



SEXUAL OFFENCES AND RELATED MATTERS

ACT 32 / 2008

PARTICIPANTS WORKBOOK

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FRIDAY

SESSION 1

INTRODUCTION

Objectives

- To introduce facilitators to participants
- Participants to introduce themselves
- To understand the expectations of the participants
- To set the ground rules for the workshop

GROUND RULES FOR THE WORKSHOP

FRIDAY

SESSION 2

INTRODUCTION TO AND OVERVIEW OF THE BILL

Objectives

- To discuss the motivation for the legislation
- To understand the international trends regarding sexual offences
- To understand the aims and purpose of the legislation
- To get an understanding of the format of the legislation
- To discuss the impact of constitutional rights on the legislation
- To discuss the jurisdiction of courts and transitional arrangements
- To discuss some of the definitions

Reading materials

Workbook

Constitution, 1996

Criminal Law (Sexual Offences) Amendment Bill

Victims' Charter

Power point presentation

Masiya 2006 (2) SACR

NOTES

SATURDAY

SESSION 1

OVERVIEW OF OFFENCES CREATED IN BILL

Objectives

- To understand the different offences created in the legislation
- To distinguish the different categories of offences created in the legislation
- To discuss and explore the elements of the different offences
- To explore the definitions, defences and presumptions

Reading materials

Workbook

Criminal Law (Sexual Offences) Amendment Bill

Power point presentation

NOTES

SATURDAY

SESSION 2

GROOMING

Objectives

- To explore the behaviour of sexually abused children
- To understand the grooming process
- To discuss the different characteristics of paedophiles
- To discuss trafficking of persons

Reading materials

Workbook

Resource articles

Criminal Law (Sexual Offences) Amendment Bill

Power point presentation

Children's Act

NOTES

SESSION 3

DISCUSSION OF OFFENCES

Objectives

- To discuss the elements of the offences
- To explore how to approach the offences
- To understand potential problems in adjudicating the offences

Reading material

Workbook
Resource articles
Criminal Law (Sexual Offences) Amendment Bill
Power point presentation
Children's Act

GROUP DISCUSSION QUESTIONS

QUESTION 1:

Snyman: *Criminal Law* (4th ed)

Just as Y's consent to the act may be signified either expressly or tacitly (by implication), her refusal to consent may likewise be signified either expressly or tacitly.

For consent to succeed as a defence, it must have been given consciously and voluntarily, either expressly or tacitly, by a woman who has the mental ability to understand what she is consenting to, and the consent must be based on a true knowledge of the material facts relating to the intercourse. (447)

Burchell: *Principles of Criminal Law* (3rd ed)

South African practice ... widened the offence, the essence of which is now that intercourse should have occurred without consent, whether the lack of consent was due to force or fear or fraud or incapacity to consent.

On this approach the fact that the woman did not physically resist and passively submitted to intercourse is not directly relevant, the central question being whether it was in fact her present and freely made decision there and then to engage in sexual intercourse.

Consent deprives the penetration of a criminal character. To have this effect the consent must have been (a) real and (b) have been given before the penetration occurred. (708)

Snyman states that consent must be based on a true knowledge of the material facts relating to the intercourse. **Burchell** states that the consent must be 'real'. **Discuss the following:**

a) What is meant with 'true knowledge of the material facts relating to the intercourse'?

b) Does 'true knowledge of the material facts relating to the intercourse', 'informed consent', 'voluntary consent' or 'uncoerced consent' have the same meanings? Explain your answer.

QUESTION 2:

Snyman refers to the position where the complainant is threatened not with physical violence but with something else, such as that she will lose her work, or that an earlier act of infidelity by her against her husband will be revealed to her husband if she does not submit to intercourse. Snyman submits that her absence of resistance in this type of situation cannot be construed a valid consent, since the 'consent' is not given voluntarily. Snyman then states: "The same test ought to be applied in these cases as is applied by the courts in determining whether a confession has been made voluntarily, and an application of this yardstick leads to the conclusion that in the type of situation under discussion the consent is not given voluntarily."

Burchell refers to the view of Temkin that since rape is so grave a crime it ought to be confined to cases where the duress is of a dangerous or highly objectionable nature. They argue that this view is the wrong way around and submit: "If the crime of rape exists to protect women in their *dignitas*, why should a man – who knows that she has agreed to sex with him because he has threatened to dismiss her – be allowed to escape liability in this case but not where his threat is that he will assault her? In short, why should the duress employed make a difference when in each case the woman has had to endure sexual intercourse against her wish?" (710)

R v Swiggelaar 1950 (1) PH H61 (A) 110 – 111:

"If a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape."

In *Volschenk* 1968 (2) PH H283 (D) where a policeman threaten a woman, whom he had arrested, that he would take her to the police station if she did not have sexual intercourse with him, it was held that the fear experienced by the woman vitiated her consent. The court said, however, that a threat by an employer to dismiss an employee was in a 'different category'.

In *S v S* 1971 (2) SA 591 (A), where the woman agreed to a policeman's demand for sexual intercourse simply because she believed he had it within his power to cause her harm, even where he made no specific threat, the court held that this fear was sufficient to vitiate consent.

Snyman states: "No valid consent can be given by a woman who is in a state of intoxication, or whose senses are benumbed as a result of drug taking or hypnosis. This will always be the case where the woman has been reduced to a state of insensibility by the intoxicants, but it may also, depending upon the facts, be the case where she is, short of insensibility, incapable of fully appreciating what she is doing." [refers to *Ryperd Boesman* 1942 1 PH H63 (SWA); C 1952 4 SA 117 (O); K 1958 3 SA 420 (A)] (on 448 – 449)

Burchell state: "According to Steyn JA in *R v K* [1958 3 SA 420 (A)], as a matter of law, there is no consent when the woman is reduced to a state of insensibility by intoxicating liquor." (on 708)

Discuss the impact of the definition of consent in section 1(2) and section 1(3) on the common law position.

QUESTION 3:

Snyman, asks the question in his book:

“What is the position if X is HIV-infected, Y is not HIV-infected and would never give consent to intercourse with a man who is HIV-infected, yet X acquires Y’s consent by misrepresenting to her that he is not HIV-infected?”, and submits that in the light of the severe consequences of such a misrepresentation Y’s consent should not be regarded as valid consent. (on 449)

a) Do you agree with his submission? Would the definition of consent in the new legislation have any impact on this submission? Discuss and motivate your answer.

b) Would it influence your answer if she had not specifically asked him about his HIV status? Motivate your answer. Would the definition of consent in the new legislation have any impact on your answer?

c) Would Snyman’s submission be applicable in respect of sexually transmitted diseases as well? Motivate your answer. Would the definition of consent in the new legislation have any impact on your answer?

QUESTION 4:

In *S v Saffier* 2003 (2) SACR 141 (SE) the facts were as follow: The Accused and complainant had lived together for 15 years. While the Accused was in prison, the complainant had a relationship with Toby. On the night in question, the three of them walked together. The Accused told the complainant to choose between him and Toby. He then ordered Toby to have sexual intercourse with the complainant. The Accused threatened Toby with a knife when he tried to leave. The Accused had pulled the complainant down on the floor of the veranda of an empty farm house, where after he had thrown Toby on top of the complainant. He told Toby to have sexual intercourse with the complainant. When the complainant resisted, the Accused told her to lie still. Toby had penetrated the complainant. The Accused then pulled him off the complainant and he (the Accused) then had sexual intercourse with the complainant. The complainant had not consented to either of the acts of sexual intercourse.

The Accused was charged with two counts of rape: with regard to count 1, he denied that he forced anyone to have sexual intercourse with the complainant, and in respect of the second charge his defence was one of consent.

