



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Reportable

Appeal Case no: AR113/2024

In the matter between:

LUNGANI MICHAEL CELE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Olsen J (Jikela J concurring)

[1] The appellant, Lungani Michael Cele, appeals against his conviction on one count of rape and the sentence of life imprisonment imposed on him. Insofar as the sentence is concerned, the prominent feature of this appeal is a question as to the proper application of the provisions of Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, given the peculiar facts of this case. This subject was not adequately dealt with in oral argument. Counsel were accordingly requested to deliver written argument, the last instalment of which reached us at the beginning of December 2025. The delivery of this judgment has since then been delayed for unavoidable reasons. Nevertheless, the delay is mine and calls for an apology, which I make.

[2] The appellant was convicted on 20th August 2014 and sentenced on 29th August 2014. He delivered a Notice of Appeal and an application for condonation of its late delivery on 13th October 2023. The state offers no objection to the grant of that application, and we see no reason to refuse it. The merits of the appeal have been fully argued.

[3] The principal witness for the state was the complainant. Where the contrary is not indicated, the account of events which follows is that of the complainant.

[4] The events which gave rise to the trial took place on 1st May 2009. The complainant, twenty years old at the time, went to a party with her friends in C section Umlazi. There were men and women at the party. The complainant knew some of them, but not all. The appellant was present. The complainant gathered that his friends at the party called him Mlungu, the name the complainant used when referring to him in evidence.

[5] The complainant found the party “good and nice”, but at a certain stage she decided she would prefer to go home. She saw that her friends were not ready to leave, and called her boyfriend and asked him to pick her up at a nearby bus or taxi stop. As she was exiting the party she was confronted by the appellant who put a firearm to her head, asking her where she was going. He insisted that she return to the party and she did so. She told her friends what had happened but they did not pay attention to her.

[6] Eventually, when others were leaving the party, the complainant made to leave in the company of two men, a Mr Mhlongo and a Mr Sikhakhane. When outside in an area properly lit by an electric light, the complainant was confronted once again by the appellant who said she should go with him. He hit the two men in the complainant’s company and instructed them to leave. They did so. When the complainant nevertheless refused to go with him, the appellant stabbed her below her left buttock. She bled as a result of this wound which was subsequently stitched. The appellant once again drew his firearm and put it to her head. He pulled her along to a house at a distance of approximately 200 metres from the party venue.

[7] When they arrived at the house the appellant opened the gate protecting the outside door using a key. The complainant was taken inside and to what was apparently a dining room in which there was a bed. The lights in the passage giving access to that room were on but not the light in the dining room itself. There the appellant undressed the complainant, undressed himself and then proceeded to rape her.

[8] Whilst the appellant was about that, the complainant saw three shadows pass an outside window and subsequently heard the sound of the gate through which she had entered the house being opened. She then saw three men whose names she did not know, but whom she had seen at the party – friends of the accused – standing in the passage under the electric light watching what was being done to her. When asked how much time had passed between her first entry into the house and the arrival of the three others, the complainant said that it was less than 20 minutes.

[9] When he was done the appellant left the complainant naked on the bed in the dining room. There she was subsequently raped by each of the three men she had seen in the passage. Because she was not led on the subject, the record reveals no evidence of the time that lapsed between the completion of the first rape and the commencement of the second; nor of the timing and duration of the third and fourth events. The only other evidence we have concerning timing is the complainant's statement that by her estimate she was in the house for four hours in all before she made her escape. She was not raped more than once by any of the four men.

[10] After the last of the rapes the four men were talking and smoking in a room which the complainant described as the main bedroom of the house. She called out that she wished to wash herself, with the result that she was eventually let into the bathroom of the house with a basin full of water. She found that the burglar guard to the outside window of that bathroom was loose. She removed it, climbed out, and ran off into the night quite naked. She reached the house of a Ms Sithole, and knocked at the door in a distraught state. Ms Sithole admitted her, lent her a dress to wear and telephoned her family who came to fetch her. She reported the rape to Ms

Sithole, whose evidence accorded with the complainant's concerning the latter's escape and rescue.

[11] The complainant was collected from Ms Sithole's house and taken to hospital where she was medically examined. The doctor gave evidence and confirmed that her findings were consistent with the complainant's description of events. After she had been to the hospital the complainant was taken to the police station and the events were reported. She guided the police to the house at which she had been raped but the appellant was not to be found. Although the investigating officer was not called, it is apparent from what followed that whatever efforts the police made to find the appellant were unsuccessful.

