

S v JA 2017 (2) SACR 143 (NCK)

KEY CONCEPTS	
Advanced age as mitigating factor	Substantial and compelling factors
Rape of minor	Sentencing in sexual offences cases
Aggravating and mitigating factors in rape	Accused of advanced age

Introduction

The appellant was charged in the regional court on one count of rape. He was alleged to have raped the 12-year-old complainant over a period of time between 2002 and 2004. The appellant pleaded not guilty, but in his plea explanation he admitted that he had on 2 September 2004 indecently assaulted the complainant by undressing her and touching her private parts. He denied ever having had sexual intercourse with her. The appellant was convicted of having raped the complainant on 3 occasions and that he had undressed her on the 2 September 2004. The matter was referred to the High Court for sentencing. The High Court confirmed the conviction and found the prescribed sentence of life imprisonment to be applicable on 2 grounds, namely that the complainant was under the age of 16 and she had been raped more than once. No substantial and compelling circumstances were found to justify a lesser sentence and the court sentenced the appellant to life imprisonment. He appealed against the sentence.

Facts of the case

The complainant was 12-years-old at the time of the incidents and she was the daughter of the appellant and Ms B with whom appellant had been living as husband and wife for more than 20 years. They lived in Port Nolloth and the appellant would from time to time work on the farms in the vicinity. The rapes occurred when the complainant and Ms B spent a school holiday with the appellant on such a farm. The rapes occurred when the appellant had followed the complainant to where she had been herding sheep. When they were out of sight, the appellant would, despite the complainant's pleas and protests, insist that she undress and would have sexual intercourse with her vaginally. The complainant was a virgin. When Ms B once noticed blood on her clothes and confronted the appellant, he admitted to having had sexual intercourse with the complainant and promised never to do so again. He did not keep this promise and threatened the complainant that he would kill her mother to ensure her silence. When Ms B became aware of the last rape, she took the complainant and returned to Port Nolloth. About two weeks later on the 2 September 2004 the appellant showed up in Port Nolloth and had the complainant called home under false pretences. She arrived with friends, but he put the friends out of the house and proceeded to undress her. He was on the point of raping her when Ms B came into the room. He pretended to be looking for his tobacco and said that the complainant had undressed herself and he didn't know why. He was arrested shortly thereafter and that was the end of the relationship between the appellant and Ms B and the complainant never saw the

appellant again after that. The appellant was 56 at the time of the rapes and 59 at the time of the trial.

A victim report by a social worker was read into the record and made the following points:

- the complainant and her siblings had grown up in unstable circumstances;
- both the appellant and Ms B abused alcohol and drugs;
- the complainant had been experiencing problems with concentration and after these events she left school in grade 4 because she was ashamed and didn't know how to explain to the people at school what had happened to her;
- she never ventured far from home in case she met the appellant;
- she feared the same thing might happen to her sister;
- she felt unsafe even at home and spent most of her time with the neighbours;
- she was depressed and had withdrawn herself from other people;
- she was later placed in a children's home; and
- feedback had been received from the clinical psychologist and supervising social worker that the depression and post-traumatic stress initially experienced had improved and the complainant had been making progress.

Grounds of appeal

The appellant argued that the sentence of life imprisonment was disproportionate to the personal circumstances of the appellant and to the crimes committed by him because:

- the appellant had not applied any violence during the incidents;
- the complainant had not suffered serious or permanent physical injuries;
- the appellant did not have previous convictions involving sexual misconduct nor violence (except one conviction for assault);
- the appellant had a low level of intelligence;
- the appellant had always worked and provided for his family;
- he had the potential for rehabilitation;
- he had shown remorse by having at least admitted that he had indecently assaulted the complainant;
- he had spent approximately 2 years in custody awaiting trial;
- the advanced age of the appellant at the time of sentencing .

In addition, it was argued that the court a quo had misdirected itself in finding that a prescribed sentence of life imprisonment was also applicable on the basis that the appellant had raped the complainant more than once.

Discussion: victim raped more than once

The provision, in para (a)(i) of the section pertaining to rape in part 1 of sch 2, read with s51(1) of the Criminal Law Amendment Act 105 of 1997, for a prescribed sentence of life imprisonment in 'circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice' was interpreted to require that the accused must in act have been charged with having raped the victim more than once.