Nepgen J held that the complainant was indeed penetrated without her consent, and that what happened to her, was unlawful. However, as the Accused was not the person who had penetrated her, he cannot be found guilty of rape, as rape can only be committed by a man who personally has sexual intercourse with a woman without her consent. Even though Nepgen J referred to the fact that the regional magistrate in his reasons had submitted the possibility of a conviction as accomplice, he stated that in his opinion, there is no room for such a conviction, something the State had also conceded to. (No further reasons were given for this opinion) The conviction on rape on count 1 was set aside and changed to a conviction for indecent assault. (No reasons were given in the judgment for this.)

Nepgen J stated further that it is extremely unsatisfactory that an accused who compels another to have intercourse with a woman without her consent should escape liability on a charge of rape, and that it is perhaps something the legislator should give attention.

Discuss the above decision in the light of the new offences created in the legislation.

Which of the new offences could the Accused be charged with?

QUESTION 5:

In the unreported judgment, *Stander v State*, Patel J asked the question whether the allegations in the case, that the complainant had to press pimples from the appellant's private part and had to masturbate him, consistent with the second element of the crime of indecent assault. (Complainant was 7 – 8 years old at the time of the alleged indecent assault; accused was her father)

Patel J held: Even if it can be said that the appellant threatened the complainant to touch him or ... instructed her to handle him, it may be surmised that subjectively his intention was indecent, but objectively there was no indecent act perpetrated by him. In regard to the complainant having pressed pimples from the appellant's private part and masturbating him, he surely must have lacked the necessary intention for committing indecent assault since it was the complainant who did the touching and handling. The mere fact that the (sic) he allowed or even instructed the complainant to touch and handle him, that does not mean that he committed indecent assault. [8]

Discuss the above decision in the light of the new offences created in the legislation.

Which of the new offences could the Accused be charged with?

QUESTION 6:

Read the article *Exposing Children to Sexual Activities is Indecent Assault: S v McNeil*.

Discuss the above decision in the light of the new offences created in the legislation.

Which of the new offences could the Accused be charged with?

Would the fact that the child is unable to understand the nature of the acts have any impact or influence on your decision?

Discuss whether expert testimony will be necessary in respect of any of the possible offences the Accused can be charged with.

QUESTION 7:

Discuss the various offences in chapters 2, 3, 4 and 7 (Part 1 and 5), and the evidence that will be required.

SUNDAY

SESSION 1

IMPACT OF LEGISLATION ON PROCEDURAL LAW

Objectives

- To explore the impact of the legislation on procedural law
- To discuss the amendments of the various procedural provisions

Reading material

Workbook

Resource articles

Criminal Law (Sexual Offences) Amendment Bill

Power point presentation

NOTES

SUNDAY

SESSION 2

IMPACT OF LEGISLATION ON EVIDENTIARY ISSUES & SENTENCING ASPECTS

Objectives

- To explore the impact of the legislation on evidentiary aspects
- To discuss the amendments of the various evidentiary provisions
- To understand the impact of the legislation and amendments on sentencing
- To discuss dealing with the new and amended evidentiary aspects

Reading material


Workbook

Resource articles

Criminal Law (Sexual Offences) Amendment Bill

Power point presentation

NOTES



Criminal Law
(Sexual Offences and Related
Matters)
Amendment Bill



- ◆ Background
- ◆ Purpose and aim of legislation
- ◆ Overview of legislation
- ◆ Jurisdiction
- ◆ Offences created in the legislation
- ◆ Impact on procedural aspects
- ◆ Impact on evidentiary issues
- ◆ Sentencing
- ◆ Other orders



Background

- ◆ SALRC report
- ◆ International trends: International Tribunals
- ◆ S v Masiya
- ◆ Constitutional Rights
- ◆ Obligations International & Regional Instruments




Purpose & aim of legislation

- ◆ Long title
- ◆ Preamble
- ◆ Objects: s 2
 - Protection of complainants
 - Criminalising all forms of sexual abuse or exploitation
 - Services




Overview of legislation

- ◆ Ch 1: definitions, Objects
- ◆ Ch 2: Sexual Offences
- ◆ Ch 3: Sexual Offences against Children
- ◆ Ch 4: Sexual Offences – mentally disabled
- ◆ Ch 5: Services, compulsory HIV testing
- ◆ Ch 6: National Register for Sex Offenders
- ◆ Ch 7: General Provisions




Jurisdiction: s 89 MCA

- ◆ District Court = jurisdiction except rape & compelled rape: s 3 & s 4
- ◆ S 93ter(2) MCA: assessors (not yet in operation)
 - Rape & compelled rape: s 3 & 4
 - Indecent assault excluded




Jurisdiction: s 61(1): Extra-territorial

- ◆ Jurisdiction regardless of **where act is committed**, and **whether offence at place of commission** if the person to be charged is:
 - Citizen of RSA
 - Ordinarily resident in RSA
 - Arrested in RSA / territorial waters / aboard ship / aircraft registered in RSA at time offence was committed
 - Company incorporated / registered in RSA
 - Body of persons – corporate / unincorporated in RSA




Jurisdiction: s 61(2): Extra-territorial

- ◆ Any act – sexual or other offence into Act – committed outside of RSA – persons other than u/ss(1), regardless whether offence at place of commission, deemed to be committed in RSA if:
 - Committed against RSA citizen / resident
 - Person is found in RSA AND
 - Person is not extradited by RSA / no extradition application




Jurisdiction: s 61(3): Extra-territorial

- ◆ Any offence committed outside RSA
- ◆ For purposes of Court having jurisdiction to try offence, deemed to have been committed:
 - At the place where complainant is ordinarily resident OR
 - At the accused person’s principal place of business




Jurisdiction: s 61: Extra-territorial

- ◆ (4): NO prosecution to be instituted – person already convicted or acquitted by court of another country – same conduct
- ◆ (5): Extra-territorial prosecution ito s 61 MUST be authorised in WRITING by NDPP




Repeal & amendment of laws: s 68

- ◆ Repeal: Crimes of rape, indecent assault, incest, bestiality & violation of corpse (commission of sexual act with corpse)
- ◆ Repeal: irrebuttable presumption that a female u/12 is incapable of consenting to sexual intercourse
- ◆ Repeal: s 9, 11, 13, 14, 15, 18, 18A, 20A Sexual Offences Act 23 of 1957
- ◆ Amend: CPA inter alia: s158, 164, 170A, 195, 227, 238, 261, 266, 276A




Transitional provisions: s 69

- ◆ Proceedings instituted prior to Act & not concluded iro common law crimes: must be continued & concluded as if Act had not been passed
- ◆ Investigation / prosecution – common law crime – initiated before Act: concluded, instituted & continued as if Act had not been passed
- ◆ Despite repeal/ amendment of any provision of any law – for purposes of disposal of any investigation / prosecution – remains in force as if not repealed / amended
 - Impact CPA amendments?
 - Impact new offences created – not offences before?




