Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 48/2018

In the matter between:

LUCAS HLALELELE GODLA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen J, Williams AJ

Heard: 27 November 2023

The judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **22 December 2023** at 10h00am.

Summary: Criminal Appeal against conviction and sentence on a charge of rape of a 9 year old girl child and a sentence of life imprisonment - approach to evidence of child witnesses – identification of appellant – conflicting versions of State and defence – alibi evidence - appeal against conviction and sentence dismissed.

ORDER

On appeal from: Regional Court Klerksdorp, North West Regional Division, (Regional Magistrate Nzimande sitting as court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

PETERSEN J

Introduction

[1] This appeal comes before the Full Bench as an automatic appeal against conviction and sentence by virtue of the provisions of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA').

[2] The appellant was charged with one count of contravening section 3 read with sections s1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment

Act 32 of 2007 (rape). He is alleged to have unlawfully and intentionally committed an act of sexual penetration with the complainant (IM) on 26 October 2013 at Kanana, North-West Province, by vaginally raping IM with his penis. The charge was further read with section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'). The appellant was convicted on 07 September 2017 and on the same day sentenced to life imprisonment.

The grounds of appeal

[3] The appellant assails the conviction on the following grounds. That the court *a quo* failed to consider contradictions inherent in the state case; by erring in finding that the evidence of the complainant was satisfactory in all material respects when regard is had to contradictions between her evidence and that of her sister, and improbabilities in her version; and failing to consider the contradictions in the evidence of the complainant and her sister and the evidence of their grandmother in respect of the identification of the appellant and where the incident occurred.

[4] The court *a quo* is further criticized for rejecting the alibi evidence adduced by the appellant in circumstances where the evidence of the appellant the other defence witnesses was to the effect that he had been watching soccer on the day of the incident and therefore could not have committed the offence.

[5] *Adv Masike* for the appellant did not persist in the appeal against sentence. The grounds of appeal in any event are general in nature without specificity as to how the court *a quo* erred in finding no substantial and compelling circumstances to deviate from the mandated sentence of life imprisonment.

The evidence for the State

[6] The fact that the 9 year' old IM was raped on 26 October 2013 is not in dispute and is confirmed in the J88 medical report and evidence of Dr Tennebaum. The main issue in the matter was the identity of the perpetrator.

[7] On 26 October 2013 at around 18h00pm, IM, her sister MM, ML (a neighbour of the two girls) and another child were sitting near a streetlight, commonly referred to as an Apollo light close to the home of the two girls. It was dark and the streetlight was on. According to IM and MM, a person, identified by dock identification by the sisters as the appellant, arrived and took them where they were playing at the Apollo light. According to IM she knew the appellant as he used to visit or pass by her parental home. She confirmed that she did not tell the police that she could point out or identify the appellant as the perpetrator. MM reported that she knew the appellant as a person who visited a certain Lucky at her parental home. ML testified that he knew the appellant as one brother Hlalele and he knew him because he used to pass by his residence on the way to school, which was a school different to that attended by the sisters. He too, pointed out the appellant in court by way of dock identification.

[8] ML was more detailed in his evidence about the arrival of the appellant at the Apollo light and the interaction with the appellant. According to ML, the appellant approached them from Lamnedi Street. He stopped and asked IM where her mother was, and IM told her that she was in Jouberton. MM asked the appellant for R1.00. The appellant told her that he did not have loose change

but that he would go to get change. At that stage IM and MM left with the appellant towards Sipho's place whilst ML and the other child, only referred to as Tumi remained behind. IM was carried by the appellant as they left.

[9] According to MM the appellant took them to go buy "SIMBA" chips, although IM made no mention of the chips. At some stage, when they reached a veld, he put IM down, slapped MM on the cheek. MM ran away to her grandmother R[…] S[…] to whom she reported what happened, and specifically told her that it was Hlahlele who was involved. Her grandmother called the police.

[10] The appellant carried IM to a veld or dumping site far from her parental home where he placed her on the ground and removed her panty. He removed his trousers and underpants and raped her once, vaginally with his penis. IM described that he "did terrible things to me, which hurt my private parts." The appellant when done ran away and some unknown young men took her home. Both girls disputed the version of the appellant that he was not involved in the incident as he was drinking at a tavern known as Masaretsi's Tavern.

