an urgent need for intensive psychiatric treatment over a long term. Expert witnesses for the State and the appellant had disagreed on the desirability of a prison sentence. The forensic criminologist called by the appellant testified that correctional supervision was appropriate but conceded that, in his unrehabilitated state, the appellant would be a danger to young boys and that any sentence, such as correctional supervision, which placed the appellant back in the community held a risk for this vulnerable part of the

[12] 2003 (1) SACR 27 (SCA)

community. The social worker called by the State testified that psychotherapy would be available to the appellant in prison and recommended a prison sentence. The 5 counts were taken together for purposes of sentence. He was sentenced by the trial court to 10 years' imprisonment. This sentence was replaced with one of 5 years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

24. The unreported judgment of *Coetzee v S* [13]dealt with a pastor who had been convicted of 5 counts relating to indecent assault of three young female parishioners who were 16, 19 and 21 years old at the time of the offences. All of them were sexually active at the time and had gone to the appellant for counselling. He pleaded not guilty and maintained his innocence throughout. He was a first offender. A probation officer's report and a correctional supervision report had been obtained. One deduced remorse although it had not been articulated by the appellant, the other found no signs of remorse. One recommended correctional supervision and the other said he was not a suitable candidate and raised practical difficulties. The magistrate sentenced him to six years' imprisonment of which two were conditionally suspended. The provincial division confirmed both the conviction and sentence. The appellate division, to whom leave to appeal against sentence only had been granted, set aside the sentence and substituted it with four years imprisonment in terms of s276(1)(h) of the Act.

25. The Supreme Court of Appeal reviewed other similar cases and no purpose would be served in repeating these here. Suffice it to say that, whilst one of

[13] SCA Case No. 502/08, handed down on 30 September 2009.

the motivating factors in *Coetzee's* case appears to have been that there was no evidence of permanent psychological damage and that the complainants were no longer young and immature. The court, in imposing this sentence, stressed the serious nature of the offences, despite reducing the sentence on appeal. It also took all the counts together for the purposes of sentence even though they were separate offences committed on different occasions.

26. In *S v D* [14] the appellant was convicted of one count of indecent assault and sentenced to 6 years imprisonment of which 2 years were conditionally suspended. He was a 37 year old married man with two children and a first offender. He had approached a group of street children and offered one of the group R10 to procure a woman for him. The group of children drove with him to a lonely spot where he took one of the children, an 8 year old girl, into the cab of his vehicle and, despite her struggles, gratified himself between her legs. The court on appeal held that, since correctional supervision did not contain a denunciatory element, a sentence of only correctional supervision would not be adequate. The majority of the court felt that this could be addressed by combining effective incarceration in terms of s 276(1)(i) of the Act with suspended imprisonment. He was sentenced to three years correctional supervision and an additional two years suspended imprisonment.

27. There is no doubt that the appellant in this matter committed heinous crimes on vulnerable young girls who had been left in his care. The Constitution of the Republic of South Africa, 1996, entrenches the rights of children and the

[14] 1995 (1) SACR 259 (A) – referred to in fn 7.

courts must do all in their power to protect children and those rights. The crimes were abhorrent and the learned magistrate was entirely correct to emphasise how serious they were. There was, unfortunately, no evidence led or submissions made concerning any psychological harm suffered by the children. That they have suffered psychological harm is not to be doubted. I do not know why the State did not make investigations in this regard and bring such information to the attention of the court prior to sentencing. It can only be hoped that the children and their parents have been offered psychotherapy to address this and minimise it. As has often been stated by our courts, "[c]hildren are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do."[15]

28. Ms Kander, on behalf of the respondent, submitted in her supplementary written argument, that the matter should be remitted back to the magistrate for evidence of the state of the children to be led. After anxious consideration, that course of action does not commend itself to me. No specific indication was given of what, if any, evidence might be available and why it was not led at the trial. In addition, I am of the view that the evidence of Dr Roux shows that there is a prospect of rehabilitation. The appellant, having pleaded guilty, showed further remorse. Contrary to what was submitted by Ms Kander, he is the one who informed the mother of the children of his conduct and voluntarily removed himself from the situation. He acted on his remorse. He took steps to seek help and would have commenced and possibly have completed the

[15] *S v D* at 260g.