[12] After much delay the final state witness, a Ms Ngwabe was called. She gave evidence against her will. In her evidence in chief Ms Ngwabe stated that she saw the complainant being forcibly taken away from the party venue by the appellant. She changed her evidence in cross examination when she accepted that she was inebriated at the time, and was in fact not able to identify the appellant as the person who took the complainant away. She repeated that evidence when questioned again on the subject by the court.

[13] The events giving rise to this case took place in May 2009. The appellant had still not been arrested three years later, when in June 2012 the complainant attended a funeral. She saw the appellant there. She left the funeral to report his presence to the police. She was present at his arrest.

[14] The appellant gave evidence, as did a Mr Hlongwane who was called with the intention of corroborating the appellant's alibi. It was apparent from an unsolicited statement made by the accused in his evidence in chief that he (perhaps through the agency of his brother) and Mr Hlongwane had compared notes before either of them gave evidence. In his evidence the accused adopted a strategy designed to support an argument that the complainant was an unreliable witness because she was drunk at the party and had indeed had there bought and taken a drug known as ecstasy. (When it was put to her that she was drunk at the party the complainant denied that.) According to the accused he left the party at about 8:30 pm to go to a nightclub in

the district of Durban known as the Point. Mr Hlongwane was in his company. According to Mr Hlongwane he did not see the complainant because he was not in fact inside the party venue, but outside throughout. He confirmed that he left the venue early in the company of the appellant. He claimed to be able to remember the night in question because it was the first time that he had gone to the nightclub. He was unable to offer any rational explanation for how he could be certain, after more than three years had passed, that the night of his first visit to the nightclub was the very night during the course of which the appellant had allegedly raped the complainant.

[15] With reference inter alia to *S v Sauls and others* 1981 (3) SA 172 (A) and *S v Mthethwa* 1972 (3) SA 766 (A) the magistrate recorded in his judgment that the so-called “double cautionary rule” had to be considered in assessing the complainant’s evidence because her identification of the appellant was in issue, and because she was a single witness on that issue. The magistrate’s finding that the complainant had ample opportunity to make a reliable identification of the accused cannot be faulted.

[16] The magistrate found that the complainant was a credible and honest witness whose testimony was not shaken by cross examination. She presented as a level-headed person who was forthright in dealing with the versions put to her in cross examination. He was unimpressed with Mr Hlongwane’s attempt to corroborate the appellant’s alibi defence. The magistrate correctly observed that there was no onus on the appellant to establish his alibi which had to be considered in conjunction with all the evidence before the court.

[17] A reading of the evidence on the record, and of the magistrate’s assessment of it, does not support a conclusion that the magistrate misdirected himself in any respect in rejecting the version offered by the appellant. The appeal against conviction must fail.

Sentence

[18] In pronouncing his verdict the magistrate said the following.

“The court finds the accused GUILTY AS CHARGED, attracting a minimum sentence of life imprisonment by virtue of her being raped by more than one person, as well as the infliction of grievous bodily harm by the accused, the rape involving infliction of grievous bodily harm by the accused.”

[19] The charge sheet reflected one crime. It was that the appellant “did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, ... , by inserting his penis into her vagina without the consent of the said complainant”. He was not charged with any crime related to the three further rapes to which the complainant was subjected.

[20] The charge sheet in its original form is somewhat confusing where it refers to the Criminal Law Amendment Act, 105 of 1997 (the “Act”). The relevant part reads as follows.

“Section 51(1) and Part [?] of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that the complainant was raped more than once and by more than one person.”

I indicate the confusing bit with the question mark in the quote above. That part was rendered in manuscript. Looked at one way it looks like the number “1”, but in another way like the number “2”. It may be that it was originally the number “1” which is altered to look like “2”. However the reference to multiple rapes indicates that it is Part I of Schedule 2 that was intended. After the charge had been put to the appellant and before he made his plea, the court said the following to him.

“Firstly, you are informed the state is relying on the minimum sentence legislation, if convicted you are liable to a minimum sentence of life imprisonment, unless the court is satisfied that there are substantial and compelling circumstances justifying imposition of a lesser sentence”.