[11] R[…] S[…], the grandmother of the sisters testified that she was watching television when MM arrived home, running. MM reported to her that she was slapped with an open hand by a man unknown to her, who took IM with him. This man she reported she could point out if she saw him again. She reported the incident to the police. When the police arrived, they left with MM and some members of the community, to the place where MM said the incident occurred, which was said to be near a church, to look for IM. IM was, however, found at a place of a man who called the police on behalf of IM. IM similarly told her that she did not know the man but that she could point him out. ML took herself, IM and MM to identify the appellant and that both girls pointed him out as the perpetrator.

The evidence for the appellant

[12] The version of the appellant was a bare denial of any of the evidence tendered by the State. He denied knowing any of the three children who testified, but admitted to knowing the grandmother of IM and MM. The appellant relied on alibi evidence.

[13] According to the appellant, he watched a soccer match between Kaiser chiefs and Orlando pirates on the day of the alleged incident. The first half of the match he watched at the house of one Masoso. Thereafter he proceeded to Asanda's Place (a Tavern), where he watched the second half of the match between 17:00PM and 18:00PM. From Asanda's Place he proceeded to Masaretsi Tavern. Along the way he met one Jacob and they proceeded together to Masaretsi Tavern. They arrived at the Tavern at some time past 6:00 PM and left at around 9:00 PM to 10:00 PM. Jacob accompanied the appellant until the appellant boarded a taxi. The appellant then proceeded to Asanda's Place. At Asanda's place he met one Ndlela and they proceeded to Pheelo's Place. The appellant remained at Phello's Tavern until 2:00 AM when the Tavern closed.

[14] The appellant was arrested on 30 October 2013. He speculated that one Mrs N[…], the mother of IM and MM must have influenced the children to falsely implicate him as only she was with Mpho when he was pointed out. There was no bad blood between them though. He disputed that IM and MM pointed him out at any stage. The appellant, in respect of his alibi evidence

initially had no intentions of calling any witnesses, but later indicated the was intent on calling several witnesses.

[15] The first two alibi witnesses for the appellant were the sisters Magosi and Martha Mowashetshsi, aged 17 and 23 years old respectively. Their evidence is essentially that the appellant whom they knew as a gardener in the area and were neighbours to, arrived at their residence at 14h00PM on 26 October 2013. He watched the first half of a soccer match which started at around 15h00PM and left for Asanda's Tavern which is about 25 to 30m from their house. Both sisters claimed that the mother of IM and MM threatened them with arrest if they attended court to testify on behalf of the appellant.

[16] Pheello Jemolane testified that he knew the appellant as they resided in the same area around Kanana and that the appellant would normally visit him at his home. On 26 October 2013 he did see the appellant, who visited him at his home, but the appellant left at 10h50AM in the morning. He next saw the appellant at 21h50PM that night when the appellant arrived with one Ndlela by motor vehicle, at his place.

[17] Jacob Molwantwa Motobi testified that he knew the appellant from his youth, as they attended the same school, and he played soccer with the appellant. He came to know about the arrest of the appellant on 30 October 2013. According to Jacob he is a very big soccer fan. On 26 October 2013 at around 17h45, he was watching the highlights of the soccer match between Kaizer Chiefs and Orlando Pirates, when the appellant arrived at his place, which is next to Masaretsi's Tavern. Masaretsi and himself were about to leave for Masaretsi's place when the appellant arrived and joined them. They left Masaretsi Tavern at around 20h15PM in the company of the appellant to board a taxi along the road. The appellant according to him, was in his company until they left at 20H15PM. Under cross examination he testified that the match ended at 15h30PM on 26 October 2013.

[18] Steven Ndlela Ndaba testified that he usually met the appellant at Pheello's Place. He learnt of the arrest of the appellant some time in November or December 2013. He saw the appellant when he was on his way from work on 26 October 2013 at around 18H00 to 19h00PM, heading to Pheello's Place and gave him a lift to Pheello's Place. He left Pheello's shortly thereafter.