Ch 2: Sexual Offences

- ◆ Part 1: Rape & Compelled rape
- ◆ Part 2: Sexual assault, compelled sexual assault, compelled self-sexual assault
- ◆ Part 3: Persons 18+: compel / cause to witness sexual acts, flashing, child porn, engage sexual services
- ◆ Part 4: Incest, bestiality & sexual acts with corpse




Part 1: Rape – s 3

- ◆ Any person who unlawfully & intentionally commits an act of sexual penetration with a complainant, without consent
- ◆ Sexual penetration - definition
- ◆ Consent – s 1(2) & 1(3)
- ◆ S 56 - defences
- ◆ S 57 – inability to consent: u/12, mentally disabled (def)




Definitions

- ◆ Sexual penetration
 - Any act causing penetration to any extent
 - by genital organs of 1 into or beyond genital organs, anus or mouth of another
 - any other part of body of 1 or any object, incl. any part of body of animal, into or beyond the genital organs or anus of another person OR
 - Genital organs of animal, into or beyond the mouth of another person
- ◆ Genital organs
 - Includes whole or part of male & female genital organs, incl. surgically constructed or reconstructed genital organs




Definitions

- ◆ Consent: voluntary or uncoerced agreement
- ◆ Circumstances not voluntary or uncoerced
 - Complainant submits or is subjected to act
 - Use of force / intimidation – person / property
 - Threat of harm – person / property
 - Abuse of power / authority – inhibited to indicate unwillingness / resistance
 - Committed u/false pretences / fraudulent means
 - Believe particular person – who is different person
 - Sexual act something other than the act
 - Incapable of appreciating nature of sexual act
 - Asleep, unconscious, u/influence
 - u/12, mentally disabled




Part 1: Compelled rape – s 4

- ◆ Any person (A) who unlawfully & intentionally
- ◆ compels a 3rd person (C)
- ◆ to commit an act of sexual penetration
- ◆ with a complainant (B),
- ◆ without consent of B
 - Definitions
 - S 56, s 57




Part 2: Sexual assault – s 5

- ◆ A person who unlawfully & intentionally sexually violates a complainant, without consent
- ◆ A person who unlawfully & intentionally inspires the belief in a complainant (B) that B will be sexually violated
 - Definitions
 - S 56, s 57




Definition – sexual violation

- ◆ Any act that causes direct or indirect contact
 - Genital organs/anus/breasts – 1 with any part of body of another, incl object
 - Mouth of 1 and
 - Genital organs/anus/breasts of another
 - Mouth of another
 - Any other part of body of another which could be used in act of sexual penetration; cause sexual arousal/stimulation; be sexually aroused/stimulated thereby
 - Mouth of compl. & genital organs/anus of animal
- ◆ Masturbation of 1 by another
- ◆ Insertion of object resembling / representing genital organs of person / animal into / beyond mouth of another




Part 2: Compelled sexual assault – s 6

- ◆ A person (A) who unlawfully & intentionally
- ◆ compels a 3rd person (C)
- ◆ without consent of C,
- ◆ to commit act of sexual violation
- ◆ with complainant (B)
- ◆ without the consent of B
 - Definitions
 - S 56, s 57




Part 2: Compelled self-sexual assault – s 7

- ◆ A person (A) who unlawfully & intentionally compels a complainant (B) without consent of B to
- ◆ Engage B him/herself in
 - Masturbation
 - Any form of arousal/stimulation of sexual nature of female breasts
 - Sexually suggestive/lewd act
- ◆ Engage in any act which has/may have effect of sexually arousing/degrading B
- ◆ Cause B to penetrate in any manner own genitals/anus
 - Definitions
 - S 56 & s 57




Part 3: Compel/cause to witness – s 8(1)

- ◆ A person (A) unlawfully & intentionally
- ◆ whether for sexual gratification of A/3rd person (C) or not,
- ◆ compels/causes compl. 18+ (B),
- ◆ without B's consent,
- ◆ to be present or watch A or C
- ◆ while he/she/they commit a sexual offence
 - Definitions
 - s 57




Part 3: Compel/cause to witness – s 8(2)

- ◆ Person (A) who unlawfully & intentionally,
- ◆ whether for sexual gratification of A or 3rd person (C) or not,
- ◆ compels/causes compl. 18+ (B),
- ◆ without B's consent,
- ◆ to be present/watch
 - A while engaging in sexual act with C / another
 - C while engaging in sexual act with D
 - Definitions
 - s 57




Part 3: Compel/cause to witness – s 8(3)

- ◆ Person (A) who unlawfully & intentionally,
- ◆ whether for sexual gratification of A/3rd person (C) or not,
- ◆ compels/causes compl. 18+ (B),
- ◆ without B's consent,
- ◆ to be present / watch A or C
- ◆ while he/she engages in act of self-masturbation
 - Definitions
 - s 57




Part 3: Flashing – s 9

- ◆ Person (A) who unlawfully & intentionally,
- ◆ whether for sexual gratification of A/3rd person (C) or not,
- ◆ exposes or displays or causes exposure or display
- ◆ of genital organs, anus or female breasts of A or C
- ◆ to compl. 18+ (B),
- ◆ without B's consent
 - Definitions
 - s 57




Part 3: Exposure/display – child porn – s 10

- ◆ Person (A) who unlawfully & intentionally,
- ◆ whether for sexual gratification of A/3rd person (C) or not,
- ◆ exposes/displays or causes exposure/display
- ◆ of child porn [s 19(a)/(b)/(c)],
- ◆ to compl. 18+ (B),
- ◆ with or without B's consent




Part 3: Engaging sexual services – s 11

- ◆ Person (A) who unlawfully & intentionally
- ◆ engages services of person 18+ (B),
- ◆ for financial / other reward, favour / compensation
- ◆ to B or 3rd person (C)
 - For purpose of engaging in sexual act with B, irrespective of whether sexual act is committed or not
 - By committing sexual act with B




Part 4: Incest – s 12

- ◆ Persons who may not lawfully marry each other
- ◆ on account of consanguinity, affinity or adoptive relationship, and
- ◆ who unlawfully & intentionally engage in act of sexual penetration with each other,
- ◆ despite mutual consent to engage in act
 - Prohibited degrees – consanguinity (blood relations) & affinity: s 12(2)
 - Prosecution authorised in writing – NDPP: s 12(3)(a)
 - may not delegate power: s 12(3)(b)




Part 4: Incest – s 12

- ◆ S 56(4) – Person (A) may NOT be convicted ito s 12 if at time - act of sexual penetration was 1st committed
 - A was below 18 AND
 - B exercised power / authority over A or relationship of trust existed between A & B




Part 4: Bestiality – s 13

- ◆ Person (A) who unlawfully & intentionally commits act
 - Which causes penetration to any extent by genital organs of
 - A into or beyond mouth, genital organs or anus of an animal OR
 - An animal into or beyond the mouth, genital organs or anus of A
 - OR of masturbation of an animal




Part 4: Sexual act with corpse – s 14

- ◆ A person who unlawfully & intentionally
- ◆ commits a sexual act
- ◆ with a human corpse
 - Definition: Sexual act
 - sexual penetration
 - sexual violation




Ch 3: Sexual offences - children

- ◆ Part 1: consensual sexual acts – certain children
- ◆ Part 2: sexual exploitation & sexual grooming, expose - porn
- ◆ Part 3: compel/cause children to witness sexual offences




Definitions

- ◆ Child – person under 18
- ◆ S 15 & 16: 12+ but under 16




Part 1: Statutory rape – s 15

- ◆ Person (A) who commits act of sexual penetration with a child (B), despite consent
 - Child (B): def – 12+ but under 16
- ◆ NDPP must authorised – in writing – prosecution if both A & B were children at time of commission of offence
- ◆ If prosecution is authorised, both A & B must be charged
 - NDPP may not delegate authority
 - Defence – s 56(2)




Part 1: Statutory sexual assault – s 16

- ◆ Person (A) who commits act of sexual violation with child (B), despite B’s consent
 - Child (B): def – 12+ but under 16
- ◆ DPP must authorised – in writing – prosecution if both A & B were children at time of commission of offence
- ◆ If prosecution is authorised, both A & B must be charged
 - DPP may not delegate authority
 - Defence – s 56(2)




Part 2: Sexual exploitation – s 17(1)

- ◆ Person (A) who unlawfully & intentionally engages services of child (B) with or without B’s consent for financial/other reward, favour, compensation to B or 3rd person (C)
 - For purpose of engaging in sexual act with B, irrespective of whether sexual act is committed or not
 - By committing sexual act with B
- ◆ In ADDITION to any other offence
 - Definitions
 - S 57




Part 2: Sexual exploitation – s 17(2)

- ◆ Person (A) who unlawfully & intentionally offers the services of child (B) to 3rd person (C) with or without B's consent, for financial / other reward, favour, compensation to A, b or other person (D)
 - For sexual act with B by C
 - Inviting, persuading/inducing B to allow C to commit sexual act with B
 - By participating, being involved, promote, encourage/facilitate sexual act with B by C
 - Making available, offering/engaging B for purpose of sexual act with B by C
 - Detaining B, whether under threat, force, coercion, deception, abuse of power or authority, for purpose of sexual act with B by C