[21] It is recorded that the accused understood that, and he made his plea of not guilty, the court being informed that the “defence will be that of bare denial”. The appellant was adequately warned of the fact that the state would be seeking a sentence of life imprisonment because of a multiplicity of rapes.

[22] The provisions of Part I of Schedule 2 to the Act provided in relevant part as follows at the time of the commission of the offence and at the time of the trial.

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –

(a) when committed –

- (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
- (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

...

(b) ...

(c) involving the infliction of grievous bodily harm.”

[23] The state did not specify in the charge sheet that it intended to rely upon a rape involving “grievous bodily harm” in order to secure a minimum sentence of life imprisonment. The concept of “grievous” bodily harm did not arise in the course of evidence. It arose for the first time either in argument (which is not on the record before us) or in the judgment itself. There is no record of any consideration being given at any time to the question as to whether the knife wound inflicted on the complainant justified the rape being classified as involving the infliction of grievous bodily harm. On the evidence the appellant kidnapped the complainant at the site of the party, and this is a case of kidnapping accompanied by an assault. (The appellant was not charged either with kidnapping or assault, involving grievous bodily harm or otherwise.) I conclude that the magistrate could not legitimately regard a life sentence as compulsory upon the basis that the rape involved the infliction of grievous bodily harm.

[24] The state established that the complainant was raped more than once on the night in question. However she was not raped, and never contended that she was raped, more than once by any one person. It is a requirement for the invocation of the penalty of life imprisonment under item (a)(i) under the heading “Rape” in Part I of Schedule 2 (“item (a)(i)”) that the victim is raped more than once either by the accused, or by any co-perpetrator or accomplice of the accused. The language is

clear. It is required for the invocation of the provision that somebody must rape the victim more than once. (I revert to the interpretation of item (a)(i) hereunder.)

[25] Item (a)(ii) of the provisions of Part I of Schedule 2 under the heading “Rape” (“item (a)(ii)”) deals with rape committed by more than one person. It is not a requirement that any such person should rape the victim more than once. However it is a requirement of the provision that those persons should act “in the execution or furtherance of a common purpose or conspiracy”. In its supplementary argument the state sought to evade the fact that the charge sheet did not record that the state intended to “rely on common purpose”. The judgments which hold that an accused person’s fair trial rights are infringed if the state does not record its intention to rely on common purpose deal with the question of whether a conviction can safely be allowed when it rests solely on the doctrine of common purpose. That is not the case here. In a case like the present the question is whether, for the purpose of sentence, the rape committed by an accused was the product of a common purpose, of the accused and the others who also raped the victim, to perpetrate the series of rapes involved. The accused person’s conviction does not rest on the existence of a common purpose. In this case the appellant was warned that a life sentence could be imposed because the complainant was raped by more than one person. He was legally represented. His counsel knew that the state was relying on Part I of Schedule 2 to the Act. His counsel was or ought to have been fully aware of the relevant text dealing with the rape of the complainant by more than one person. However, given the facts of this case there is no need to decide the question as to whether item (a)(ii) is inapplicable in the absence of a warning of the state’s intention to rely on a common purpose or conspiracy to bring the case within item(a)(ii). I proceed on the assumption that the notification was sufficient, which in my view it was; and that the absence of a reference to common purpose or conspiracy did not constitute an infringement of the appellant’s right to a fair trial.

[26] Nevertheless, something ought to be said about the way in which the charge sheet was formulated. I say that because the record is almost devoid of any sign that the prosecutor was aware of the fact that the common purpose relied upon had to be proved. (It may be, one supposes, that the prosecution was aware of the problem but could tender no more evidence beyond that which it did tender on the subject.) One

suspects that words “the complainant was raped more than once and by more than one person” have become something of a formula. However, it would not be asking too much of the prosecution to add words to the effect that “the said persons acted in the execution or furtherance of a common purpose or conspiracy”.

[27] Although in his argument counsel for the state has presented an analysis of the facts which appears to be directed at a finding that common purpose between the four persons who raped the complainant on the night in question has been established, his principal argument is not that common purpose is established as required by item (a)(ii), but that this case actually falls under item (a)(i). In that regard he has urged us to follow the judgment of a full bench of this court in *S v Mthombeni* 2020 (2) SACR 384 (KZP). The reason counsel for the state has followed this line of argument seems to lie in an assumption that we would hold that it is impermissible for the state to rely on item (a)(ii) because it failed to record in the charge sheet that it would be relying on common purpose in asserting that the provisions of Part I of Schedule 2 were engaged in this case. (As already stated, I take the view that this case should be decided upon the assumption that no such obstacle to the states reliance on item (a)(ii) exists.)

