

SOUTH AFRICA / JUDGMENT

Dyantyi v S (CC95/2008) [2010] ZAECHGC 120; 2011 (1) SACR 540 (ECG) (6 December 2010) [2010] ZAECHGC 120

COURT

Eastern Cape High Court, Grahamstown

BEFORE

X M Petse, D van Zyl, B Sandi

CASE / FILE NUMBER

CC95/2008

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

1

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

APPEAL CASE NO. CA159/10

CASE NO. CC95/2008

In the matter between:-

Mncedisi DyantyiAppellant

And

The StateRespondent

FULL BENCH JUDGEMENT

PETSE ADJP:

- [1] The appellant in this appeal was arraigned before Plasket J on a charge of rape. The allegation against him was that on or about 29 September 2007, and at or near Zola location Bathurst in the district of Bathurst, he did unlawfully and intentionally have sexual intercourse with one Z D, a 14 year old female person without her consent. [2] I must pause here to mention that given the age of the rape victim the indictment explicitly stated that in the event of a conviction ensuing the Director of Public Prosecutions would, in so far as sentence is concerned, seek that the trial court invoke the provisions of sec 51(1) of the

Criminal Law Amendment Act 105 of 1997 (the so-called Minimum Sentences Act).

- [3] Despite his plea of not guilty, substantiated by a plea explanation asserting that sexual intercourse between the appellant and the complainant had been consensual, the appellant was convicted of rape and sentenced to imprisonment for life.
- [4] The ensuing application for leave to appeal made by the appellant before the court a quo against both his conviction and sentence was turned down. The present appeal against sentence only now before us is by leave of the Supreme Court of Appeal.
- [5] Accordingly, what now requires determination from this Court is whether the sentence imposed by the trial court is appropriate or not. If it is the appeal would fall to be dismissed, whilst if not, interference by us with the sentence imposed by the trial Court would be warranted.
- [6] It has been held in a plethora of judicial pronouncements that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate Court will only be entitled to interfere with the sentence imposed by the trial court if one or more of the recognised grounds justifying interference on appeal has been shown to exist. See in this regard : *S v Mtungwa en 'n Andere* 1990 (2) SACR 1(A). Once it is shown that one, some or all of the following factors exist the appellate Court will be justified to interfere, namely : if the sentence appealed against is, for example :

(i) disturbingly inappropriate;

(ii) so totally out of proportion to the magnitude of the offence;

sufficiently disparate;

vitiated by misdirections showing that the trial Court exercised its discretion unreasonably;

is otherwise such that no reasonable Court would have imposed it.

See also in this regard : *S v L* 1998 (1) SACR 463 (SCA); *S v Kibido* 1998 (2) SACR 213 (SCA); *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).

- [7] Consequently the circumstances in which an appellate Court will interfere with the exercise of such discretion are circumscribed. In *S v Sadler* 2000 (1) SACR 331 (SCA) Marais JA writing for the unanimous court had occasion to re-state them at 334d-335g when he said the following :

“[6] The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in S v Shapiro 1994 (1) SACR 112 (A) at 119j-120c:

‘It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 857D-F:

“1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –

- (a) should be guided by the principle that punishment is ‘pre-eminently a matter for the discretion of the trial court;’ and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been ‘judicially and properly exercised’.
2. the test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”’
- [7] Counsel for the State submitted that the trial court had misdirected itself in various material respects when imposing sentence. I do not find it necessary to reach any firm conclusion in that regard. I shall assume in favour of respondent that no such misdirections exist.
- [8] The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed

a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social

utility it is intended to have. So it is said that where there exists a ‘striking’ or ‘startling’ or ‘disturbing’

disparity between the trial court’s sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial court’s discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised.

- [9] The problem is to give practical content to these notions. The comparison involved in the exercise may sometimes be purely quantitative, say three years versus six years’ imprisonment or a fine of R50 000.00 versus a fine of R100 000, or it may be qualitative, say a custodial versus a non- custodial sentence. Where quantitative comparison are involved there is the problem of deciding how great the disparity must be before it attracts the epithet ‘striking’ or ‘startling’ or ‘disturbing’. Where qualitative comparisons are involved one faces a

similar problem. When compared with a sentence of wholly suspended imprisonment which an appellate Court considers would have been appropriate, a trial court's decision to impose a substantial fine with an alternative of imprisonment may not be regarded as giving rise to a disparity of that character. As against that, the distinction which exists between a non-custodial and a custodial sentence, as those terms are commonly understood, is so generally recognised to be profound and fundamental that, save possibly in rare instances, the conclusion that a custodial sentence was called for where a non-custodial sentence has been imposed (or vice versa) will justify interference with the sentence imposed.

