IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no. A 110/2021

Before: The Hon. Mr Justice Erasmus

The Hon. Mr Justice Binns-Ward

Heard: In terms of s 19(a) of the Superior Courts Act

Judgment: 9 November 2021

In the matter between:

MSEKELI GAJU First Appellant

SIPHESIHLE QEQE Second Appellant

and

THE STATE Respondent

Order: The appeals against conviction and sentence are dismissed.

JUDGMENT

Handed down by email to the parties' legal representatives and release to SAFLII

ERASMUS et BINNS-WARD JJ:

[1] The appellants were each convicted on two counts of rape in the regional court sitting at Stellenbosch. The convictions attracted a prescribed sentence of life imprisonment, in terms of s 51(1) read with Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, because the offences were committed in circumstances where the victim was raped

more than once. The trial court found that there were no substantial and compelling reasons to depart from the prescribed sentence and duly sentenced the appellants to life imprisonment. The appellants exercised their automatic right of appeal against both their convictions and sentence. With the consent of the appellants' legal representatives, the appeal was disposed of in terms of s 19(a) of the Superior Courts Act 10 of 2013 on the papers with written argument.

[2] The complainant testified that the appellants were part of a group of young men that accosted her and two other women as they walked to a friend's house late at night. They managed to shake the men off by pretending that they had arrived at their destination. The complainant's two companions then went to a shebeen and the complainant, who had decided to go home, then noticed that the men were still showing an interest in her, especially the first appellant. She asked a woman who was in charge of selling drinks to people wishing to go into the drinking area of the shebeen for shelter but was turned away because the woman did not know her. Fortuitously, her brother emerged from the shebeen at that stage and was surprised to find her there. He agreed to walk home with her. As they went on their way, the group of young men approached aggressively and, using knives and broken bottles to threaten him, frightened the complainant's brother into running away. They wanted to know what he (the complainant's brother) was doing with the first appellant's 'girlfriend'. When her brother ran off, the group handed the complainant into the custody of the first appellant telling him that they had got his 'girlfriend' for him.

[3] The first appellant dragged the complainant to his nearby shack, where he forcibly undressed her and raped her. While the first appellant was engaged in sexual intercourse with the complainant, the second appellant came into the room and he and the first appellant thereafter repeatedly took it in turns to have intercourse with the complainant. She was so distressed by what had been done to her that she was unable to tell the trial court exactly how

many times each of them had raped her. She said that while the two appellants were raping her a third man had come into the room apparently intending to join in the assault. This third person had been sent away by the appellants.

[4] The complainant pretended that she needed to urinate and used the opportunity, when the appellants provided her with a container to use for that purpose, to break out of the room and run, completely naked, to another shack a few doors away where she burst in and asked the astonished occupant, who was an older man, for sanctuary. She told this man, who testified at the trial, that she had been raped. He lent some clothing to cover her nakedness. She was also able to tell him the first name of one of her assailants (the first appellant) because she had heard the second appellant use it when speaking to the first appellant when they were raping her. The man recognised the name. He asked the complainant if she would go with him to confront the appellant. She declined, saying she wanted to go home because she was in fear.

[5] When the complainant reached home and reported what had happened, various of her family members accompanied her back to the place where the assault had occurred. They found a crowd of people gathered there including the person who had assisted the complainant after she had escaped from the appellants. The evidence was that the first appellant was present and admitted that he had had sexual intercourse with her. He apologised for his actions and said that he had been intoxicated. His family offered to pay compensation if the complainant would refrain from laying a charge.

[6] The matter was reported to the police and the complainant was medically examined later the same day.

[7] The complainant's evidence was corroborated in material respects by that of her brother and Mr B[....] B[....], the person in whose shack she had sought refuge when she

escaped from the appellants. The latter witness was called by the court, the prosecutor, quite astonishingly, having failed to call him in the state's case.

[8] The appellants both admitted having sexual intercourse with the complainant but claimed that it had been consensual. The first appellant claimed that he had intervened to stop the complainant from being pestered by another man and that they had thereafter fallen into conversation and gone to his shack where he proposed that they have sex, to which she agreed. He had fallen asleep after they had had sexual intercourse.

[9] The second appellant testified that when he arrived home from the shebeen he had found that the door to his shack was padlocked. He went to the first appellant's shack to borrow a hammer with which to break the padlock open. He was sitting in the room next to room in which the first appellant slept when the complainant emerged. They fell into conversation, in the course of which he proposed that they have sexual intercourse, to which the complainant agreed.

[10] The trial court accepted the evidence of the state witnesses and rejected that of the appellants. In our judgment it was wholly justified in doing so. The complainant's evidence was corroborated by an entirely independent witness. The notion that the complainant would have run naked from the first appellant's shack into the street and then burst into a stranger's home in a state of high distress if she had had consensual congress with the two men was completely far-fetched.

