

De Klerk v State, Kwazulu-Natal High Court (Pietermaritzburg), Appeal No. AR 326/2009, 8 October 2009

KEY CONCEPTS	
Indecent assault of 3 girls under 12	Sex offender typologies
Fixated sex offender	Regressed sex offender
Opportunistic sex offenders	Predatory sex offenders
Sentencing of sex offender	Rehabilitation of sex offender

The appellant pleaded guilty to 3 counts of indecent assault on sisters, aged 6, 7 and 11 years respectively. The appellant, who was 39 at the time, was sentenced to 10 years on each count and was granted leave to appeal on the sentence. The appellant called a clinical psychologist to testify on sentence.

The clinical psychologist raised the key issue of sex offender typologies in her report. She briefly summarised sex offenders as falling into two main groups, namely fixated sex offenders and regressed sex offenders. Fixated sex offenders were primarily sexually attracted to children and were, therefore, difficult to rehabilitate whereas regressed sex offenders were primarily sexually attracted to adults but turned to children in times of stress and were, therefore, easier to rehabilitate. Regressed sex offenders tend to victimise children they have easy access to, make use of opportunities that arise and are at a lower risk of re-offending.

The clinical psychologist also distinguished between predatory sex offenders and opportunistic sex offenders. Predatory sex offenders deliberately seek out children and place themselves in positions where they can meet potential victims. Opportunistic sex offenders do not specifically seek out children but, if the situation arises, they will use the opportunity to engage in a criminal sexual activity.

According to the clinical psychologist, the appellant fitted into the category of a regressed sex offender as he had previously been sexually attracted to and involved with adult women. There was also evidence that he was under stress at the time of the offences. In addition, he could be described as an opportunistic sex offender because he did not actively seek out children, but found himself in circumstances that made his victims available to him. She made the following findings in her report and evidence:

- 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;
- He is suffering from chronic depression which has not been treated;
- He has poor coping skills; and

- He understands that what he did was wrong and feels remorse and a strong sense of guilt for his behaviour, which was borne out by his guilty plea.

The clinical psychologist testified that incarceration was not conducive to rehabilitation and that the incarceration itself acts as a catalyst for the later aggression on victims. Research has shown that there are certain characteristics which make rehabilitation more successful. These include 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. A further factor contributing to the success of programmes related to whether they involved group therapy within the context of a supportive family.

She testified further that, although imprisonment might serve the short-term need for society to be protected, it could result in the appellant being more of a threat to society than he was previously since imprisonment 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 a rehabilitation programme (CATTS), 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.

Other factors taken into account were:

- The appellant had a supportive brother and was employed by him;
- He had voluntarily removed from Durban where the offences were committed having told the mother of the children;
- He was living with his brother and working on a construction site where contact with children was minimal.

In addition, a report was handed in 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 examining the trial court's reasons for sentence, the High Court found that there was a clear bias to the punitive and deterrent aspects in the magistrate's reasons for sentence. 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, the High Court found that they could set aside the sentence imposed by the magistrate and impose

an appropriate sentence. In addition, the High Court found the sentence to be so shockingly inappropriate as to warrant interference on appeal.

The Constitutional Court has held in *S v Williams* 1995 (2) SACR 251 (CC) that, whilst deterrence was previously considered the main purpose of punishment with other objects being accessory, the introduction of correctional supervision as a sentencing option has resulted in a shift from retribution to rehabilitation. 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.

The High Court found that, in addition to the misdirections mentioned above, the learned magistrate,

overlooked at least four factors:

- 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- he failed to make this initial enquiry
- the trial magistrate characterised correctional supervision as lenient and having no deterrent effect – this did not take into account the stigma of house arrest and the restrictions this placed on an individual
- the magistrate overlooked the positive measures which can be used to require active co-operation in his rehabilitation on pain of being sent to prison
- the magistrate 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.

The High Court found that, in the light of the evidence presented, the appellant did not fall into the category of offender who had to be removed from society. Although there was a risk of recidivism, it was a highly limited one which could be addressed within the ambit of correctional supervision. In addition, this had to be coupled to a suspended period of imprisonment which would be put into effect if the appellant committed a similar offence during the period of suspension.

The High Court set aside the sentence imposed by the magistrate and replaced it with the following sentence:

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

- such correctional supervision is subject to the following conditions in terms of s84 of the Correctional Services Act, No. 8 of 1959:
 - The accused, with due consideration of his work / general cooperation 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.
 - 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 may deem fit.
 - 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.
 - 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 (CATTSS) 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.
 - The accused shall consult with the relevant persons who would be able to provide psychopharmacological intervention for the appellant's depression.
 - 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.
 - The accused shall refrain from using alcohol and / or drugs and not make himself guilty of criminal or other behaviour.
- 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.
- 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.