[28] Nevertheless it is necessary to deal with the judgment in *Mthombeni*. The case concerned an appeal against sentence following a conviction on a plea of guilty to rape. The plea disclosed that the appellant and others had decided to break into a house and rob the occupants. During the course of that robbery the appellant raped the complainant, and one of the others with him also raped her. The court a quo held that because the complainant had been raped by two persons the matter fell within Part I of Schedule 2 to the Act and accordingly imposed a life sentence. However the second perpetrator had not been convicted. On appeal counsel for the appellant argued that the magistrate (and the full bench before which he appeared) was bound by the decision of the Supreme Court of Appeal in *S v Mahlase* [2013] ZASCA 191 to the effect that to sentence an accused upon the footing that the victim was raped by more than one person, it is required that the other person has been convicted. Confronted with that argument on appeal, the court in *Mthombeni* expressed the view that *Mahlase* had been wrongly decided by the Supreme Court of Appeal. However it held that it was bound by that judgment only to the extent that the state

sought to rely on item (a)(ii). It reasoned that, on the facts, the case before it fell within the provisions of item (a)(i), a proposition with which I disagree, as already stated earlier in this judgment.

[29] The judgment in *Mahlase* was overruled by the Supreme Court of Appeal in *Director of Public Prosecutions, KwaZulu-Natal vs Ndlovu* 2024 (1) SACR 561 (SCA). Before dealing with the reasoning followed in *Mthombeni* it seems apposite to quote this passage from paragraph 23 of the judgment in *Ndlovu*.

“It is no exaggeration to say that the decision of this court in *Mahlase* caused consternation amongst some of the judges in certain divisions of the High Court. Some, although expressing misgivings about its correctness, nevertheless rightly considered themselves bound by it, in keeping with the doctrine of stare decisis. Others, however, expressed their disinclination to follow it, even in circumstances where there was no tenable legal basis to avoid its reach. In certain instances, judges resorted to employing ingenious ways to distinguish cases serving before them from *Mahlase*.”

[30] This court in *Mthombeni* was clearly one of those disinclined to follow *Mahlase*. It also regarded itself as not bound by the decision of the majority of this court in *Ndlovu*, when it was heard here before advancing to the Supreme Court of Appeal. Although not clearly stated in its judgment, it does seem that the court in *Mthombeni* regarded the majority judgment in *Ndlovu* as incorrect to the extent that it did not recognise that the rape of a complainant by more than one person falls within the ambit of item (a)(i).

[31] The essential elements of the reasoning followed by the court in *Mthombeni*, leading to the conclusion that a case like the present one falls within item (a)(i), may be summarised as follows. (I quote from paragraphs 30 and 31 of the judgment.)

- (a) “Having regard to the constitutional rights and values which the offence of rape violates, and specifically the rights of women to be protected from gender-based violence, the provisions can only sensibly refer to a multiple rape performed collectively by an accused, a co-perpetrator or an accomplice (and not necessarily a multiple rape by one of them).”

- (b) “It would be absurd to suggest that the minimum sentence would not apply to an accused where the accused raped the victim once and a co-perpetrator also raped the victim once, such that neither of them did so more than once.”
- (c) “The words ‘more than once’ must be interpreted to refer to the victim having been raped by any of the accused, a co-perpetrator or an accomplice collectively more than once in the circumstances in which the crimes were committed, and the word ‘or’ should be interpreted to mean ‘and/or’.”

[32] I fully endorse the concern expressed by the court in *Mthombeni* concerning the gross violation of the rights of women subjected to rape, multiple or otherwise. However I know of no authority for the proposition that statutory interpretation undertaken through the prism of the Constitution may permissibly yield a construction of the statutory instrument which the language of the instrument cannot bear. This is not a case in which the constitutional validity of an enactment is at stake, where the remedy of reading-in may be employed.

[33] In my view the erroneous conclusion reached in *Mthombeni* is ultimately the product of attempting to interpret item (a)(i) in isolation from the provisions of item (a)(ii). No absurdity arises from a conclusion that item (a)(i) does not mandate a life sentence when two or more people each rape a complainant once, because the phenomenon of so-called “gang rape” is dealt with in item (a)(ii).