[19] This constitutes the factual matrix of the evidence before the court *a quo*.

The test on appeal against conviction

[20] The approach by a court of appeal to the factual and credibility findings of the trial court are trite. A court of appeal will not lightly interfere with such findings as "*the findings of fact of a trial court are limited… In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and it will only be disregarded if the recorded evidence shows them to be clearly wrong."* See *S v Mkohle* 1990 (1) SACR (A) at 100e; *S v Francis* 1991 (1) SACR 198 (A) at 204c-e, *S v Monyane and Others* 2008 (1) SACR 543 at paragraph [15].

The law applicable to onus in a criminal matter, child witnesses, identification and alibi evidence

[21] In *Maila v S* (429/2022) [2023] ZASCA 3 (23 January 2023), Mocumie JA re-stated the principles applicable to the approach of the evidence of a single, child witness as follows:

"[17] The evidence in this case was based on the evidence of a single witness, the complainant. Apart from being a single witness to the act of rape, the complainant was a girl child, aged 9 years at the time of the incident. For many years, the evidence of a child witness, particularly as a single witness, was treated with caution. This was because cases prior to the advent of the Constitution (which provides in s 9 for equality of all before the law) stated *inter alia* that a child witness could be manipulated to falsely implicate a particular person as the perpetrator (thereby substituting the accused person for the real perpetrator). To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, this Court stated in *Woji v Santam Insurance Co Ltd*, that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

'Trustworthiness… depends on factors such as *the child's power of observation*, his power of recollection, and his power of narration on the specific matter to be testified…His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the *capacity of recollection* will depend again on whether he has *sufficient years of discretion "to remember what occurs"* while the *capacity of narration or communication* raises the

question whether the child has the "*capacity to understand the questions put, and to frame and express intelligent answers*."'

[18] This Court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule. It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. 'Satisfactory in all respects' should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person. What this Court in *S v Hadebe* calls the necessity to step back a pace (after a detailed and critical examination of each and every component in the body of evidence), lest one may fail to see the wood for the trees…"

(emphasis added)

See too: *Otto v S* (A858/2014) [2016] ZAGPPHC 605 (19 April 2016), was later confirmed by the Supreme Court of Appeal in *Otto v S* (988/2016) [2017] ZASCA 114; 2019 (3) SA 189 (SCA) (21 September 2017) at paragraphs [17] – [18]; *S v Mahlangu and another* 2011 (2) SACR 164 (SCA) at paragraph [21].

[22] In *Maila*, Mocumie JA, further re-stated the approach to alibi evidence as follows:

"[19] As indicated, in his defence the appellant raised an alibi that he was at work when the complainant was raped. However, this was not put to the witnesses. Nor was it stated in his plea explanation, as the plea tendered on his behalf by his counsel was that of a bare denial.

[20] It is trite that an accused person is entitled to raise any defence, including that of an alibi – that at the time of the commission of the crime, they were not at the scene of the crime but somewhere else. They can also lead evidence of a witness(es) to corroborate them on their whereabouts at the critical time. Nevertheless, it is trite that an accused person who raises the defence is under no duty (as opposed

to that of the State) to prove his defence. If the defence is reasonably possibly true, they are entitled to be discharged and found not guilty.

[21] The only responsibility an accused person bears with regards to their alibi defence is to raise the defence at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defence and bring it to the attention of the court. In appropriate cases, in practice, the prosecution can even withdraw the charge should the alibi defence, after investigations, prove to be solid.

[22] The alibi defence has received the attention of our courts, in particular that of the Constitutional Court in *Thebus v S*, where it is stated:

'… [A] *failure to disclose an alibi timeously* has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in *R v Mashelele*. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

"But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that *the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence*, this does not constitute a misdirection."'

(emphasis added)

[23] The appellant places reliance on the law related to mutually conflicting versions. It is trite that where there are conflicting versions, only one can be true and the other by implication must be false. In such an assessment a court must still consider the evidence in its totality and not the State and defence case individually.