Part 2: Sexual exploitation – s 17(3)

- ◆ Person (A) who
 - (a) intentionally allows / knowingly permits commission of sexual act by 3rd person (C) with child (B), with/without B's consent, while being primary care-giver (s 1 Social Assistance Act), parent or guardian of B
 - Owns, leases, rents, manages, occupies / has control of any movable / immovable property to be used for purposes of commission of sexual act with B by C
- ◆ Guilty of offence of furthering the sexual exploitation of a child




Part 2: Sexual exploitation – s 17(4)

- ◆ Person (A) who intentionally receives financial / other reward, favour / compensation from the commission of sexual act with child (B) by 3rd person (C)
- ◆ Guilty of offence of benefitting from sexual exploitation of a child
- ◆ S 56(5) – person may not be convicted if person is a child AND not person – s 17(1)




Part 2: Sexual exploitation – s 17(5)

- ◆ Person (A) who intentionally lives wholly or in part on rewards, favours or compenstion for commission of sexual act with child (B) by 3rd person (C)
- ◆ Guilty of offence of living from the earnings of sexual exploitation of a child
- ◆ S 56(5) – person may not be convicted if person is a child AND not person – s 17(1)




Part 2: Sexual exploitation – s 17(6)

- ◆ Person (A) incl juristic person, who
 - (a) makes / organises any travel arrangements for or on behalf of 3rd person (C) whether other person is resident within /outside RSA, with intention of facilitating commission of any sexual act with child (B) irrespective of whether act is committed or not, OR
 - (b) prints / publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B
- ◆ Guilty of offence of promoting child sex tours




Part 2: Sexual offences - child

- ◆ 18(1) – promoting sexual grooming
- ◆ 18(2) – sexual grooming
- ◆ 19 – expose / display of or causing exposure or display of pornography to children
- ◆ 20(1) – using children for child pornography
- ◆ 20(2) - benefiting from child pornography




Ch 4: Sexual offences – mentally disabled

- ◆ 23 – sexual exploitation
- ◆ 24 – sexual grooming
- ◆ 25 – exposure / display of or causing exposure / display of porn / harmful material
- ◆ 26 – using mentally disabled for pornographic purposes / benefiting therefrom




Ch 7: Part 1 – miscellaneous offences

- ◆ 54 – obligation to report commission of sexual offences against children / mentally disabled
- ◆ 55 – attempt, conspiracy, incitement or inducing another to commit a sexual offence



Ch 7: Part 6: Trafficking

- ◆ 71 – trafficking in persons for sexual purposes
 - Definitions – s 70
- ◆ Children’s Act



Other offences

- ◆ Relating to HIV testing – s 38
- ◆ Ch 6 – National register




Grooming & Consent

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Why Children Don't Yell & Tell

- ◆ A small number may
 - The 2 I know of
 - Question of misjudging the child
- ◆ Majority are like antelope caught in headlights
- ◆ Some may have feelings for the perpetrator
 - The "compliant victim"
- ◆ Either way, grooming has played a part




Context of Grooming

- ◆ How molester uses grooming
 - To manipulate child to lower his/her sexual inhibitions
 - prepare the victim for abuse/exploitation
 - To decrease likelihood child will disclose
 - Will almost certainly delay disclosure
 - To increase likelihood child won't be believed if s/he does disclose



Context of Grooming

- ◆ How Grooming affects the Victim
 - Makes him/her feel at least partly responsible for abuse or exploitation
 - Makes child feel s/he can't tell and be believed
 - Makes psychological damage worse and longer term
 - More psychological damage than with brute force
 - Finkelhor & Brown - Traumagenic Dynamics



Grooming and "Consent"

- ◆ Child cannot, legally or genuinely, consent to abuse or exploitation
- ◆ Paedophile uses grooming to manipulate the child into feeling/believing that s/he has "consented" to the abuse & that perpetrator "loves" her/him
- ◆ D rationalizes & reinforces his own criminally deviant behavior through child not physically fighting or immediately yelling & telling




GROOMING

- ◆ Offender Typology
- ◆ Child Sexual Abuse Accommodation Syndrome
- ◆ Physical Grooming
- ◆ Victim Impact Statements



OFFENDER TYPOLOGY




Pedophilia - DSM-IV-TR

- ◆ Pedophilia-over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving sexual activity with a prepubescent child or children


(child generally age 13 or younger, and pedophile is at least age 16 years and 5+ years older than the child or children)

Visual age, not necessarily chronological age




Associated paraphilias


- ◆ Hebephilia-adolescents
- ◆ Infantaphilia-infants



DSM-IV-TR Cautionary Statement (p. xxxvii)



“...a diagnostic category such as...**Pedophilia** does **not** imply that the condition meets **legal** or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability. The ... categorization of these **conditions** as mental disorders may **not** be wholly relevant to **legal** judgments, for example, that take into account such issues as individual responsibility...”




Types of Paedophiles



Categories of Paedophiles

<ul style="list-style-type: none"> ◆ Situational – Regressed – Morally indiscriminate – Sexually indiscriminate – Naïve/ inadequate 	<ul style="list-style-type: none"> ◆ Preferential – Sadistic – Fixated – Seductive
---	---




Category I - Situational Paedophiles




Situational Paedophiles

- ◆ Do not have exclusive preference for children
- ◆ Usually have fewer & different victims
- ◆ They may also abuse other easy victims
- ◆ Four subtypes:
 - Regressed
 - Morally indiscriminate
 - Sexually indiscriminate
 - Naïve/ inadequate



Type 1: Regressed

- ◆ Uses children temporarily as a result of a situation in his life
- ◆ “Stress” leads to abuse of children
- ◆ Generally more involved with adults
- ◆ Often married with children
- ◆ Victims strangers & opportunistic
- ◆ Victims tend to be females
- ◆ Geographically stable & employed



Type 2: Morally indiscriminate

- ◆ Sexual abuse of children part of general pattern of abuse of people
- ◆ Abuses wife, colleagues, friends etc
- ◆ Psychopathic
- ◆ Will force or manipulate victims
- ◆ Collects pornography




Type 3: Sexually indiscriminate

- ◆ Experiments sexually
 - Sadism
 - Spouse swapping (swinging)
- ◆ Victimized strangers or own children
- ◆ Collects pornography




Type 4: Naïve/ inadequate

- ◆ **Social 'misfits'**
- ◆ **Any helpless person is potential victim**
- ◆ **Doesn't usually physically harm victim**
- ◆ **Doesn't usually engage in intercourse**



Category II - Preferential Paedophiles




Preferential child molesters

- ◆ **Prefers children to adults**
- ◆ **Will have more victims**
 - Due to need for frequent contact
- ◆ **More likely to be dangerous**
- ◆ **Three subtypes:**
 - **Sadistic**
 - **Seductive**
 - **Fixated**




Type 1: Sadistic

- ♦ Violence usually ends with death of child
- ♦ Victims are strangers
- ♦ Stalks victims, takes by force
- ♦ Places where children frequent
- ♦ Boys usually victims
- ♦ Crime is premeditated
- ♦ Fantasy driven




Type 2: Seductive

- ♦ Will court children as his partner with attention, affection and gifts
- ♦ Takes time until inhibitions have been lowered
- ♦ May simultaneously have several children



Type 2: Seductive

- ♦ Seeks out vulnerable children - neglected, unpopular, in turmoil, psychosexually confused
- ♦ Once child gets too old he loses interest




Type 3: Fixated

- ◆ Desires affection from children
- ◆ Usually single, no friends of his own age
- ◆ Comes across as child-like
- ◆ Not interested in physically harming child
- ◆ Oral-genital sex is norm
 - intercourse only after a long period of time, if at all




◆ Grooming
–Where it's most common

- ◆ Preferential Child Molesters
 - Seductive
 - Fixated




Who are the perpetrators?