CATTS course had the magistrate not imprisoned him. That imprisonment and any further period of imprisonment whilst awaiting the referral back to the magistrate may well increase the risk of recidivism and therefore not be in the interests of the community at large. Whilst I am aware that Dr Roux is an expert witness whose opinions are given in order to assist the court in arriving at its own conclusions, I find her evidence to be well researched and reasoned and the conclusions correct and compelling.

29. Taken all of the above into account, I am of the view that the counts should be taken together for purposes of sentence. I am also of the view, in the light of the evidence, that the appellant does not fall into the category of offender who must be removed from society. Whilst there is a risk of recidivism, it is a highly limited one which can be addressed within the ambit of correctional supervision. I am therefore confident that correctional supervision is appropriate in this instance. Having said this, it should be coupled to a suspended period of imprisonment which will be put into effect if the appellant commits a similar offence during the period of suspension. As in *S v D* the denunciatory aspect and that of deterrence, both of the appellant and of potential offenders, can be adequately catered for by this and stringent conditions for the period of correctional supervision with which the appellant would have to comply on pain of incarceration.

30. In the event, I would propose that the appeal against sentence be upheld and that the sentence imposed by the learned magistrate be set aside and substituted with the following sentence, the three counts to be taken together for the purposes of sentence:

30.1 The accused is sentenced to a period of correctional supervision of 5 years in terms of s276(1)(h) of the Criminal Procedure Act, No. 51 of 1977.

30.2 Such correctional supervision is subject to the following conditions in terms of s84 of the Correctional Services Act, No. 8 of 1959:

30.2.1 The accused, with due consideration of his work / general co-operation and other relevant circumstances is placed under house arrest for the duration of his sentence in order that the accused is made aware of the element of punishment of the sentence option and by attempting to combat further criminality by means of strict control or supervision.

30.2.2 The accused may not leave his residential or work address or magisterial district without prior approval except for purposes of essential work or other reasons as the Commissioner of Correctional Services my deem fit.

30.2.3 In order to meet the community's expectations in terms of retribution and compensation for crime, it is recommended that the accused does sixteen hours of free community service for each month of the sentence of correctional supervision.

30.2.4 The accused shall attend the Orientation and Drug Information

Programme and participate in a sexual offender's programme of a group therapy nature, preferably the Child Abuse Treatment and Training Services (CATTS) programme, and shall be obliged to submit for an assessment and attend other programmes aimed at improving his identified problem areas which may seem necessary during the serving of the sentence.

30.2.5 The accused shall consult with the relevant persons who would be able to provide psychopharmacological intervention for the appellant's depression.

30.2.6 The accused shall consult with a clinical psychologist with a view to receiving individual psychotherapeutic intervention of an intensive nature for the period recommended by that psychologist.

30.2.7 The accused shall refrain from using alcohol and / or drugs and not make himself guilty of criminal or other behaviour.

30.2.8 The Commissioner shall ensure that the conditions are complied with and will act in terms of s 84B of the Correctional Services Act if the conditions are breached.

30.3 The accused is, in addition, sentenced to a period of imprisonment of five years which is wholly suspended for a period of

five years on condition that the accused is not convicted of the offence of rape or indecent assault committed during the period of suspension.

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GORVEN J

I agree and it is so ordered.

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SWAIN J

31 Subsequent to this judgment being handed down, it has been brought to our attention that the provisions of s276A(1)(b) provide that no period imposed in terms of s276(1)(h) may exceed three years. The imposition of 5 years was therefore incompetent and a patent error. Paragraph 30.1 of the order is therefore amended to read:

30.1 The accused is sentenced to a period of correctional supervision of 3 years in terms of s276(1)(h) of the Criminal Procedure Act, No. 51 of 1977.

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GORVEN J

I agree and it is so ordered.

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SWAIN J

Date of Appeal	:	17 September 2009
Date of Judgment	:	8 October 2009
Counsel for the Appellant	:	Adv E Zaca
Counsel for the Respondent	:	Adv C Kander