Discussion

Ad conviction

[24] When the four children were found sitting at the Appollo alight around 18h00PM on 26 October 2013, the evidence of ML provides context to what would eventually transpire. According to ML, a person arrived, whom he knew as brother Hlahlele, the appellant. ML further relayed that, the appellant asked IM where her mother was, and that she told him that her mother was in Jouberton. The question about the whereabouts of the mother of IM and MM speaks to familiarity. The answer provided by IM also points to the evil intent which the said person harboured with that question. When it became clear that her mother was in another township and MM asking him for R1.00, he offered to get change.

The familiarity with the said person led the two girls to leave with him to buy chips, with IM even allowing him to carry her. This person said both IM and MM was the appellant, as ML had also confirmed.

[25] ML, a child independent of the family of IM and MM, gave a clear account of how he knew the appellant. In fact, ML was clear in his evidence how he knew the appellant and his evidence of identification cannot be faulted. It was clear in all respects, met only by a bare denial from the appellant. ML's evidence about a conversation between IM, MM and the appellant provides context to why IM and MM would eventually leave with the appellant. Both IM and MM undoubtedly had to know the appellant for them to willingly leave with him. If they did not know him, the conversation testified to by ML, would after all, make no sense.

[26] The rape of IM on 26 October 2013 is common cause and confirmed by medical evidence. Much is made about IM not testifying that the rape occurred at a church and not in a veld and/or dumping site as was testified to by IM. Whatever description was given as to the place where the rape occurred, does not detract from the inescapable and indisputable fact that IM was raped on 26 October 2013. This inconsistency, if it may be called

that, does not affect the credibility of IM nor does it impact the reliability of her evidence on the rape. There can be no dispute that IM was raped.

[27] MM once slapped by the appellant, ran home and immediately reported the ‘snatching’ of her sister IM to her grandmother, who called the police for assistance. IM and MM accompanied by their grandmother and LM pointed out the appellant. His arrest would not have been possible at that time, otherwise. The evidence of IM, MM and ML could only go to the reliability of their identification of the appellant and not their honesty. Once accepted that their evidence is satisfactory in all material respects, including the identification of the appellant, and not on issues of minor inconsistency, then in the absence of the version of the appellant being reasonably possibly true, the appeal against conviction stands to be dismissed.

[28] The version of the appellant, constituting as it does a bare denial, bolstered with alibi evidence is riddled with improbabilities and contradictions, which includes the evidence of some of his alibi witnesses. The appellant at a late stage in the trial elected to call on the evidence of his alibi witnesses, in circumstances where he

initially had no intention of calling any witnesses. As in *Maila supra*, the identity of his alibi witnesses was not revealed until the trial commenced and very far into the trial. None of the witnesses were confronted with the alibi evidence, save for the broad statement that the appellant was watching soccer at the time of the incident. Tellingly, the appellant provided no plea explanation, in which he could have disclosed that the basis of his defence was predicated on alibi evidence.

[29] The appellant testified that he watched the first half of the Kaizer Chiefs and Orlando Pirates soccer match at Masoso's house. Masoso, according to the sisters Mowashetsi, was the nickname of their mother. They confirmed that the appellant watched the first half of the match at their home, which started around 15h00pm. A historical search of the Premier Soccer League records, in fact shows, that the match started at 15h30PM. The Mowashetsi sisters could not say what happened to the appellant after he left for Asanda's Tavern. That the appellant could have watched the first half of the soccer match at the household of the Mowashetsi's is a neutral aspect as that would have transpired before the incident which occurred after 18h00PM in the evening.

[30] Asanda's Tavern was 25-30m from the Mowashetsi homestead. The appellant maintains that he watched the second half of the match at Asanda's Tavern between 17:00PM and 18:00PM. If this evidence is placed in context, the match started at 15h30PM. Ordinarily each half is 45 minutes. The first half would have ended at 16h15PM with a 15-minute break. The second half would have started at 16h30PM and ended at 17h15PM. The appellant logically therefore could not have watched the entire second half at Asanda's Tavern.

[31] The appellant maintains that he left for Masaretsi Tavern at 18h00PM and met Jacob (Mr Motobi) along the way and they proceeded together to Masaretsi Tavern. Jacob Motobi, however, testified that the appellant arrived at his home at around 17h45, as he was watching the highlights of the soccer match between Kaizer Chiefs and Orlando Pirates. According to Mr Motobi the match ended at 15h30PM already, which could not be correct, as the match started at 15h30PM. That he could have been watching highlights of the match is possible, as the match would have ended at 17h15PM.