- ◆ The Perpetrators
 - Sexual abuse – male majority
 - 21.5% “dad”; other male relatives 19.4%; other male caretakers 24.9% (babysitters, teachers, priests, etc...),
 - Remainder – neighbors, friends, strangers
 - Female abusers
 - Sexual victimizers usually known to the victim (Childline)
 - @ 80% family, friends, acquaintances
 - @ 20% unknown to victim or status unknown



The Ideal Victim


- ◆ **Because:**
 - Naturally curious
 - Grooming hijacks natural curiosity
 - Easily influenced by adults
 - Need for attention & affection
 - Often not believed when they complain



Grooming – The Stages


(1) Targeting stage

- ◆ Many have a “sixth sense” as to who would be more likely to be victimized
- ◆ Targets neglected, emotionally needy children, many who come from “troubled” homes
- ◆ Can “groom” parents as well



Grooming

- ◆ Gives the child (more/better) gifts
- ◆ Sleepovers, trips, attention
- ◆ Fulfils an emotional need or non-sexual need of the victim
 - Trust building stage
- ◆ Positioning for strike
 - Abuse of power



Grooming

(2) Non-sexual touching stage

- ◆ “accidental” touching
- ◆ introduction of alcohol/drugs
- ◆ introduction of pornography
 - child pornography vs. adult pornography




Collecting of child pornography




Background

- ◆ Paedophiles collect & keep pornography
- ◆ Preferential paedophile more likely to have it
- ◆ Use it in grooming process
 - Adult and child pornography
- ◆ 40% dual offenders
 - US and Canadian findings



Characteristics of Collection


- ◆ Spend time and money on collections
- ◆ Constant & ongoing
- ◆ Highly organized
- ◆ Concealed, but won't be destroyed
- ◆ Computer-based



Grooming

(3) Sexual touching stage


- ◆ Sexually assaultive behaviour ranging on a continuum from touching to intercourse



Grooming's Final Stage


(4) Exit strategy

- ◆ Sexually no longer interested in child
 - Once they begin to look too much like an adult
 - Disclosure by child may occur here BECAUSE the abuse has ended, NOT to put an end to the abuse
- ◆ Threats/manipulation to prevent disclosure
 - Groomed for abuse/exploitation
 - Groomed not to tell
 - Kids (like many adults) may live in hope




The US Catholic Priest Cases

- ◆ Over 4,000 priests implicated
- ◆ 50 years of abuse
 - Documentation by church of its practices
- ◆ 10,000 victims
 - Mostly boys
 - Fear of gay stigmatization; fear of power
 - Groomed parents too
- ◆ \$100,000,000.00 in damages to 500 victims in Boston alone
- ◆ Figures from February 2004 Catholic Church commissioned report
- ◆ Similar cases in Mexico, Austria, Ireland, Poland, France and South Africa




New Bottle, Old Wine: Internet Grooming

- ◆ Internet provides the pedophile with access to many more potential victims, simultaneously, while giving them the cloak of anonymity
 - shortens the trust building stage
 - may deepen the “bond”
 - when physical presence was needed, would have drawn a lot of attention




Internet grooming

- ◆ Can operate under the cloak of anonymity
 - False persona and lifestyles
- ◆ Paedophiles can pretend to be anyone they want in order to deceive the victim into thinking that they are understanding and sympathetic
 - Know the lingo
 - Punctuation is now optional, as is correct spelling



Identifying the preferential child molester



Children as preferred sexual objects

- ◆ Often not married/partnered
- ◆ If married often has 'special' relationship with wife
 - Visual appearance
 - Lack of sex life
 - Cover marriages
 - Incest & victimization of other children



Well developed techniques in obtaining victims

- ◆ Identifying vulnerable victims
- ◆ Identifies with children
 - "Give me 2 minutes"
- ◆ Activities that exclude adults






What Are They Thinking?




Cognitive Distortions in Offenders

- ◆ Rationalizations and justifications for behaviour
- ◆ Manipulates children and the reality of what is happening
 - Makes child take responsibility for adult's criminal acts
- ◆ Offence facilitating thinking



“Our Little Secret”

- ◆ Pedophile traps the child and stops the disclosure by altering the reality of what is said and how the child interprets it.
- ✓ ‘You took the money’ – ‘I’m a prostitute’
- ✓ ‘You did it for free’ – ‘I must like it’
- ✓ ‘You’re too pretty’ – ‘I attract it’
- ✓ ‘You could have said no’ – ‘True, I didn’t’




“Our Little Secret”

- ✓ ‘You came back’ – “I must want it”
- ✓ ‘You began the game’ – “So I did. It must be my fault”
- ✓ ‘You didn’t tell’ – “It can’t be that wrong”
- ✓ ‘I’m sorry’ – “That’s o.k.”




After identification

How will the paedophile behave?




Reactions

- ◆ Denial
 - Absolute
 - Intent (accident)
- ◆ Minimization
 - Both as to acts and length of abuse
 - Minimizes harm caused
- ◆ Justification
 - Stress/alcohol/caring responsibilities
 - If only my wife understood me
 - The child seduced me




- ◆ **Fabrication**
 - Research/legitimate use
 - 2 prong test
- ◆ **Mental illness**
 - Attempt to fake, but usually no record
 - Associated sympathy ploy of:
 - “I was a victim as a child”



Previous Abuse


- ◆ **Vampire Syndrome-If you were sexually or abused you will become an offender**
 - 70+ per cent self report abuse during childhood
- ◆ **Objective, verifiable, externally validated number?**
 - The Pinocchio Syndrome



Aetiology

Essentially unknown in psychiatric terms

- ◆ **Doing the math – what we do know**
 - If abuse leads to abusing, (vast) majority of perpetrators would be female
- ◆ **Not hereditary – it’s a choice, not a destiny**



- ◆ **Sympathy**
 - I am a family man... I have problems
- ◆ **Guilty but not guilty**
 - Try to make a deal to avoid prosecution
 - Pleading in the alternative
- ◆ **Attack**
 - Threaten witnesses, detective




Can they be Rehabilitated?

- ◆ Definition of rehabilitation
- ◆ Cannot refocus their sexual desire
- ◆ Can engage in trigger recognition
- ◆ Can engage in aversion therapy
- ◆ Can absent themselves from access
- ◆ Adults are hardwired
- ◆ When the offender is a child
 - Kids may not be




CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME




Child Sexual Abuse Accommodation Syndrome

- ◆ Syndrome-group of individual findings which have special meaning when they co-occur
- ◆ Roland Summit article 1983
- ◆ Repudiation of assumed “normal” child victim responses to sexual abuse



CSAAS

- ◆ Used to educate about the counterintuitive aspects of a child victim’s behavior
- ◆ Child Sexual Abuse Accommodation Syndrome
 - Secrecy
 - Helplessness
 - Accommodation
 - Delayed and/or Unconvincing Disclosure
 - Recantation



CSAAS

Secrecy
It's our little secret, because you're special.
We expect children to tell immediately
They don't, as a rule

Helplessness
What am I supposed to do?
We expect children to be robust and aware of their rights and the help available to them
They aren't, as a rule

Accommodation
Let's make a deal.
We expect children to be fighters, not bargainers



(4) DELAYED/UNCONVINCING DISCLOSURE

HOW DO CHILDREN NORMALLY DISCLOSE ABUSE?

Disclosure is a process, not an event




(5) THE RECANTATION PROCESS

- (1) May initially deny abuse occurred.
 - (1) Intentional & active vs. accidental disclosure
- (2) Tentative disclosure or reluctance to discuss abuse.
- (3) Active disclosure or a “complete” statement about the abuse.
- (4) Recantation about the abuse (< ¼).
- (5) Reaffirmation of the allegation(>90%).