In the present case the charge did not allege more than one rape and, even if it did, the record shows that the appellant had never been informed that a finding that more than one rape had occurred could in itself result in a prescribed sentence of life imprisonment. This would nevertheless have been applicable because of the age of the complainant and the appellant had been informed of this fact. There is also no indication that, had the appellant been advised about this, he would have altered his version or defence.

Substantial and compelling circumstances

The test to be applied by a court on appeal against findings regarding substantial and compelling circumstances is to consider whether such circumstances have been duly considered by the sentencing court.

- the fact that the appellant had always financially provided for his family was a favourable personal factor;
- absence of previous convictions involving violence or sexual misconduct, especially at his age, would have been favourable; however, the appellant had 11 previous convictions for housebreaking and theft, escaping and stock theft, which indicate a propensity to commit crimes in general and a disrespect for the law;
- the absence of violence and the fact that there were no permanent or serious physical injuries would normally be a mitigating factor but here it would be weighed up against the fact that the appellant, the biological father of the complainant and an adult person in whose house she had grown up, had abused his position of trust and had in fact manipulated the complainant to subject herself without the appellant having to apply violence. The threat to kill the complainant's mother was also relevant here;
- there is no merit in the submission that the appellant had shown a measure of remorse by admitting to the indecent assault; this related only to that particular day and the appellant had not disclosed that he had in fact in fact also partially undressed himself; he denied the events on the farm and forced her to relive them in her evidence and cross-examination; there was, therefore, no sign of remorse;
- time spent in custody awaiting trial has been taken into account by courts in circumstances where the prescribed sentence was life imprisonment;
- it was argued that the age of the appellant should be considered a mitigating factor; it was submitted that the appellant would only become eligible for parole no sooner than 74 and possibly only at 84;
 - in *S v Barendse* 2010 (2) SACR 616 (ECG) the age of the appellant was held to be relevant in determining the period of imprisonment to be imposed in circumstances where substantial and compelling circumstances had already been found to reduce the prescribed life sentence. There was no finding that the advanced age of that appellant had in fact been a mitigating factor which constituted or contributed to substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment;
 - a sentence of life imprisonment must, from the viewpoint of the courts, be seen as exactly that – imprisonment for the rest of the natural life of the offender;

- o the possibility that a sentenced offender may later be released on parole is dependent upon a statutory power and discretion which lie within the domain of the executive, and courts and the courts are not allowed to take into account the possibility of such release when considering a sentence; the function of the sentencing court is to determine the maximum term of imprisonment the convicted person may serve; the court imposes what it intends should be served and it imposes that on an assessment of all the relevant factors before it;
- o it is not for the sentencing court to try to work out how old an offender could be when (if at all) the executive decides to release him or her on parole;
- o in **S v Abrahams** 2002 (1) SACR 116 (SCA) para 27, where the applicable prescribed sentence had been life imprisonment, held that the age of that appellant (53 at the time of the rape and 54 at the time of sentencing) was not a mitigating factor when it came to the issue of substantial and compelling circumstances; and
- o it was the court's view that the appellant's relatively advanced age would not have been a mitigating factor in the context of a prescribed sentence of life imprisonment and in considering whether there are substantial and compelling circumstances justifying a lesser sentence.

The court highlighted the following as amounting to aggravating factors:

- the appellant committed the rapes repeatedly over a period of time and he had ample opportunity to reflect and come to his senses; he had been discovered and made a promise not to do it again, and even followed the complainant to Port Nolloth and again attempted sexual intercourse;
- the appellant's acts were calculated – he would send the complainant to take care of the sheep and he would then follow her there and in Port Nolloth he summoned the complainant home under false pretences;
- the prevalence of the rape of children;
- in **S v PB** 2013 (2) SACR 533 (SCA) ([2012] ZASCA 154) the court said:
 - “It can hardly be disputed that rape of young girls by their fathers is not only scandalous; it has become prevalent as well. To all right-thinking people it is morally repugnant. It has emerged insidiously in recent times as a malignant cancer seriously threatening the wellbeing and proper growth and development of young girls. It is an understatement to say that it qualifies to be described as a most serious threat to our social and moral fabric.”

The court was of the opinion that, upon consideration of all mitigating and aggravating factors in this matter, there was no basis for interference with the sentence of life imprisonment. The appeal was dismissed and the sentence of life imprisonment confirmed.