

REPUBLIC OF SOUTH AFRICA
IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Reportable: No

Of interest to other judges: No

Revised.

17/5/2017

Appeal No: A702/16

In the matter between:

S SAMBO

Appellant

and

THE STATE

Respondent

JUDGMENT

J W LOUW. J

[1] The appellant was convicted in the regional court, Nelspruit (now Mbombela) on two counts of rape of the first complainant and on two counts of rape of the second complainant. The first complainant was 15 and the second complainant 16 years old at the time of the alleged incidents. The four counts were taken as one for purposes of sentence and the appellant was sentenced to life imprisonment. The appellant appeals against his conviction on all four counts. He denies involvement in any of the incidents.

[2] The first complainant testified that on the day in question, 8 August 2008, she was sent by her grandmother at about 8 pm to buy bread from a shop. She was accompanied by a friend by the name of N. When they arrived at the shop, the friend went inside but the first complainant remained outside. The appellant then approached her and requested her to accompany him in order to call his girlfriend. The first complainant had known the appellant for about three years as he and his mother attended the same church as the complainant and her grandmother. She walked with the appellant in the direction of his girlfriend's place. When they reached the first house, they carried on walking. The complainant asked the appellant where they were going as he had pointed that house out as the house where his girlfriend stays. When they reached the end of the residential area, there were bushes. The appellant produced a knife and ordered her to remove her trousers. He threatened to stab her with a knife if she refused. He removed his jacket, put it on the ground and ordered her to lie on top of the jacket. He unzipped his trousers and proceeded to rape her.

[3] After the appellant had finished, he said he was taking her to her place. They walked past the homestead of a certain Khoza, at which point the appellant said that they should go to his place and not to the complainant's place. When they arrived at the appellant's place, he entered the house while the complainant remained outside. The first complainant tried to lock the door of the house with the "shoot", which I understand to mean a sliding lock. The appellant, however, overpowered her by pulling the door forcefully. He pulled her inside the house and instructed her to remove her trousers again, which she did. He then ordered her to lie on the bed and again raped her. After ejaculating, he told her to take a wet cloth which was in the house to wipe her vagina. After doing that, she dressed herself. The appellant then ordered her to hang up his clothes which were placed on top of a basket. It was dark in the room. After she had hung up the appellant's clothes, he produced, what she called, an instrument. She did not know whether it looked like a firearm or whether it was a real firearm. The appellant said that if she reported the matter to the police, he would use the firearm to shoot her and her grandmother. He would also tell the police that he did not rape her, they were lovers.

[4] The appellant thereafter accompanied her to the house where she stays. She stays with her grandmother on the same property, but they each have a separate house.

When they reached the gate, the appellant turned around and she went to bed in her house. She did not report the matter to anyone because she was afraid that the appellant would shoot her and also her grandmother.

[5] Four years later, a counselor by the name of Nonhlanhla came to the school where the complainant was a pupil. She advised the children that if anyone of them had been abused, they should come forward because such an incident would affect their lives. The first complainant then reported the whole incident to Nonhlanhla. She was advised to report the matter to the police who then opened the case against the appellant.

[6] The first complainant was asked by the court if she was sexually active at the time, which she confirmed. She was also asked whether she saw the appellant after the incident. She said that he used to come to her place and knock at the door. On one occasion, he knocked at the door and when she asked who it was, he said that it was Xolani, her boyfriend. When she opened the door and saw that it was the appellant, she asked him what he wanted. He requested water, which she gave him. Her grandmother then came to the door and asked the appellant what he wanted, to which he replied that he wanted his girlfriend by the name of Momphilo. He thereafter left.

[7] The first complainant was asked in cross-examination whether she was not asked by her grandmother about what had happened to the bread. She said she lied by saying that she had spent the night at her friend's place. Her grandmother did not notice that there was anything wrong with her because she did not show any signs that she had been abused. She was also asked by her friend when she next saw her, what had happened to her after not finding her when she came out of the shop. The complainant said she also lied to the friend, but did not say what she told the friend. She lied to her grandmother and to the friend because she was afraid that the appellant would shoot her and her grandmother.