CAUSES OF RECANTATION


Lack of support	Anxiety about court appearances
Misplaced loyalty	Change in home environment
Isolation	Loss of benefits
Pressure	Shame/guilt/shared responsibility
Threats	-I.E. GROOMING
Fear	Least likely-It wasn't true
Cultural stigmas	
Defense mechanism	



Physical Grooming of the Victim




How can a “normal” exam be consistent with sexual abuse?
OR
Grooming can be physical too



SOME ANSWERS

- ◆ Elasticity of hymenal tissues can allow penetration w/o tearing the posterior rim of hymen (digital preparation, lubricant, etc)
 - San Diego video w/o injury to 9 yr old
 - Grooming may be physical too
 - Leave no mark on the child
 - decrease likelihood of disclosure
 - increase disclosure being dismissed


Jack Coyne, M.D.



SOME ANSWERS


- ◆ Healing of even acute injury of anal/hymenal tissue is significantly faster and physically different from other planes of the body
 - CD Rom of healing
- ◆ Perception of penetration is real, but penetration thru the hymenal opening to the cervix did not occur – still rape

Jack Coyne, M.D.




Some More Reasons

- ◆ Delay in seeking exam
- ◆ Fondling, oral sex do not usually leave findings
- ◆ Ejaculatory dysfunction common
- ◆ Anal sphincter allows for passage of stool larger in diameter than a penis or an object
 - Ex: pencil




Sexual Abuse Medical Exam Findings

- ◆ SANE division of findings
 - Applies to both girls and boys
- ◆ Category I-Normal Exam Findings
 - Approximately 80% of the exams
- ◆ Category II-Non-specific Findings
 - Discharge, redness
 - May be present with or without abuse




Sexual Abuse Medical Exam Findings

- ◆ **Category III-Concerning**
 - Suspicious of abuse, but insufficient data to indicate abuse as only possible cause
 - Acute abrasions, lacerations or bruising of genital area
- ◆ **Category IV-Suggestive**
 - Presumption of abuse, unless and until explained otherwise
 - Grossly enlarged openings, adult bite marks, STD
- ◆ **Category V-Clear or Definitive - <5%**
 - Pregnancy, sperm, semen
 - Videod/witnessed assaults




It's Normal to be Normal

- ◆ 1994 Pediatrics
- ◆ 236 kids examined whose case had resulted in a criminal conviction
- ◆ Mean age 9; range 8months to 17 yrs 11 months
- ◆ Colposcopic photographic findings examined




It's Normal to be Normal

- ◆ 28% Normal
- ◆ 49% Non-specific
- ◆ 9% Suspicious
- ◆ 14% Abnormal
- ◆ Abnormal anal findings in only 1%
- ◆ Time of (1) last incident and (2) reporting of blood greatest factors in abnormal genital findings




It's Normal to be Normal

- ◆ Abnormal genital findings are not common in sexually abused girls
- ◆ More emphasis should be placed on documenting the child's description of the molestation, and educating that for children alleging abuse "it's normal to be normal."




Anatomical Changes Resulting from Sexual Abuse

- ◆ 2000 Am J Obstet Gyn
- ◆ 192 3-8 yr olds, penetrative abuse victims plus 200 non-abused children
- ◆ Vaginal discharge more common in abused children
- ◆ Only 4 children with hymenal transection, perforation or deep notch, all of whom were abused




Anatomical Changes Resulting from Sexual Abuse

- ◆ Genital examination of abused children rarely differs from that of abused children
- ◆ Experts should focus on the child's history as the primary evidence of abuse




Medical Findings in 2384 Children

- ◆ Child Abuse and Neglect (2002)
- ◆ Referred after:
 - disclosure;
 - behavioural changes;
 - exposure to abusive environment; or
 - possible medical conditions




Medical Findings in 2384 Children

- ◆ 96.3% of all children referred had a normal medical examination
- ◆ 95.6% of those reporting abuse
- ◆ 99.8% of those with behavioural changes or exposure to abuse




Medical Findings in 2384 Children

- ◆ Of the 182 referred with possible medical conditions, 92% normal
 - Remainder had STDs, acute or healed genital injuries




Medical Findings in 2384 Children

- ◆ Only 4% of all those referred had abnormal findings at time of exam
- ◆ Even with history of severe abuse, such as vaginal or anal penetration, only 5.5% have abnormal medical findings




Normal Doesn't Mean that Nothing Happened

- ◆ 2004 Pediatrics
- ◆ Many clinicians still expect that a history of penetration will be associated with exam findings of trauma



Normal Doesn't Mean that Nothing Happened

- ◆ 36 pregnant adolescent girls who reported
- ◆ Only 2 had definite evidence of penetration
- ◆ One was on her second pregnancy



Normal Doesn't Mean that Nothing Happened

- ◆ Penetration does not necessarily mean trauma
- ◆ Vaginal penetration generally does not result in observable evidence of healed injury to perihymenal tissues




Victim Impact Statements




Victim Impact Statement

- ◆ Increased recognition of V in sentencing phase
- ◆ Sources
 - Supreme Court of Appeal
 - W/O VIS no fair decision possible
 - Draft Legislation – Criminal Law
 - Sexual Offences Amendment Bill 2006
 - VIS to show extent of harm suffered by V
 - Grievous harm as aggravating factor
 - Victims' Charter
 - Make statement to court




Victim Impact Statement

- ◆ Harm to victim as independent fourth factor in sentencing
- ◆ Equal Protection & Human Rights
 - Perpetrator & victim
- ◆ Others are:
 - (1) Crime
 - (2) Criminal
 - (3) Community




Types of Harm

- ◆ Physical
 - Includes sexual
- ◆ Mental
- ◆ Emotional
- ◆ Economic
- ◆ Includes immediate family or dependants of direct victim




Long term harm Examples

- ◆ Trust issues
 - Knowing the D is an aggravating factor, not a mitigating one
- ◆ Bonding issues
 - If X doesn't love me, who will?
- ◆ Confidence issues
- ◆ Self-esteem
- ◆ Physical/medical issues
 - Especially with girls who have been targeted for repeated intrusive abuse, reproductive abilities may be impaired later
 - Cervical cancer w/ multiple perpetrators




Other Examples

- ◆ Very young children DO have long term effects
- ◆ Children who have been groomed have just as much, if not more, psychological damage as those targeted by strangers
- ◆ Betrayal of trust = Problems with
 - Relationships
 - Intimacy
 - Sexual adjustment



Conclusion

- ◆ Paedophilia is a psychiatric diagnosis, not a legal defense – it's a choice, not a destiny
- ◆ Grooming is an intentional, concerted, often long-term process to exploit the child by lowering and then overcoming their sexual inhibitions
- ◆ Grooming is done to make the child appear to have consented & minimize obvious harm
- ◆ Does the child more psychological harm than with force
- ◆ Grooming can be physical too




Resources

- ◆ SAPS Investigative Psychology Unit
 - Within the Serious & Violent Crime Head Office
 - E-mail contact: ipsych@saps.org.za
 - Gérard Labuschagne, Ph.D. (Head)
 - Other members of the unit
 - Supt Jan de Lange
 - Captain Lynne Evans
 - Captain Elmarie Myburgh




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A140/03-JduP

JUDGMENT

Sneller Verbatim/JduP

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: A140/03

2004.02.13

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The Magistrate

Pretoria

Case No: 14/550/2000

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<u>YES/NO</u>
(2) OF INTEREST TO OTHER JUDGES	<u>YES/NO</u>
(3) REVISED	<u> </u>
DATE <u>9/6/2004</u>	SIGNATURE <u>[Signature]</u>

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In the appeal of

15

BAREND FREDERICK STANDER

Appellant

and

THE STATE

Respondent

JUDGMENT

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PATEL, J:

[1] The appellant is the biological father of the complainant. She was 13 years old at the time of her father's trial.

