

S v Enslin 2017 JDR 0241 (GP)

KEY CONCEPTS	
Sentencing in sexual offences, rape (digital penetration)	Rape by stepfather
Mitigating factors in rape sentencing	Aggravating factors in rape sentencing
When can higher court interfere with sentence imposed by lower court	Determining appropriate sentence for rape (digital penetration)

This case was an appeal against sentencing. The appellant is the stepfather of the complainant and pleaded guilty to various sexual offences, including rape, of his 17 year old step-daughter when she was between the ages of 14 and 17. Although the appellant was considered to be a good candidate for correctional supervision, the trial court was of the view that imprisonment would be an appropriate sentence under the circumstances.

In mitigation of sentence, the following points were raised:

- the appellant handed himself over to the police and made a full declaration
- he pleaded guilty to the charges proffered against him and showed remorse
- he also verbalised his remorse towards third parties as well as the complainant when he addressed a letter to her
- he was under the influence of alcohol during the commission of the crime of rape
- there was only one count of rape which occurred when the complainant was 17
- the complainant showed no resistance
- there was no violence involved
- the complainant did not sustain any injuries
- the complainant did not sustain injuries during the commission of the rape
- the appellant penetrated the complainant's vagina with his finger
- he underwent therapy sessions and a rehabilitation program and did not wait for the court to order him to do so
- he was assisting the complainant financially in that he bought her a vehicle, is paying for her medical aid and vehicle insurance
- he is the sole breadwinner and, in terms of the divorce settlement, he had to pay maintenance of R6 000.00 for the complainant's mother and R8 000.00 for the maintenance of 2 minor children
- although the appellant and the complainant's mother initially divorced, the complainant's mother moved back to stay with the appellant and their two minor children
- the appellant employs 40 people.

Factors in aggravation included:

- sexual assault and violation of women and children have become commonplace in our society

- sexual assault on children is devastating and leaves an indelible mark in the psychological upbringing of a child
- this is more so when such offences are committed within the household by a father who is naturally entrusted with the protection of his children.

The appeal court found that it was trite, when deciding on an appropriate sentence, that a court is required to strike a balance between the interest of society; the seriousness of the offence and the personal circumstances of the accused. The appeal court may only interfere with the sentence when it is demonstrated that the trial court has not properly and reasonably exercised its discretion in imposing sentence. The court of appeal is also entitled to interfere with sentence if same is disturbingly inappropriate and so totally out of proportion to the offence or vitiated by misdirection showing that the trial court exercised its discretion unreasonably.

Another important point to bear in mind, according to the appeal court, is that the sentencing courts cannot apply the one-size fits all approach when sentencing offenders. A distinction should be made between those offenders who ought to be removed from society and those who, although deserving of punishment, should not. With appropriate conditions, correctional supervision is undoubtedly an appropriate and severe punishment, even for persons convicted of serious offences. This was emphasised in the case

In *S v Samuels* 2011 (1) SACR 9 (SCA) para 9-10, Ponnar JA pointed out that:

'An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.'

The appeal court found that the trial court had failed to exercise its discretion judicially in imposing the sentence of imprisonment. The trial court commissioned the pre-sentence reports but did not consider them. If the trial court had formed the view that correctional supervision was not an appropriate sentence, it should have given sufficient reasons for the rejection of it. The appeal court found that the sentences imposed by the trial court was severe and consequently disproportionate when regard was had to the circumstances under which the offences were committed.

The appeal court was further of the view that the sentences imposed by the trial court strikes one with a sense of shock and leads to the conclusion that it is shockingly disproportionate to the offences of which the appellant was convicted, when regard is also had to the circumstances of the offences. Accordingly, the court of appeal was entitled to interfere with the sentences imposed by the trial court and was of the view that correctional supervision was an appropriate sentence.

COMMENT: Interesting to note that the court focused almost exclusively on the fact that there was no physical violence, but did not deal with any trauma the complainant may have experienced or the psychological impact. There was only a cursory comment that “sexual assault on children is devastating and leaves an indelible mark in the psychological upbringing of a child” without any reference to the complainant or the impact of the sexual violence on her.