- [10] However, even in the latter class of case, it is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences

of opinion will frequently exist. However, the hierarchical structure of our courts is such that where differences exist it is the view of the appellate Court which must prevail".

- [8] Before turning to a consideration of the rivalling submissions urged on us on the issue of the appropriateness or otherwise of the sentence imposed by the court a quo, a word or two had better be said about the horrific nature of the crime of rape as can be gleaned from various dicta appearing in various previous decisions of our Courts.

- [9] In *State v Chapman* [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5 b-c, rape was described in these terms :

"Rape is a very serious offence, constituting as it does, a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have the legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives".

- [10] In the case of *N v T*, 1994 (1) SA 862 (CPD) at 864G rape was described in these terms :

"Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victim".

Lastly, I think it would be appropriate also to make reference to the case of *State v Ncheche* [2005] ZAGPHC 21; 2005 (2) SACR 386 (WLD) to which the learned trial Judge in the court a quo has referred in his judgment in which rape was described in these terms in para [35]:

“Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly, the poor and vulnerable. In our country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman’s body is sacrosanct and anyone who violates it, does so at his peril and our Legislature and the community at large, correctly expect our courts to punish rapists very severely. In this case the complainant lived in a shack, without the security enjoyed by many citizens in more affluent circumstances. Unfortunately, very many people in our country still live in these circumstances and are

entitled to look to the courts for protection”.

[11] There are also other cases too numerous to cite in this judgment that have come before our Courts in the recent past, which describe rape as a scourge in our society, which therefore places an obligation on our courts to send a clear message to rapists

and potential rapists that the rights of women in general, and children in particular, will be protected to the extent that the full might of the law permits.

[12] In the context of this case in which the provisions of sec 51(1) of the Minimum Sentences Act apply this Court is enjoined, given the hierarchical structure of our Courts, to take its tune, so to speak, from the well known and often-quoted judgment of S v Malgas 2001(1) SACR 469 (SCA) in which Marais JA writing for the unanimous Supreme Court of Appeal said in para [7] that when it comes to imposing sentences in terms of the Act, the sentencing Court is required to take cognisance of the fact that in enacting the Minimum Sentences Act “Parliament was not content with” the situation that prevailed before the Act was enacted, and that “it was no longer to be business as usual when sentencing for the commission of the specified crimes.” The learned Judge of Appeal went on to say the following at para [8] of the same judgment :

“In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence

which ordinarily should be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature

aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public’s needs for effective sentence against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specific sentences come what may.”

[13] In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) the Supreme Court of Appeal recognised the fact that life imprisonment is the heaviest sentence a person can be legally obliged to serve and also went on to hold that, taking due cognisance of that fact the sentencing Court must not on the one hand lightly hold that substantial and compelling circumstances exist on unsubstantiated grounds, nor should the sentencing court on the other

hand hesitate too long to find that substantial and compelling exist when this appears to be the position.

[14] The principle which I have been able to extract from the *Malgas* case *supra*, and others too many to cite in this judgment in regard to the correct approach to be adopted in the exercise of the discretion conferred on the sentencing Court in terms of section 51(3) of the Minimum Sentences Act may be summarised as follows :

The point of departure is that the prescribed sentence must ordinarily be imposed.

It is only if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence that it may depart from the prescribed sentence.

In deciding whether substantial and compelling circumstances exist the Court is required to look at all the factors traditionally taken into account in determining the appropriate sentence, that is, mitigating and aggravating factors, and consider the cumulative effect thereof.

If the Court concludes that the minimum prescribed sentence is so disproportionate to the sentence which would be appropriate to the extent that an injustice would be done by imposing that sentence; it would be entitled to impose a lesser sentence.

The specified sentences are, however, not to be departed from lightly and for flimsy reasons.

[15] With that prelude I now turn to a consideration of the circumstances peculiar to this appeal. The thrust of the contention advanced on behalf of the appellant is that the court a quo erred in coming to the conclusion that in the circumstances of this case there were no substantial and compelling circumstances

present that justified the imposition of a lesser sentence. It is further contended that in coming to this conclusion the court a quo had regard to the fact that the complainant had previously been raped twice by other persons and in sentencing the appellant, the court a quo, in a manner of speaking, thus visited the sins of the two previous perpetrators on the appellant. By so doing, so went the argument, the court a quo committed a material misdirection.