[2] The appellant was charged on three counts. The first count 25

and 1998 the appellant did unlawfully and intentionally commit an assault of indecent character upon the complainant in that she had to remove pimples from his penis, she had to masturbate him, and he inserted his finger into her vagina. The second count was of contravening section 41(a), alternatively section 41(b), and further alternatively section 41(c) of the Sexual Offences Act, 23 of 1953. The third count was of assault with intent to do grievous bodily harm. It was alleged that during 1995 and 1998 he wrongfully and intentionally assaulted the complainant with his flat hand, fist and a rubber object.

[3] The appellant was acquitted on the second count, and convicted on the remaining counts of indecent assault and assault with intent to do grievous bodily harm. He was sentenced to 10 years' imprisonment on each count, thus effectively sentenced to a term of 20 years in jail.

[4] At the outset, the appellant sought condonation for the late filing of his leave to appeal. There is no resistance from the State. Accordingly condonation is granted.

[5] The appellant is appealing against both the conviction and sentence.

[6] As it will become apparent shortly, the prospects of success on the conviction, in terms of the indecent assault count, that is

the first count, favours the appellant. However, I have some

very pertinent concerns regarding this count. According to Prof

consists in unlawfully and intentionally assaulting, patting or handling another in the circumstances in which either the act itself or the intention with which it is committed is indecent. The learned author then identifies the elements of the crime. These are:

- "(a) an act of either assaulting, touching or otherwise handling another;
- (b) either the act or X's intention must be indecent;
- (c) unlawfulness; and
- (d) intention."

[7] The question is: Are the allegations in this case, that the complainant had to press pimples from the appellant's private part and had to masturbate him, consistent with the second element of the crime of indecent assault?

[8] Regarding two of the three allegations contained in the charge, the evidence before the trial court was that the complainant touched and handled the appellant. Even if it can be said that the appellant threatened the complainant to touch him or as Mr Kriel submitted that he instructed her to handle him, it may be surmised that subjectively his intention was indecent, but objectively there was no indecent act perpetrated by him. In regard to the complainant having pressed pimples from the appellant's private part and masturbating him, he surely must have lacked the necessary intention for committing indecent

the complainant to touch and handle him, that does not mean that he committed indecent assault.

[9] To be convicted of the crime of indecent assault the State must prove beyond reasonable doubt that the appellant had the intention to act indecently by touching and handling another, which the appellant in respect of the two allegations alluded to above never did. Thus, the State failed to prove beyond reasonable doubt those two allegations of alleged indecency on the appellants. 5

[10] The last of the three allegations was, that the appellant inserted his finger into the complainant's vagina. She testified that this happened once (see p.13, lines 18-19 of the record). She also said it happened "meer as een keer" (p.15, line 15). But, she also said "ja" in response to a question: "jy kan nie mooi die insident onthou nie, is dit korrek?" (p.15, lines 16-18). Under cross-examination she said: "Ek weet nie hoe baie keer het dit gebeur nie" (p.35, lines 15, 23). This certainly highlights the inconsistencies in the complainant's testimony. And is very material to the charge of indecent assault. With deference to the trial court magistrate, the inconsistencies were neither considered in the court's assessment and evaluation of the complainant's evidence. Nor did the court approach the complainant's testimony with any degree of caution. 10 15 20

[11] In *S v V* 2000 (1) SACR 453 (SCA) para 2 at 454h-i, Zulman

ARMSA - SEXUAL OFFENCES AND RELATED MATTERS AMENDMENT BILL WORKSHOP 67

1 (with whom Hefer JA and Mthiyane AJA (as he then was)

"In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution. (*R v Manda* 1951 (3) SA 158 (A), at 163C; *Wojj v Santam Insurance Co* 1981 (1) SA 1020 (A), at 1028B-D), and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. (*S v J* 1998 (2) SA 984 (SCA), at 1009B)".

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[12] In the absence of applying the cautionary rule *apropos* a child's evidence in cases of sexual misconduct, there is the ever present danger of acting upon such evidence. In the *South African Law of Evidence* by Zeffertt *et al*, at p.806-807, the authors say:

15

"There is no particular age below which the cautionary rule applies. This is obviously a matter of common sense to be applied in each particular case, and the degree of corroboration and other factors required to reduce the danger of lies of the child's evidence will vary with his or her age and other circumstances of the case, but the courts have usually required substantial confirmation where very young children were concerned, and when the child is the only witness implicating the accused the dangers are even greater, particularly in sexual cases."

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any cogency whatsoever that the appellant was responsible for breaking the complainant's hymen and injuring her vagina. Dr Grabie's report appears at page 273. It simply concludes that the complainant had a damaged hymen. The conclusion does not corroborate the complainant's evidence that the appellant was responsible for the condition of her vagina. On the complainant's own evidence, she was molested by the nephew at the aunt's yard (see p.32). However, this evidence does not indicate that she was an innocent victim. Inferentially even though she was of tender age, she was sexually aware, if not precocious.

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[14] In the final analysis, I have tremendous difficulties with the magistrate's judgment in its entirety. When I consider the evidence of the appellant he was truthful in stating that he masturbated. He did not deny that the complainant sat on his bed. He tendered a plausible explanation and also indicated that she was not under the blanket but only on top of the bed. He also said that he did hit the complainant, an aspect that I will deal with later. In my view, there is a reasonable possibility that his evidence might be true. However, even if there is some suspicion that he did indecently interfere with the complainant in some manner, as testified by the complainant herself as well as both Otto and Wessels, it leaves me with a sense of unease

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because I am unable to reconcile the testimonies of Otto and

Wessels in the specific time frame and place with that of the

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"In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution. (*R v Manda* 1951 (3) SA 158 (A), at 163C; *Woji v Santam Insurance Co* 1981 (1) SA 1020 (A), at 1028B-D), and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. (*S v J* 1998 (2) SA 984 (SCA), at 1009B)".

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[15] On having regard to the totality of all the evidence that was before the court below as appears on record which I have scrutinised I am not persuaded that the appellant's conviction can safely be sustained at all on the first count of indecent assault. In my view the State did not establish the appellant's guilt beyond reasonable doubt on that count.

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Turning now to the third count of assault with intent to cause grievous bodily harm, it is common cause that this father did chastise his child. Mr Kriel was unable to point to any part of the record where the assault perpetrated on this child was one that resulted in grievous bodily harm. I have been at pains to pinpoint the exact nature of these assaults. Without alluding to all the evidence, much of which appears at pages 20, lines 15/6 as well as 19; page 55, lines 25/6; and page 27, lines 5 and 10. What is pertinent is what was said by the appellant at page 154, lines 7-11:

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" --- Sy het baie lelike woorde gebruik wat sy vir my gesê het. En toe het ek haar met die plat hand, toe ek het haar teen die mond geklap en toe sê ek vir haar: 'Jy praat nie met my so nie. Ek is nog jou pa.'

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[16] Mrs Smith, the lady who lived with the appellant, also testified that he did hit the complainant since she was always naughty (sée p.229, lines 20-23).

[17] From the evidence on record it is apparent that the appellant did hit the complainant. What is at issue is the nature and extent

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that the appellant used a fan belt to hit her. There is no evidence from other witnesses as to the use of any instruments, or the degree of violence, or the nature of the injuries inflicted. There was one occasion on which the child was hit, and from the evidence it emerged that the appellant's excuse was that she fell from the room divider. On this occasion as a caring father, whose relationship has deteriorated with the child, he did take her to the doctor. There is no medical forensic evidence in this regard. At best, and rightly accepted by Mr Kotze, that this crime would lead to the conviction of assault.

This raises the question: What was the nature of this assault? Was it fair and reasonable? If we come to the conclusion that the punishment that was meted out was fair and reasonable, then an appropriate sentence would be a partly suspended sentence.

[18] In the result the appellant's appeal on conviction on the first count must succeed, i.e. the count of indecent assault. On the third count, of assault with grievous bodily harm, it succeeds to the extent that it should be "assault" *per se*.