[8] The first complainant was asked in cross-examination whether she knew anything about an incident when a teacher at the school, Mr. Xebe, told her and other schoolgirls that the appellant rapes people and that he even wrote the registration number of the appellant's vehicle on the board. The first complainant said she knew nothing about that. It was put to the first complainant that on the day that she went to the police station

to lay the charges, she went there with the second complainant and many other schoolgirls together with Mr. Xebe. The first complainant denied that Mr. Xebe was present, and said that they went with Nonhlanhla and that it was only herself, the second complainant and a certain lady whose name she had forgotten. She also denied that Mr. Xebe was present when they were counseled by Nonhlanhla. It was put to her that Nonhlanhla says that Xebe was there and that he wrote the registration number on the board. The first complainant denied that Xebe was in the class and also denied that he was present when she approached Nonhlanhla.

[9] It was further put to the first complainant that one Cynthia Khoza, whom the complainant said she did not know, would testify that there was bad blood between Xebe and the appellant, that he incited the first complainant and the second complainant to fabricate charges against the appellant, that he even promised Cynthia Khoza money to lay a false charge against the appellant, which she refused to do, and that he also promised to pay the first complainant money to lay the false charge against the appellant. The first complainant said she knew nothing about that. It was put to her that when she went to lay the charges, they were six who laid charges, but that some of the victims had withdrawn their charges. She also knew nothing about that.

[10] It was put to the first complainant that if she did not report the incident because she was afraid that the appellant would shoot her and her grandmother, she would also not have told Nonhlanhla about the incident. She said that the reason why she reported the incident to Nonhlanhla was because of the advice she was given and after Nonhlanhla had counseled them and explained to them that if they had been raped, it would affect them for the rest of their lives.

[11] The counselor to whom the complainant referred, Ms. Nonhlanhla Mashego, and who referred to herself as a peer-educator, testified that at the time when the first complainant made the report to her, she was working at the Masisukumeni Women's Crisis Centre, a non-governmental organization which assists women who have been abused to come forward. Ms. Mashego said she went to a class at the Luvunywa school (which is the school attended by the complainant) in 2012 during a life orientation period to teach scholars about gender violence. She then went to teach the next class where the first complainant was present. After finishing her lecture, the first complainant got up

and followed her. The complainant said she wanted to tell her something that happened to her and requested that they talk in a private place. The first complainant then informed her that she had once been raped. Ms. Mashego asked the first complainant whether she had reported the matter to anyone. The first complainant said that she hadn't because the person who had raped her had threatened to kill her and her grandmother if she reported the matter. The complainant said she was raped in 2008 and mentioned the appellant's name as the person who raped her.

[12] Ms. Mashego testified that the complainant reported to her that she had been sent to a shop where she met the appellant, that the appellant pointed her with a knife and took her away and raped her. Ms. Mashego then reported the matter to her office where her senior informed her that the matter would be reported to the police. She was later approached by a police officer who wanted to see the victims.

[13] In cross-examination, it was put to Ms. Mashego that Mr. Xebe wrote the registration number of the appellant's vehicle on the board and told the learners that they should be aware of the vehicle bearing that registration number. Ms. Mashego said that she went to different classes and that Mr. Xebe wrote the number on the board in another class, not the class in which the complainant was. In the class where the complainant was, Mr. Xebe was not present.

[14] Mr. Xebe testified that his sister had been abducted by the appellant in his taxi and that he wrote the number of the taxi on a board and warned the students to be careful of this vehicle. He knew the appellant as a member of the community, but wasn't close to him. His sister did lay a charge against the appellant, but the matter had not been finalized. He denied that he had influenced the schoolchildren to lay false charges against the appellant because of the incident of his sister.