[16] It is indeed so that in the course of its judgment the court a quo alluded, properly so in my view, to the fact, apparent from the psychological assessment impact report of the Psychologist Ms Andrews, that after the third rape the complainant's potential to develop to her full developmental potential in all important arrears of functioning in what is termed "Moderate Mental Retardation range" became completely arrested as a result of the third rape. It is thus contended on behalf of the appellant that "by placing the full extent of her

psychological impact on the appellant the court a quo in effect punished the appellant for the previous two rapes” for which he was not the perpetrator. Not only was such an approach unfair, so went the argument, because it is contrary to the provisions of sec 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) but also, as I understood the argument, in adopting such an approach the learned Judge in the court a quo committed a material misdirection. Counsel concluded his argument by urging upon us an all-embracing submission the upshot of which is that serious though the offence of which the appellant was convicted is, it still does not fall in the upper echelons of gravity

as to deserve being visited with the most severe sentence that the court a quo could legally impose. In support of this argument counsel called in aid in his written heads of argument the case of *S v Nkomo* 2007 (2) SACR 198 (SCA). This is how the learned Judge in the court a quo dealt with the argument advanced on behalf of the appellant, namely : that the personal circumstances of the appellant were pretty much comparable to those of the appellant in the case of *S v Nkomo*, supra :

“[21] It was argued by Mr De Jager who appeared for the accused that his relative youth, his prospects for rehabilitation and his socio-economic circumstances together constitute substantial and compelling circumstances. I was referred to the majority judgment of Lewis JA in S v Nkomo 2007 (2) SACR 198 (SCA), in which the age of the appellant – he was described as ‘relatively young’ and was 29 years of age

–

the fact that he was employed and his prospects of rehabilitation, he being a first offender, were substantial and compelling circumstances. Serious as the rapes in that case were, the facts of this case are very different. The fact that the accused raped a young girl who was mentally retarded, and the evidence placed before me of the devastating effect of the rape on her makes this a case of rape at the apex of the scale of seriousness.

[22] At least one further significant factor distinguishes this case from *Nkomo*. It is that, whereas Lewis JA was prepared to accept on the strength of the appellant being a first offender that his prospects of rehabilitation were good, in this case, the accused has seven previous convictions, six of which are relevant to sentence. From his five previous convictions for housebreaking with intent to steal and theft, I can conclude that the accused has little respect not only for the property of others but also for their privacy. That is relevant to the offence of rape, which is an offence that invades in a most fundamental way not only the dignity and bodily integrity, but also the privacy, of the victim. See *S v Chapman*, 5b-e. From his two previous convictions for assault with intent to do grievous bodily harm I can conclude that the accused has little respect for the bodily integrity of others and is prepared to invade that right and the right to dignity through violence. As these rights are infringed by the violent act of rape, these previous convictions are directly relevant. My conclusion is that, whatever the basis for the conclusion that the appellant in *Nkomo* had good prospects of

rehabilitation, the evidence in this case concerning the accused is to the contrary.”

[17] In the light of the foregoing I am by no means persuaded that the reasoning of the learned Judge can be faulted. If anything could be said about those remarks it is that they not only justify the finding by the learned Judge that there is a material distinction between the personal circumstances of the appellant and those of the appellant in the case of *S v Nkomo*, supra but also aptly demonstrate the level of the appellant's depravity, given the complainant's mental retardation, thus

re-inforcing the justification to keep the elements of retribution and deterrence to the fore when it comes to sentence in this appeal. Compare in this regard : *S v Swart* 2004 (2) SACR 370 (SCA) at para [13].

[18] To the extent that the appellant has seemingly pinned his faith on the case of *S v Nkomo*, supra I am reminded of what Nicholas AJA had occasion to point out in *S v Fraser* 1987 (2) SA 859 (A) in a passage appearing at 863 C-D in which he said that "it is an idle exercise to match the colour of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence." Whilst not meaning to downplay the importance and value of judicial precedents

it seems to me that in the ultimate analysis, as Schreiner JA once observed in *R v Karg* 1961 (1) SA 231 (A) at 236 G-H :

"..... . But each case should be dealt with on its own facts, connected with the crime and the criminal".

One must also add the interests of the victim of crime to that equation, and when this is done it becomes readily apparent that in the context of the circumstances of this appeal the appellant's moral blameworthiness is of a grave nature. This is so because from a reading of the appeal record it becomes evident that the appellant took advantage of a mentally retarded and under-aged girl. There is evidence on record that the complainant was well known to all and sundry in the area where she lived that she is

suffering from a mental impairment of some sorts, and given the fact that the appellant also lived in the same area, the inference is inescapable that he could not have failed to observe that the complainant was mentally retarded much as he was constrained to

concede during his testimony under cross-examination, that he had listened to the questions put by counsel for the State to the

complainant and "could see that she answered after a long time", and further that he had noticed during the trial in the court a quo that both the Intermediary and the Interpreter had some difficulty in hearing what the complainant was saying.