[32] Masaretsi's Tavern is right next door and Maseretsi was in fact present at Mr Motobi's home. It is improbable on the evidence of the appellant's lifelong friend Mr Motobi, that the appellant met

him along the way to Masaretsi's Tavern. The two versions are clearly contradictory to this point.

[33] The appellant maintains that he left Masaretsi's Tavern at 20h15PM with Mr Motobi. Mr Motobi, however, claims that they left much later between 21h00PM and 22h00PM. The issue of time and the appellant being in the company of Mr Motobi is therefore clearly contrived, insofar as Mr Motobi's evidence contradicts that of the appellant.

[34] The appellant maintains that he left with a taxi to Asanda's Place where he met one Ndlela and that they proceeded to Pheelo's Place where they remained until 2:00 AM when the Tavern closed. Steven Ndlela Ndaba (Ndlela), however, testified that he whilst he usually met the appellant at Pheello's Place, he saw the appellant heading to Pheello's Place between 18H00PM and 19h00PM on 26 October 2013, gave him a lift to Pheello's Place and left shortly thereafter. Mr Ndaba gave no evidence of being with the appellant at Pheello's Place from after 21h00PM on 26 October 2013 until 02h00AM the following morning, as the appellant testified. Mr Ndaba's evidence contradicts that of the appellant and Mr Mothobi materially as to where the appellant was between 18h00PM and 19h00PM on 26 October 2013, as

the appellant and Mr Mothobi claim to have been in each other's company at Masereti's Place at that time. Mr Ndaba's evidence also contradicts the evidence of the appellant that he was in his company after 21h00PM on 26 October 2013 until 02h00AM the following morning.

[35] The acceptance of the appellant's evidence, when weighed against that of Mr Mothobi and vice versa; and when weighed against the evidence of Mr Ndaba and vice versa, and similarly with Mr Mothobi and Mr Ndaba's evidence, leads to the ineluctable deduction that the acceptance of the evidence of the one must by necessary implication lead to the rejection of the evidence of the other.

[36] No material part of the evidence of the appellant or Messrs Mothobi and Ndaba could possibly have been believed by the court *a quo*. The evidence of the Mowashetsi sisters also provides no corroboration for the whereabouts of the appellant at the time of the rape.

[37] In the final analysis, due regard being had to *Maila* and the cases referred to therein, the court *a quo* was correct in its acceptance

of the evidence of IM, MM, ML, which was satisfactory in all material respects, along with the incontrovertible medical evidence confirming the sexual violation/rape of IM and the immediate first report to RS. This, notwithstanding the inconsistencies in the evidence which were immaterial to the proof of the charge of rape.

[38] The version of the appellant being a bare denial, not finding corroboration through the alibi evidence, when weighed with the evidence as whole and "taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.', the finding of the court *a quo* that the guilt of the appellant was proven beyond a reasonable doubt cannot be faulted. The appeal against the conviction of the appellant must accordingly fail.

Ad sentence

[39] As indicated *supra* no reasons have been advanced on behalf of the appellant on sentence in this appeal, with the acceptance that the sentence of life imprisonment was merited.

[40] There is in fact no merit in the appeal against sentence. The appellant was not a first offender and in fact had, amongst others, a previous conviction for rape, on which he was out on parole at the time of the commission of this offence. On his version, in addition to the rape, he was in all probability in violation of his parole conditions, visiting drinking establishments and remaining from home until the early hours of the morning. I can do no better than echo what was said in *Maila* at paragraphs [40] –[60] regarding sentencing in matters of this nature.

Order

[41] In the result, the following order is made:

The appeal against conviction and sentence is dismissed.

_____

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

_____

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the Appellant: Adv T Masike

Instructed by: Acting Pro Deo for the Appellant

North-West Bar Association

MAHIKENG

For the Respondent: Adv K Mampo

Instructed by: The Director of Public Prosecutions, Mahikeng
Mega City Complex
East Gallery
3139 Sekame Road
MMABATHO