[15] In cross-examination, Mr. Xebe denied that there was bad blood between him and the appellant, although he was not happy, as a brother, about the incident involving his sister. It was put to him, on instructions of the appellant, that he had gone to the media, specifically the Daily Sun, and had told them that the appellant was a rapist that went around raping local young girls. This Mr. Xebe denied. It was put to him that Ms. Cynthia Khoza, who Mr. Xebe said he did not know, would testify that he had asked her

to also fabricate false charges of rape against the appellant, but that she refused the request. Mr. Xebe said that he did not know this Cynthia, and that he would be happy if she came to testify to that effect.

[16] It was put to Mr. Xebe that he went to see the appellant's father on 2 July, before the trial, and that he told the father that, because he was a pastor, he wanted to apologize and said that he would tell the first complainant and the second complainant to withdraw the charges because he had influenced them to fabricate the charges against the appellant. Mr. Xebe denied this and said that he had gone to the appellant's place as there was bad blood between himself and the appellant because the appellant would not stop for him when he needed a taxi. As a preacher, he used to pass the appellant's place and he then decided to report this matter to the appellant's father. The father informed him that they were not angry with him because of his sister opening a case against the appellant. Mr. Xebe was then asked why he had earlier said that there was no bad blood between him and the appellant. He explained that he had initially been asked whether he was quarreling with the appellant, to which he had answered no. It must be remembered that the witnesses testified through an interpreter.

[17] Mr. Xebe was referred to the fact that he had told the court, when this matter had previously served before the court in Tonga, that the appellant had intimidated him. He said that the reason why he had complained about the appellant's behaviour was because the appellant had intimidated him in court that if he did not withdraw this matter, he would do something to him as he was prepared to settle the matter at home. It was then put to him Mr. Xebe that he had gone to the appellant's father to apologize and had told the father that he would tell the first complainant and the second complainant to withdraw the charges because he had influenced them to fabricate the charges against the appellant. This was denied by Mr. Xebe.

[18] I have several difficulties in accepting the appellant's version that the complainants were influenced or incited by Mr. Xebe to fabricate false charges against him. The appellant testified that the reason which made Mr. Xebe fabricate a story against him was that he was in love with his sister by the name of Kate (who coincidentally has the same first name as the second complainant) and that Xebe instructed the appellant to end the relationship. He said that he agreed to that, although he lied to Xebe that he

would end the relationship. If he told Xebe that he would end the relationship with his sister, there would be no reason for Xebe to incite the complainants and other girls (it was put to the first complainant that there were six in total) to fabricate and lay false charges. The second difficulty I have, is that it was put to the first complainant that one Cynthia Khoza was one of the girls who was so influenced and that she was even promised money if she did that, but that she refused to cooperate. Cynthia was, however, not called as a witness.

[19] After the appellant had testified, Surprise Masibe was called as a witness instead of Cynthia. Her version was never put to the first complainant. She testified that she was a neighbour of Mr. Xebe and that he had asked her the previous year whether she would go to Tonga and lay a false charge that the appellant had raped her. She was asked how Xebe stood to benefit if she did that. Her answer was that if the appellant was locked up, Xebe would give her money, but that he did not disclose the amount. This was, of course, no answer to the question. She said that she did not agree to the request because if she was asked questions, she would not be in a position to answer them. She was further asked whether there was any existing relationship between her and the appellant, which she denied. She was asked whether she had a child, and her answer was no.

[20] When it was put to her in cross examination that the appellant testified that he had a child with her, she admitted this. She was then asked why she had changed her mind. She said that she did not hear when she was asked the question. The appellant had a different version of what Surprise told him why she had refused to lay a false charge against him. His evidence was that she told him that she had told Xebe that she could not lay a false charge against the appellant as she had a child with him.

[21] Her explanation that she did not hear the question when she was first asked whether she had a child with the appellant is unconvincing. She was clearly lying, and the only explanation for that is that she wanted to portray herself as an independent witness which she clearly was not. The appellant's evidence was that she was once a girlfriend of his.