[11] The evidence makes it clear that the complainant and her two companions were targeted by a roving group of young men looking for mischief. It is evident that when the complainant was left on her own after her two companions went into the shebeen, the complainant was identified by the group as prey for the first appellant's sexual pleasure. The second appellant, who was part of the group, plainly decided to join in the rape. That would explain how he came to enter the first appellant's room unannounced while the latter was

engaged in raping the complainant and then joined in the activity as if it were some sort of game.

[12] It is also apparent that the charge sheet was incompetently drafted. The complainant's evidence indicated that she was raped by each of the appellant's repeatedly. It is unlikely that the complainant's evidence in this respect could have deviated materially from her witness statement because had it done so, she would undoubtedly have been confronted with the deviation by at least one of the appellants' legal representatives at the trial. The fact that the complainant's evidence would support charges on multiple counts of rape, not just two, should have been evident to the prosecution before the trial commenced. Charging the appellants with just two counts of rape was grossly inappropriate and a travesty of justice in the circumstances. It also bears mention that the charge sheet did not contain a reference, as it ideally should have, to s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which recast the common law offence of rape in statutory form.

[13] The courts have on more than one occasion previously criticised the shoddy preparation of charge sheets in serious sexual assault cases; see *S v Mponda* 2007 (2) SACR 245 (C), [2004] All SA 229, *S v Ro and Another* 2010 (2) SACR 248 (SCA) at para 27-28, *S v ZW* 2015 (2) SACR 483 (ECG) at para 33-35 and *S v DJ* 2019 (2) SACR 613 (WCC). It is extremely worrying that the concern expressed in those judgments does not appear to have incentivised the prosecuting authority to institute effective corrective measures. It makes a mockery of the publicly professed determination of the National Directorate of Public Prosecutions to effectively address the scourge of gender-based violence.

[14] The appellants were both very young men at the time of the commission of the offence, one of them was 20 and the other 21. They were first offenders. They were employed with no dependants. Those were all factors that weighed in favour of some

mitigation. The magistrate was cognisant of them. He also took into account that they had spent two years in custody in connection with the offences before they were sentenced. Weighing against the mitigating factors were the aggravating ones. Most especially, the particularly heinous nature of the rape. The complainant was preyed on by a gang of marauding young men and seized in violent circumstances when she was especially vulnerable. She was thereafter grossly demeaned by the dehumanising way in which the appellants treated her as a mere object for their sexual gratification. This was a very serious instance of rape, and it ended only because the complainant was able to escape. The evidence made it clear that had she not managed to get away, the sexual assault would have continued, as while the complainant was urinating, she heard the appellants arguing as to which of them should have the next turn at raping her again. Even her escape was a most humiliating experience, necessitating her to run naked into the street and in that embarrassing state throw herself on the mercy of a complete stranger. The appellants also showed no remorse for their actions. After unsuccessfully trying to buy the complainant off, the first appellant's initial apology for his actions quickly turned into a fallacious claim that the complainant had consented to sexual intercourse with him. The second appellant's dishonest defence added insult to injury by making the complainant out to be a woman of easy virtue.

[15] In all the circumstances there is no reason to fault the magistrate's finding that there were no substantial and compelling circumstances to justify a departure from the prescribed sentence. The appellants' legal representatives referred us to a number of judgments in which lesser sentences were imposed in comparably serious rape cases. There are, however, also examples of comparable cases in which the sentence of life imprisonment has been imposed; see, for example *S v Moyo* [2013] ZAKZDHC 77 (8 August 2013), 2014 JDR 1308 (KZD); *S v Mini* [2015] ZAECGHC 111 (14 October 2015), 2015 JDR 2253 (ECG) and *S v De Wee* [2016] ZAECGHC 152 (20 October 2016), 2017 JDR 0005 (ECG).

[16] The inconsistency in sentencing in rape cases has been the subject of discussion in the literature; see SS Terblanche, *The Guide to Sentencing in South Africa* 3rd ed. (LexisNexis, 2016), at §3.5.4.6 and 3.5.5. It is a fact that reflects that no one case is exactly like another, and that sentencing is not a mechanical judicial function. It involves the exercise of judicial discretion by the judge or magistrate who presided over the trial and saw and heard the victims and the perpetrators at first hand.

[17] In the context of there having been no identified misdirection by the magistrate in his factual findings and in the exercise of his discretion, the ultimate test is whether the sentences imposed induce a sense of shock; in other words, whether, objectively considered, they strike us as being clearly disproportionate in the circumstances (cf. *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552; 2012 (6) SA 353). If they are not, it does not matter that we might instead have imposed a lengthy determinate sentence had we been sitting at first instance. As Rogers J observed in the full court's judgment in *S v GK* 2013 (2) SACR 505 (WCC) at par 14, it is not enough to justify interference by an appellate court for it just to feel '*uneasy at the imposition of a life sentence* ... [it must] *have a conviction that such a sentence would be unjust, ie disproportionate to the crime, the offence, and the legitimate needs of the community*'.

[18] For these reasons the appeals against conviction and sentence are dismissed.

N.C. ERASMUS

Judge of the High Court

A.G. BINNS-WARD
Judge of the High Court