

S v JN 2020 (2) SACR 412 (FB)

KEY CONCEPTS	
Rape of 9-year-old	Rape by neighbour
Substantial and compelling circumstances	Life imprisonment
Circumstances of 71-year-old offender	Minimum sentences

FACTS: The appellant pleaded guilty to and was convicted of the rape of a 9-year-old girl. The appellant is the complainant's neighbour and the friend of her grandfather. The appellant came home drunk and saw the complainant playing with other children in the street. He lured the complainant to his house by sending her to the shop to buy him a box of matches. On her way back he grabbed her and penetrated her vaginally with his penis. His wife caught him in the act. The appellant was sentenced to life imprisonment and appealed against this sentence.

ISSUE: The issue before the court was whether the trial court had erred in making the finding that there were no substantial and compelling circumstances present that justified the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment for the rape of a child under 16.

DISCUSSION: The appeal court found that sentencing powers lie within the judicial discretion of the trial court and that the court of appeal should be careful not to erode such discretion. The appeal court can only interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. Although, when sentencing, the court must strike a balance between the crime, the offender and the interests of society, the sentence must nevertheless be individualised.

"In sentencing, a 'one size fits all approach' does not translate into fairness and justice. Every case presents its own considerations, ranging from the facts and circumstances of the offence to the personal circumstances of the offender, and the sentencing court must give due regard to all these factors."

The appeal court highlighted the following factors that needed to be taken into account when determining the appropriate sentence:

- the offence was a serious one
- the appellant was a friend of the complainant's grandfather and like a family member to the complainant
- the complainant trusted him and he took advantage of this
- rape of minor children must be viewed in a serious light, especially where it is committed by those who are entrusted with their care
- these crimes evoke indignation from communities and prompts them to take matters into their own hands to keep their children safe

- the complainant was raped at a place that she considered to be safe and supposed to be her sanctuary
- the incident has affected the complainant adversely – she has become violent; struggles academically; is unable to relate well to her peers; and has become rebellious since this event

The appeal court further highlighted that, in cases involving child victims, cognisance must be taken of the Constitutional acknowledgment that a child's best interests is of paramount importance and is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children, unless unjustifiable. Whilst children have a right to, inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law-enforcement agencies, but also on right-thinking people and, ultimately, the court, which is the upper guardian of all children.

The appeal court found that mandatory sentences are not intended to strip judicial officers of their ability to devise punishments that fit specific crimes and offenders but the punishment must be proportionate to the offence.

The appeal court found the following circumstances to be substantial and compelling:

- the appellant is a first offender
- he is 71 years old
- he is the sole breadwinner of his family
- he committed the offence under the influence of alcohol and showed remorse by pleading guilty
- the chances of him reoffending are slim.

HELD: The court held that the trial court did not pay due regard to the appellant's personal circumstances and they were, therefore, obliged to interfere with the sentence. They found that a sentence lesser than life would serve the purpose of punishment and upholding the trial court's decision would be to sacrifice the appellant on the 'altar of deterrence.' The sentence of life imprisonment was set aside and replaced with a sentence of 10 years' imprisonment.