[22] What was said by appellant's legal representative to the court after the conclusion

of the evidence of Surprise was that he had spoken to Sylvia, but that she refused to involve herself in the matter. It is not clear who this Sylvia is, or whether he may have intended to refer to Cynthia. What the court was also told was that the only further person who would be called as a witness was one Bonisiwe Masilela, who was a pastor. The court then adjourned to a later date. When the matter resumed, the court was simply informed by the appellant's legal representative that the further witness he was supposed to call was not available.

[23] The appellant's father was called as a witness for the defence. He testified that Mr. Xebe came to his place on 2 July 2013 and said that he was looking for the appellant, who was not at home, because he wanted to apologize to the appellant as he was the one who had influenced the victims to lay false charges against him and wanted to go and withdraw the charges. He was asked by the court what Mr. Xebe told the victims to testify about. He said that Mr. Xebe told him that the reason why he influenced the victims to lay false charges against the appellant was because the appellant and other taxi drivers had abused him and that they had gone to his workplace and nearly killed him. This was not the reason given by the appellant why Mr. Xebe allegedly laid false charges against him, to which I have referred above. As in the case of Surprise, the appellant's father would obviously also have had a motive to protect the appellant from conviction.

[24] As I have mentioned, two witnesses who were identified by the defense as witnesses who would be called to testify on behalf of the appellant, and who could be expected to have been independent witnesses, were not called to confirm the version of the appellant which was put to the first complainant. But the most important reason why I am not prepared to accept the appellant's version that Mr. Xebe influenced or incited the first complainant to lay a false charge against him, is the fact that there was no opportunity for him to do so. The first complainant reported the rape to Ms. Mashego immediately after her lecture to the pupils without Mr. Xebe being present in the classroom during the lecture.

[25] In view of the foregoing, I find that the learned magistrate was correct in finding that the appellant's version was not reasonably possibly true. The appellant's appeal against his conviction on counts one and two must therefore fail.

[26] I proceed to deal with counts three and four which are in respect of the second complainant. She was 16 years old at the time of the alleged offenses. She testified that on the day in question, 20 February 2012, she was at a shop at Langloop Trust with her friend Andile when the appellant arrived. He was not known to her, but Andile knew him. He said that the two of them should accompany him to go and call his girlfriend from her parents place. When they arrived at the homestead where the girlfriend was supposed to be, the appellant said that she was not there and decided that they should go and call another girlfriend. They walked on, and the appellant promised that he would buy them a cold drink at Haffi's store. When they arrived there, the shop was closed. They then walked to Teni's store which she said seemingly belonged to the appellant's parents. At the back of the shop, there was a one room house which the appellant said they should enter. The appellant thereafter went outside and closed the door of the room, but did not lock it. The second complainant and Andile then opened the door and went out. They found the appellant next to the shop. He asked them where they were going and Andile responded by saying that she had been called from her place. The appellant then told them to switch *off* their cell phones. He took the cell phones from them and the three of them then again entered the room. During cross-examination, the second appellant was referred to the statement which she had made, presumably to the police, in which she said that the appellant told them to switch their cell phones *off* when they were walking to the Teni tuck shop, that it was the appellant who switched their cell phones *off*, but then gave the phones back to them. She then said that the appellant switched the phones of while they were going to the one-roomed house. The second complainant therefore contradicted herself about when the phones were switched *off* and by whom they were switched off.

[27] Returning to what happened at the room when the three of them went back into the room, the second complainant testified that the appellant then whispered to Andile that he was not going to have sex with her but that he would pretend as if they were having sex because he wanted to have sex with the second complainant. The appellant then climbed on top of Andile and pretended to have sex with her. He then came to the second complainant and had sex with her after removing her skirt and panty. She said that she did not consent to having sex with the appellant.

[28] The second complainant testified that the appellant thereafter took her and Andile out of the one room house and accompanied them in order for them to go home. When they reached a nearby cemetery, they came across some ladies and the accused ordered them to hide. Once the ladies had passed, the appellant ordered Andile to urinate on the road and threatened to beat her up if she didn't. He thereafter whispered to Andile to ask the complainant to be his girlfriend. The second complainant told Andile and the appellant that she could not accept the appellant as her boyfriend because she did not love him. At that stage, the appellant was threatening to assault them.

