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 21/2018

In the matter between:

LIMITED KAMONA BANDA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen J, Williams AJ

Heard: 29 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 **21 December 2023** at 14h00pm.

Summary: Criminal Appeal against conviction on a charge of rape – complainant, a girl aged 13 years –– absence of injuries, absence of report to doctor by child of previous rape by the appellant and evidence not being satisfactory in all material respects raised as grounds of appeal – single, child witness – cautionary approach re-stated – evidence of child was satisfactory in all material respects - appeal against conviction dismissed.

ORDER

On appeal from: Regional Court Mankwe, North-West Regional Division, (Regional Magistrate Pako sitting as court of first instance):

The appeal against conviction is dismissed.

JUDGMENT

PETERSEN J

Introduction

[1] This is an appeal against conviction with leave of the trial court (court *a quo*). Leave to appeal against sentence was refused by the court *a quo* and not pursued further on petition.

[2] The appellant was charged with one count of contravening section 3 read with ss 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal

Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape). The appellant is alleged to have unlawfully and intentionally committed an act of sexual penetration with the complainant (LS) on 13 April 2012 at Ledig, North-West Province, by vaginally raping her 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 29 October 2014 and on the same day sentenced to twenty (20) years imprisonment, as deviation from life imprisonment.

The grounds of appeal

[3] The appellant assails the conviction on the basis that the doctor is found no visible vaginal injuries; that the evidence of the complainant was not satisfactory in all material respects and that the complainant failed to inform the doctor that she was raped twice.

Background facts

[4] The complainant (LS) was 13 years old at the time of the incident on 13 April 2012. The appellant was her grandfather. On 13 April 2012 she remained home and did not attend school, having come

down with the flu. Her grandmother left for Sun Village at around 10h00am. The appellant arrived home and enquired about her not attending school. She explained to him that she come down with the flu. The appellant gave her R10.00 and sent her to buy a Stoney Ginger Beer ('Stoney'), which she was to boil and drink as medication. She left to buy the Stoney and upon returning proceeded to her bedroom.

[5] Around 13h00pm, the appellant came to her room, poured a glass of Stoney, and returned to his bedroom. The appellant thereafter returned to her bedroom. He got onto the bed where he covered her mouth to prevent her from screaming. He removed her pants and panty and proceeded to penetrate her vaginally with his penis without using a condom. When done, the appellant dressed himself and returned to his bedroom.

[6] LS, in turn, dressed herself and left for her aunt, G[…] S[…], who happened to reside in a neighboring house. Upon arrival at her aunt's home, she was crying, and her eyes were red. Upon initial enquiry from her aunt why her eyes were red, she told her that was nothing. When her aunt intimated that she did not believe her, LS reported that the appellant raped her. Her aunt enquired about the whereabouts of the appellant, who was said to be busy in his

garden. Ms S[…] called for assistance from some people and contacted LS mother to inform her about the incident. Whilst at her aunt's place the appellant fled with people giving chase to him. The group of people later returned with the appellant, having assaulted him, and placed him in the back of a police van. Ms S[…] confirmed the report made to her by LS.

[7] LS was taken to the hospital where she was examined by a doctor and later, furnished a statement at the police station. According to LS it was not the first time the appellant raped her. She explained that, on the first occasion she did not report the rape as the appellant threatened to kill her, her siblings and her mother if she said anything.

[8] LS was aware that some of her mother's family members *"did not want"* the appellant, implying that they had issues with him. She, however, did not know if that animosity included her grandmother, who was in a relationship with the appellant.

[9] The version of the appellant was a bare denial, predicated on a general assertion that LS was used by her family to falsely implicate him in the rape. This he maintained they did, as they were not in favour of his relationship with her grandmother; and

because he was a foreign national. Both LS and her aunt disputed this version.

[10] Save for testifying about the age of LS, her mother confirmed that some of the family members had issues with the appellant, but that herself and LS lived with her mother, LS grandmother and the appellant, and they had no issues with him. Ironically, the appellant agreed with the latter evidence.

[11] The J88 medical report was admitted by consent. The doctor who examined LS on 13 April 2012 at 17h05pm, Dr Kerena Gengan, noted the following gynecological findings. The hymen was absent and there was a profuse white discharge in the vagina which was also found on the cervix. Dr Gengan opined as a conclusion that LS was possibly penetrated vaginally with a blunt object.

[12] As indicated above from the version of the appellant, which he also testified to, he believed that LS was used to falsely implicate him in the rape.

The test on appeal against conviction

[13] 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].

Discussion

[14] The credibility of LS both as a child witness and a single witness to the rape is assailed by the appellant. It is trite that in terms of section 208 of the CPA '*An accused may be convicted of any offence on the single evidence of any competent witness.'* LS was both a single witness and a child witness and a cautionary appraoch was called for in the evaluation of her evidence.

[15] 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].

[16] The contention that LS evidence was not satisfactory in all material respects is based on two contentions, that was put to her repeatedly in cross examination at the trial. Firstly, that she was not suffering from the flu, had not told the doctor about her having the flu and that she was therefore not truthful to the doctor. Secondly, that she failed to tell the doctor that she had been raped previously by the appellant.

[17] The first contention does not constitute an inconsistency in the evidence of LS. That she had the flu was confirmed in evidence by her mother. The fact that she did not tell the doctor about the

previous rape does not avail the appellant, as the medical evidence was demonstrative of the absence of a hymen. Further, the medical evidence overwhelmingly demonstrated a profuse white discharge in the vagina which was also found on the cervix. The doctor opined that the findings were consistent with penetration by a blunt object. That LS was raped was beyond dispute. All that remained was to consider who the perpetrator was and, in that regard, LS was clear, it was the appellant.

[18] The version of the appellant that LS was used to falsely implicate him amounts to nothing more than speculative hypothesis, in the face of evidence from LS which rests on a solid foundation. The account that she was raped by the appellant was confirmed by her aunt. Her aunt provided the requisite consistency as a first report, which report was made immediately after the rape. LS mother further confirmed that there were no issues with the appellant in the household they shared with him and her mother (LS grandmother).

[19] The conviction of the appellant by the court *a quo* accordingly cannot be faulted, and the appeal against conviction must accordingly fail.

Order

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

The appeal against conviction is dismissed.

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A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

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Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Appearances:

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