[34] In my view it is not clear that substituting the term “and/or” for the word “or” in item (a)(i) generates the meaning ascribed by the court in *Mthombeni* to item (a)(i). Adding in the word “collectively” somewhere would do so, but the legislature did not use that word.

[35] The ordinary meaning of the words in item (a)(i) conveys that the subject addressed is the rape of a complainant more than once by somebody. The ordinary meaning of the words employed in item (a)(ii) conveys that the subject of that item is the rape of a complainant by more than one person. However it must be granted that there is or may be some overlap between the items, which may be confusing.

[36] No difficulty arises when the victim is raped more than once by the accused. However, item (a)(i) is also engaged when another person, a “co-perpetrator or accomplice”, rapes the victim more than once, despite the fact that the accused whose sentence is at issue raped the victim once. In Professor Snyman’s work on criminal law (8th ed) he summarises the legal concepts of a perpetrator, and of co-perpetrators, as follows.

“1 A person is a perpetrator if –

- (a). his conduct, the circumstances in which it takes place (including, where relevant, a particular description with which he as a person must, according to the definition of the crime, comply) and the culpability with which it is carried out are such that he satisfies all the requirements for liability contained in the definition of the crime; or
- (b). although his own conduct does not comply with that required in the definition of the crime, he acted together with one or more persons and the conduct required for a conviction is imputed to him by virtue of the principles relating to common purpose

- 2 If two or more persons act together and they all comply with the above definition of a perpetrator, they are all co-perpetrators. There is no rule to the effect that if two or more people are involved in the commission of a crime only one of them can qualify as a perpetrator and that the other(s) must all fall into a different category.
- 3. For a person to be a perpetrator, it matters not whether he commits the crime himself or makes use of an agent (human or non-human) to effect the commission.”

[37] By way of example, if one of the appellant's three friends ("B") had accompanied the appellant to the latter's house, and had held down the complainant to facilitate the appellant's rape, B would have been guilty of the same rape as a co-perpetrator, attaining that status by reason of the doctrine of common purpose of the kind which is evidenced by his "joining in". If B then himself penetrated the complainant sexually he would be convicted on a second count of rape; and, technically in any event, the complainant would have been raped more than once by a person who is a co-perpetrator of the rape committed by the appellant. That would technically have satisfied the requirements of item (a)(i); and also item (a)(ii), because the complainant would have been raped by more than one person, and the appellant's rape of the complainant would have been executed in furtherance of a common purpose shared between the appellant and B. The "technicality" embedded in this example is extinguished if one postulates that B actually rapes the complainant himself twice. The conclusion is then clearer. (Whether the 'technical' example postulated above is valid depends on whether the word "rape" in the two items means and involves only actual sexual penetration, or whether it has the wider meaning which fixes criminal responsibility for penetration also on a person who does not himself sexually penetrate the victim. In my view the former seems correct.)

[38] The fact that in certain circumstances the rape of a victim by an accused may fall within both items does not mean that item (a)(i) may be regarded as a general receptacle for all cases in which a victim is raped by more than one person, even if none of them rapes the victim more than once. That would undermine the qualification to item (a)(ii), (the express subject of which is the rape of the victim by more than one person), that the accused's rape of the victim should have taken place in the execution or furtherance of a common purpose shared by those persons, or of a conspiracy between them. Item (a)(i) is not subject to that qualification.

[39] Item (a)(i) is not engaged in this case. Its subject is the rape by the appellant himself (ie his sexual penetration of the complainant). There is no evidence that the appellant's three friends were co-perpetrators of or accomplices with regard to that act. They only arrived on the scene after the rape had commenced, and did not

participate in it in any way at all. In addition, none of them subsequently raped the complainant more than once.

[40] In the circumstances the prosecutions invitation to us to consider this case within the framework of item (a)(i) must be declined. The question to be decided is in fact whether the state established the common purpose or conspiracy upon which the application of item (a)(ii) depends. The magistrate was aware of the requirement. He dealt with it in this fashion.

“The fact that she was raped by more than one person and as she said, these others, although she could not identify them, were at the party with the accused and the fact that while he was raping her, she saw the shadows through the window and when they came in she realised that it could only **have been that by knowledge with the accused, otherwise how else would they have known that she was there and taken by the accused.**”
(My emphasis.)