[29] The three of them then returned to the one room house and entered the room. At about 01h00 Andile's boyfriend arrived. The second complainant could not hear what the boyfriend and the appellant were talking about, but when they had finished talking, the boyfriend came inside and took Andile away. The appellant then took the second complainant to his parents' place. When they arrived there, they had sex. The second complainant was not dressed because the appellant had ordered her to lie on the bed and had undressed her. She was asked by the court why she allowed the appellant to have sex with her. She said because the appellant threatened her and told her that he used to kill people.

[30] At about 04h00 in the morning the appellant ordered the second complainant to go home. When she arrived home, she found no one. At about 06h00 Andile arrived at the second complainant's home. She told Andile that she had been raped after Andile had left. The two of them then went to Shoe's place. Shoe is a neighbour. The second complainant reported the incident to Shoe. They did not report the matter to the police as they were scared to go alone to the police. They did tell their parents about the incident, but their parents did not take them seriously. The second complainant reported the incident for the first time when Ms. Mashego came to the school to give them lessons. She did not know why her parents did not take the complaint seriously. It was Andile who reported the incident to Ms. Mashego. They were taken from there to the Tonga police station where they made a statement.

[31] The second complainant denied that she was unduly influenced by any person to lay a charge against the appellant. She had been sexually active at the time, and did not know whether she had sustained any injuries.

[32] During cross-examination, the second complainant said that she did not know the difference between being raped and having sex with consent. She didn't know what it meant to say that someone has been raped, but denied that she consented to have sex with the appellant. She was asked why they hid from the ladies at the cemetery. She said that they were afraid of the appellant because he had said that he killed people and were therefore scared to ask the ladies for help. The ladies were not far from them because they could hear them talking. She agreed that if they had screamed, the ladies would've heard them. She was asked why they did not simply just walk home as the appellant was not holding them and did not have a firearm with him. She said that when they wanted to go home at the time they were walking to go and call his girlfriend, the appellant asked them whether they knew him and that they did not know what he had in his pockets. She then said that they were threatened when they arrived at Haffi's shop and found that it was closed.

[33] The second complainant was asked whether she tried to get assistance by using her phone. She said that their phones had already been switched off. They must have switched their phones back on when the appellant went out of the room because the second appellant said that Andile received a call from her home and was asked where they were, to which Andile replied that they were at Thulani Section. Andile was not able to talk further because the airtime of the person who phoned her had run out. The second complainant apparently made no *effort* to use her own cell phone to call for help. The second complainant in fact confirmed that she and Andile switched their phones on when they were inside the room. She was then asked whether their cell phones with switched on for the rest of the night. She said that she switched her phone off until the next morning.

[34] It was put to the second complainant that her story of being raped by the appellant was a fabrication and that she had been influenced by Mr. Xebe. She denied this, and said that Xebe had not even been her teacher during the previous year. She was asked why, after reporting the alleged rape to Shoes, she did not take the matter any further. Her answer was that it was because the appellant promised them that he would kill them.

[35] The evidence of the second complainant's friend, Andile, was that on the day in question she accompanied the second complainant to a shop where they found the appellant, whom she knew, standing with his girlfriend. She said that the appellant's girlfriend then left, whereafter the appellant asked her and the second complainant to accompany him to call another girlfriend. This evidence contradicts the evidence of the second complainant. On the second complainant's evidence, there was no girlfriend present when they met the appellant. She continued to say that when they arrived at the other girlfriend's place, the appellant didn't call her, but said that he would buy them a cold drink at Lusaka section. When they arrived there, the appellant did not call his girlfriend, but instead said that they should go to his parents' place when he would call his younger brother to accompany them to their home. When they arrived at the appellant's place, they did not enter his parents house, but instead he took them to a one room house where he locked them up. They managed to open the door, but when they got out they found the appellant standing outside the door. She said that she then lied to the accused by telling him that her boyfriend had called her and had told her that they should meet at the gate of the cemetery. The appellant then accompanied them to the cemetery, but when her boyfriend was not there, the appellant threatened to beat her up and said that they should return to the one room house. Some elderly people came walking along, and the appellant instructed them to hide, which they did until they had passed. They thereafter went back to the one room house.