[19] This raises the question as to the appropriateness of the sentence. Mr Kriel suggested a period of 1 year imprisonment. From the submission of Mr Kotze the impression I get is that that sentence is not appropriate, however, when suggested by the court, he conceded that a partly suspended sentence would

ORDER

[20] The following order is made:

(1) The appellant's conviction on counts 1 and 3 are set aside.

In respect of count 3 the substituted conviction is one of assault.

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(2) The sentence on count 1 is wholly set aside.

(3) The sentence in respect of count 3, namely that of assault, is 1 year imprisonment, half of which is suspended for a period of 3 years, and during the period of suspension the appellant is not to be convicted of any crime, an element of which is one of violence.

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KRUGER, A.J.: I concur.

ON BEHALF OF THE APPELLANT:

ADV D J KOTZE

ON BEHALF OF THE STATE:

ADV KRIEL

15

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**1.2 EXPOSING CHILDREN TO SEXUAL ACTIVITIES IS INDECENT ASSAULT:
S v J McNeil¹**

The significance of the McNeil judgement lies in the court's finding that the accused was guilty of indecent assault by exposing a child to sexual objects (sex toys) or sexual activities, in circumstances where the child was not, at the time, physically touched or abused.

In addition to being found guilty of the indecent assault of children, and possession of child pornography, James McNeil was found guilty of an indecent assault on a young child, the evidence for which consisted of a videotape of McNeil engaged in sexual activities with a woman who had her infant child with her at the time. The Court found that:

"Although...the accused does not touch the child, neither does the child touch the accused, there is no doubt in the Court's mind from what is observed and heard on the video, that the accused both overtly and directly participated in involving the child in the sexual activities between himself and the female, and also intentionally exposed the child to sexual acts and objects." [Emphasis added]

"Having decided this, the Court has to finally ascertain whether the accused's actions constituted an assault of an indecent character on the child. From the evidence accepted...the Court finds that the accused did in fact actively manipulate and coerced sexual conduct with the child, by the female. The Court rules out the possibility of such contact being a natural mother/child relationship."

"The child was enticed into performing unnatural sexual acts with the mother, the female, and further exposed to sexual activities and sex objects, clearly with a view to grooming the child."

"This type of behaviour is clearly *contra bonos mores*, and frowned at by society, and the Court has no hesitation in finding that it constituted an assault of an indecent character upon the child."²

The evidence

The videotape is a recording of the accused, a female in her early twenties and a child of approximately one year old. The video shows the child lying on the bed next to the female (presumably the mother), playing with a toy car. Apart from a T-shirt, the female is naked and is masturbating while reading a magazine. The accused is then seen repositioning the female so that her lower body faces the camera, and he continues to videotape her as she masturbates. The accused then proceeds to masturbate her himself until she reaches orgasm, after which the female cuddles the child.

Next, the female is seen seated on the bed with wearing only panties. The child reaches out and sucks her breast. The accused is heard to say "Let her go for it. I love watching this", referring to the child sucking the breast. He is heard to say, further: "You feel nice when she sucks your breast. That is good. Let her carry on sucking your breast". The accused then hands the female an orange - coloured toy penis. The child is attracted to it and reaches out for it. The female puts it in her mouth. She then puts the object into her vagina and then puts it into her mouth again. The female then kneels on the bed and inserts the object into her anus. The child is then seen sucking on the object.

¹ Case No. 24/904/01, Magistrate's Court, Cape Town

² Pages 324-325 of the transcript

The female asks the accused for a toy for the child and he brings the child a toy car. While the child plays with the toy car, the accused fondles and strokes the female with his fingers and then uses the toy penis to stimulate her to orgasm, while now and then looking at the child. The child whimpers and the accused says: "All right baby, don't be scared", and asks the female to turn around so that the child sucks her breast while he inserts the object into her vagina. The child looks at the accused. The female then inserts the toy penis into her vagina and then takes out, shows it to the child and then puts it back into her vagina.

The accused and the female engage in various sexual activities, while the child sucks the breast, plays with the female's navel, tugs at the female's hair, sucks the female's body in the region of her stomach and sucks her face.

The child is seen as an integral part of the sexual activities between the accused and the female, and is seen lying on the bed between the accused and the female while they were resting from their sexual activities.

Exposing a child to pornography as a form of non - contact sexual abuse

Child protection practitioners have long recognised, from their experiences in working with children with problems, that sexual abuse occurs in different forms, but that the effects of non - contact sexual abuse are no less traumatic on a child than contact sexual abuse. Non -contact sexual abuse includes the exposure of children to pornographic materials as well as to overt sexual activities.

Effects of non - contact sexual abuse

A number of researchers in the area of child behavioural problems have established a connection between traumatised children and non - contact sexual abuse like exposure to pornographic materials and overt sexual activities.

Araji³ found, in the interaction patterns in the homes of sexually abusive children, aggression, conflict and "non - normative sexual environments", such as exposure to adult sexual activities or pornographic materials. She cautions that sexually abusive children should always be evaluated for the possibility of having been exposed to sexually explicit material. Hewitt⁴ also makes the point that in all cases of child sexual abuse, it is important to screen for the possibility that the child was exposed to pornographic materials as this exposure itself can cause the same impact on a child as sexual abuse. See also Myers⁵: "Sexual touching is not the only kind of child sexual abuse. It is abuse to intentionally expose a child to pornography."

Gill and Johnson⁶ describe the experience of a child's exposure to explicit sexuality as follows:

"...a frightened four - year who is forced to observe or be part of sexual intercourse between two adults cannot fully understand what is happening. The child may comply and go through the motions while emotionally he leaves his body or pretends to be invisible. The child's memory of the event may not be intact, yet he may suddenly repeat phrases he heard during the experience, have intrusive flashbacks of the adult's faces....may suddenly become terrified in the presence of a male adult or may refuse to go to bed, remembering on some level what occurred previously in that bed. These are ways in which children re - experience fragmented aspects of trauma through behaviour, sleep disturbances, or post - traumatic stress symptoms such as intrusive flashbacks."

³S K Araji, *Sexually aggressive children*, Sage Publications (1997)

⁴Assessing allegations of sexual abuse in preschool children, Sage Publications (1999)

⁵A mother's nightmare - incest, Sage Publications (1997)

⁶Sexualised children, Launch Press (1993)

According to Dr. Renee Potgieter⁷, what Gill and Johnson describe is a very typical reaction of children who have been exposed to pornography. "In one case handled at the RP Clinic a child of eight years old, who had viewed pornographic material, suddenly lost all interest in school...during assessment of the child it became clear that he was pre - occupied with the pornographic material to which he had been exposed. In therapy he kept on drawing the explicit sexual material that he had been exposed to."

While the causal connection between exposure to sexually explicit materials and behavioural problems may be persuasive but not conclusive, the evidence of many researchers and the experience of many child protection practitioners suggest that non - contact sexual abuse, such as intentionally exposing a child to pornographic materials or overt sexual activities, is no less harmful and traumatising to children than physical sexual abuse. Young children are neither neurologically ready nor sufficiently experienced to process sexually stimulating information, and children are easily disturbed and traumatised by experiences that they cannot fully comprehend or assimilate. Even if the causal connection between a traumatised child and exposure to pornography is only anecdotal, exposure to pornography is often part of the "grooming process" to seduce children into sexual activities.

The McNeil case lends its weight, even if it does not enjoy the status of a *stare decisis* of a court of superior jurisdiction, in support of those who, on the basis of their experience of traumatised children, hold that exposing children to pornographic materials and overt sexual activities is a form of non - contact sexual abuse and that it constitutes indecent assault.

Iyavar Chetty and Brenda Roodt
Films and Publications Board

⁷The Relationship Between Pornograph
and the Sexual Abuse of
Children: View from Literature
and Personal Experience
Pretoria (200

76.