[41] The magistrate’s reasoning is inferential. The cardinal rules for inferential reasoning of this type in criminal cases were set out in the judgment of Watermeyer JA in *Rex vs Blom* 1939 AD 188 at 202 – 203.

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

The first of these rules is satisfied in this case. The inference that the accused together with the three other rapists acted in the execution or furtherance of a common purpose or conspiracy is consistent, or perhaps one should say not inconsistent, with the proved facts. The question is whether the proved facts exclude every reasonable other inference; i.e. that the four men may not have acted in the execution or furtherance of a common purpose or conspiracy insofar as the appellant’s rape of the complainant is concerned. (It bears repetition that the

question in this case is the appellant's rape of the complainant. His culpability or potential culpability with respect to the subsequent three rapes is not the subject of any charge brought against him.)

[42] The complainant's evidence is that in the light of what she observed at the party, the three other rapists were rightly regarded by her as friends of the appellant. The house to which she was taken was either the appellant's house or the one at which he was staying. He had the key to gain entry to it. The answer to the magistrate's question, as to how the three would have known that the appellant was or might be there, is that if they were acquainted with him and for that reason knew where he was staying, and found that he had simply disappeared from the party venue, they may very well have decided to seek him out at his place of abode. There is no evidence that they had advance warning or knowledge that he was in fact there, or what he might be doing there. On the complainant's evidence they had nothing to do with the exchange between her and the appellant when he initially forced her to return to the party; and nothing to do with the circumstances in which she was kidnapped and taken to the house. Perhaps the question the magistrate ought to have asked was not how the three knew where to find the appellant, but why, if they had formulated a common purpose to rape the complainant, all four of them did not leave with her together.

[43] In my view all the proved facts are not such as exclude a reasonable inference that the appellant's three friends went in search of the appellant not knowing that he would necessarily be found at his place of abode; and that they there made up their minds also to rape the complainant despite the fact that they had no prior knowledge of the complainant's presence in that house, nor of the appellant's abduction of her. In the circumstances the prosecution failed to prove the common purpose or conspiracy required for the application of item (a)(ii).

[44] On that basis the maximum sentence which the magistrate could have imposed on the appellant would have been 15 year's imprisonment. In my view that is an appropriate sentence.

[45] The appellant abducted the complainant at gunpoint and took her to his place of abode with the intention of there raping her, as he did. His conduct was callous throughout. We do not know what passed between him and his three friends when he emerged from the dining room and found them present in the house. But of course he had to know thereafter that they were taking turns to rape the complainant themselves. Afterwards he stood around in a room with them smoking while she was left naked in the room in which she had been molested. Neither his conduct in that regard, nor the manner in which he conducted his defence, suggest that there is any remorse at all in him for what he did. The evidence in mitigation of his family members, concerning dependency on him and the affection in which they hold him, serves as no meaningful counterweight to the callous nature of the crime of which he has been convicted. The words of Khampepe J in her judgment in *S vs Tshablalala and another* 2020 (2) SACR 38 (CC) are apposite. The learned judge observed in paragraph 74 of the judgment that the

“notion that rape is committed by sexually deviant monsters with no self-control is misplaced. The law databases are replete with cases that contradict this notion. Often those who rape are fathers, brothers, uncles, husbands, lovers, mentors, bosses and colleagues. We commune with them. We share stories and coffee with them. We jog with them. We work with them. They are ordinary people, who lead normal lives.”

The learned judge continued in paragraph 75 to point out that rapists

“behave in a way that is heinous and inhumane. The moral repugnancy of the act is self-evident. The point is merely that you cannot tell that someone is a rapist by their mere physical appearance or their standing in the community or their relationship to you.”

The moral repugnancy of the appellant’s conduct during the night in question, and his indifference to, and perhaps complicity in, the rapes which followed his own, support the imposition of a substantial sentence.

[46] The following order is made.

1. The application for leave to appeal is granted.
2. The appeal against the conviction of the appellant on one count of rape is dismissed.
3. The appeal against sentence is upheld. The sentence of life imprisonment imposed by the magistrate is set aside and replaced by the following.

“The accused is sentenced to fifteen (15) year’s imprisonment.”

4. The sentence of fifteen year’s imprisonment is backdated to the 29th of August 2014.

Olsen J

Jikela J

Case Information:

Judgment reserved: 17 October 2025
Written argument received: December 2025
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