[36] When they were inside the room, the appellant told her to tell the second complainant that she should accept him as his boyfriend. The second complainant refused. The appellant then whispered to her, saying that he was not going to have sex with her but that he instead wanted to have sex with the second complainant. He then pretended to have sex with Andile and told her to pretend as if she was crying. He then had sex with the second complainant. He thereafter made them leave the room and took them to another house. This evidence also contradicts the evidence of the second complainant

[37] Andile proceeded to say that when they entered the other house, the appellant locked the door and made them sit while he was drinking alcohol. They sat watching television and at about 02h00 in the morning Andile made a call-back to her boyfriend. The boyfriend did call her back, and she told him that she was at the house next to his

parent's house. The boyfriend arrived and took her away while the second complainant remained. Andile remained at the boyfriend's place until the following morning. She was then afraid to go to her parents' place, and went to the second complainant's place to ask her to accompany her. The second complainant was also afraid and they then decided to ask the neighbour Shoes to accompany them. She said that the second complainant reported to her that after she, Andile, had left with her boyfriend, the appellant had taken her to his parents' place where he had sex with her. They told Shoes everything. Shoes then accompanied them to Andile's place of residence. There her mother asked her where they had been, and they told her everything. The mother then told them to go to the police to report the matter. They did not go because the parents did not have money for transport.

[38] Andile testified that their cell phones were taken from them when they arrived at the cemetery. This evidence again contradicts the evidence of the second complainant about when their cell phones were taken from them by the appellant. She also testified that the second complainant cried during the time of the alleged rape. This was not mentioned by the second complainant herself. Andile further testified that she and the second complainant spent about nine hours in the presence of the appellant.

[39] It was put to Andile in cross-examination that the second complainant had testified that she, Andile, had told Ms. Nonhlanhla Mashego that the second complainant had been raped. Her answer was that she had never spoken to Ms. Mashego. This was yet another contradiction between the evidence of the second complainant and that of Andile. It was further put to her that according to the evidence of the second complainant, she had only been with the second complainant in the one room house, and had said that Andile did not go into the appellant's parents' house. She agreed that she did not go to the appellant's parents' house, but said that she had been taken to two separate houses. The second complainant never mentioned being taken to another house before being taken to the parents' house.

[40] Andile's further evidence in cross-examination was that she had accompanied the appellant voluntarily until the time that she wanted to call her boyfriend when they were at the cemetery. According to her observations, that also applied to the second complainant. That, again, contradicted the evidence of the second complainant.

[41] The trial court referred in its judgment to some of the contradictions between the evidence of the second complainant and that of Andile, but found that these contradictions do not disturb the high quality of the second complainant's evidence. In my respectful view, the learned magistrate erred by not having sufficient regard to all of the contradictions in the second complainant's own evidence and to the contradictions between her evidence and that of Andile to which I have referred. In my view, the extent of all those contradictions is such that the court should not have regarded the evidence of the second complainant and of Andile to be sufficiently reliable to justify conviction of the appellant on counts three and four.

[42] The appellant's appeal against his conviction on counts three and four should therefore be upheld and the convictions set aside.

[43] I accordingly propose that the following order be made:

[a] The appellant's appeal against his conviction on counts one and two is dismissed.

[b] The appellant's appeal against his conviction on counts three and four is upheld and the trial court's order in respect of those counts is set aside and replaced with the following order:

"The accused is found not guilty on counts three and four."

I agree

K. LaM. MANAMELA
ACTING JUDGE OF THE HIGH COURT

It is so ordered

J W LOUW

JUDGE OF THE HIGH COURT.

Appearances:

For the appellant: Adv. R Kriel

Instructed by: P J Lourens Inc

For the respondent: Adv. J J Jacobs

On behalf of the Director of Public Prosecutions