[19] Whilst it must be readily acknowledged that the sentence imposed on the appellant is, to borrow the phraseology used by Mpati JA, as he then was, in *Rammoko's* case, supra at para [13], "the heaviest sentence that a person can be legally obliged to serve" it has to be said though, even at the risk of repetition, that the seriousness of the rape with which we are

dealing in this appeal is aggravated by the fact that the appellant took an unfair advantage of someone who is mentally retarded and thus a vulnerable member of the community. On the evidence of Ms Andrews the Clinical Psychologist who testified at the instance of the State, the appellant, being a resident in the same area in which the complainant lived, could not have failed to appreciate the fact that the complainant was mentally retarded, a condition said by Ms Andrews to have been obvious even to a layperson because of the complainant's mannerisms and gestures.

- [20] It bears mentioning that it is of course widely known that rape is one of the most prevalent offences in this country, a fact which is, in so far as this Division is concerned, confirmed by the somewhat large number of rape cases that are tried on a regular basis both in this Court and the Regional Courts operating within the area of jurisdiction of this Court. In this context the remarks made in *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519 d-e are apposite. The following was said :

"Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence (cf Windlesham "Life Sentences: The Paradox of Indeterminacy" [1989] Crim LR at 244-255). Retribution may even be decisive (S v Nkwanyana and Others [1990] ZASCA 95; 1990 (4) SA 735 (A) at 749 C-D)"

- [21] To conclude on this point, I believe that I should also remind myself of what was said in *S v Holder* 1979 (2) SA 70 (A) at 81B when Rumpff CJ made, what I consider to be a telling point, which is that a sentencing court should take cognisance of the times in which sentencing takes place. Much has been said by communities in all walks of life in this country in relation to crimes such as rape in particular and abuse of women and children in general. One can thus safely say that all right thinking members of the public view such crimes with revulsion. Taking this factor into account therefore enjoins this Court to view crimes such as rape in an extremely serious light and consequently when it comes to punishment Courts must, after taking due cognisance of all relevant factors, impose sentences that reflect the revulsion of society at the commission of such crimes. This is, however, not to say that the courts

should abdicate their sentencing discretion and allow themselves to be swayed by public opinion, it is rather more to say public interest dictate that the concerns of society and society's disapproval of certain crimes should receive some recognition in the sentences that courts impose, especially those offences that strike at the very heart of the values and ethos of our Constitution. This is not something that is new or without judicial precedent. As long ago as almost fifty years ago the Appellate Division approved of this approach in *R v Karg*, *supra* when once again Schreiner JA had the following to say in a passage appearing at 236B:

“It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud

judgment:

See also : S v Flanagan 1995(1) SACR13(A) at 17 d-e.

Accordingly it is my view that if our courts punish rape lightly they would in effect not be taking due cognisance of the reality of the lamentable situation which is that unfortunately in this country sexual predation has reached epidemic proportions.

[22] In similar vein Vivier JA writing for the unanimous Appellate Court said the following in S v Di Blasi 1996(1) SACR 1 (A) at 10 f-g :

“.....

. The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested

persons and of the community at large and to serve as a just retribution for the crime but should also deter others from similar

conduct.”

Although these remarks were made in the context of a murder trial there is, in my view, no reason in principle or logic why they should not, by parity of reasoning, equally hold good in the context of a rape trial. After all both rape and murder which, it must be said even at the risk of repetition, are prevalent in this country, rank as the most serious of offences.

[23] In the context of this appeal it behoves us to keep uppermost in our minds that we are enjoined by judicial authority to take tune from the well-known and often-quoted judgment of S v Malgas, supra in which it was said that “when it comes to imposing sentences in terms of the Act the sentencing Court is required to take cognizance of the fact that in enacting the Minimum Sentences Act Parliament was not content with the situation that prevailed before the Act was enacted” and consequently it can “no longer be business as usual when sentencing for the commission of the specified crimes.”

[24] Again in *Rammoko v Director of Public Prosecutions*, supra, at 205e the Supreme Court of Appeal, whilst cognisant of the fact that life imprisonment is the heaviest sentence a person can be legally obliged to serve, nevertheless went on to hold that sentencing courts must not lightly hold that substantial and compelling circumstances exist on unsubstantiated grounds. In my view, if there is a proper case which imperatively calls for this admonition to be heeded, coming as it did from the Supreme Court of Appeal, it is this one.

[25] A point is made in the appellant's heads of argument which was, however, not pressed before us in argument although not disavowed which is that regard being had to the fact that the appellant is "a relatively young" man. One must thus accept that there are prospects of him being rehabilitated. I should perhaps, in dealing with this submission, start off by saying

that it has often been stressed in some circles that when it comes to the element of rehabilitation one ought to move from the premise that every human being is capable of change and transformation if offered the opportunity and resources: See for example in this regard : The White Paper on Corrections in South Africa (2005) at para 424 and an Article titled : The Prospect of Rehabilitation "as a substantial and compelling" Circumstances to Avoid Imposing Life Imprisonment in South Africa by Jamil Ddamulira Mujuzi published in 2008 South African Journal of Criminal Justice at 1-21.

[26] But it is, however, my view that seeds of rehabilitation can, in a manner of speaking, germinate only if the convicted person him/herself has first and foremost, expressed contrition for his/her criminal wrongdoing thereby accepting the gravity of the criminal act of which he/she has been convicted and commit to return to the path of rectitude. Without expression of contrition any hope of rehabilitation becomes illusory and thus an unrealistic expectation and not merely a speculative hypothesis as the learned author Mujuzi sums it up in his article on The Prospect of Rehabilitation in South Africa.

[27] What aggravates the seriousness of the rape committed by the appellant, in my view, and underscores its horrific and appalling nature is the fact that the complainant is mentally retarded. Thus raping a vulnerable person, as the complainant is because of her mental impairment, renders this rape the most despicable one.

[28] I listened with great care to the submissions advanced by Mr de Jager for the appellant in his endeavour to persuade us that the learned Judge in the court a quo erred in coming to the conclusion that no substantial and compelling circumstances exist on the facts of this case. Having given the matter my anxious consideration I must say that quite frankly I remain unpersuaded that there is merit in this contention.

[29] On the facts of this case it is my judgment that the elements of retribution and deterrence must surely come to the fore in order to bring it home to the appellant that serious crime is not treated leniently by our Courts but rather harshly, and correctly

so in my view, so that those who might be inclined to commit serious offences know what fate would befall them when the long arm of the law finally catches up with them. Compare in this regard : S v Swart 2004 (2) SACR 370 (SCA) at para [12]. This is, however, not to suggest, and still less, to hold that the appellant in this appeal is being sacrificed at the altar of deterrence. See in this regard : S v Sobanda 1992 (2) SACR 613 (AD). Nor is it to say that individualisation has no role to play when it comes to sentencing of a particular type of crime. It is rather more to re-affirm the trite legal principle that sentences that courts impose must also reflect the gravity of the offence committed.

[30] For the sake of completeness it bears mentioning the fact that rape is always viewed as a reprehensible crime and society's abhorrence of it is universally accepted. See in this regard : S v Vilakazi 2009 (1) SACR 552(SCA) at para [1]. The younger the victim is, coupled as is the position in this appeal, with the fact that the rape victim is mentally retarded, aggravate in my view the reprehensible nature of the heinous crime committed by the appellant. In S v Mc Millan 2003 (1) SACR 27 (SCA) at 33 h-i the Supreme Court of Appeal recognised the need for sentencing courts, in so far as rape cases are concerned, to afford adequate protection to children by imposing sentences that clearly reflect the gravity of such offences.

[31] Although all fair-minded persons would no doubt characterise the appellant's conduct as utterly disgusting and despicable we must, in considering the question of whether the punishment meted out to the appellant is fair and just, given the jurisprudential objectives of punishment, still approach the issue at hand in this appeal in a spirit of calmness as we have done, thus paying due heed to the admonition by Corbbet JA, as he then was, in S v Rabie 1975 (4) SA 855 (A) at 866 A-C who remarked as follows:

"A judicial officer should not approach punishment in a spirit of anger because being human that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity nor on the other hand surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and pressure of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of an appropriate punishment in the light of all the circumstances of the particular case."

[32] For all the foregoing reasons therefore it is my judgment that this appeal must fail. In the result the following order is made :

The appeal is dismissed.

X. M. PETSE

JUDGE OF THE HIGH COURT

I agree

D. VAN ZYL

B. SANDI

APPEAL HEARD ON : 22 NOVEMBER 2010

JUDGMENT DELIVERED ON : 06 DECEMBER 2010

APPELLANT'S ATTORNEY : MR D. DE JAGER

INSTRUCTED BY : JUSTICE CENTRE,

GRAHAMSTOWN

RESPONDENT'S COUNSEL : ADVOCATE N.C. TURNER

INSTRUCTED BY : THE DIRECTOR OF PUBLIC

PROSECUTIONS : GRAHAMSTOWN

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2010/120.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dyanti-v-s-unknown-topic-aecghc-2010>

Prepared on 10 October 2026 · Esheria