

**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/ **Not Reportable**

Case no: CA & R 54/2024

In the matter between:

VINCENT EULDRED VAN WYK

Appellant

and

THE STATE

Respondent

Neutral citation: *Van Wyk v The State* (CA & 54/2024)

Coram: Tlaletsi JP et Tyuthuza AJ.

Heard: 01 December 2025.

Delivered: 08 May 2026.

Summary: *Criminal Law – Appeal against convictions – Charges of rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – Assault with the intent to do grievous bodily harm and kidnapping – s 51(1) of the Criminal Law Amendment Act 105 of 1997 incorrectly applied – Misdirection resulted in conviction being considered afresh.*

ORDER

1. The appeal against the conviction in respect of count 1 is upheld.
2. The conviction on count 1 is set aside and replaced with the following:

‘The accused is found guilty of the offence of rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997’.
3. The appeal against the conviction in respect of counts 2 and 3 is dismissed.
4. The matter is remitted to the court *a quo* for reconsideration of the sentence to be imposed on counts 1, 2 and 3.

JUDGMENT

Tyuthuza AJ

Introduction:

- [1] The appellant, Mr Vincent Euldred Van Wyk, was charged with three counts, namely: (a) contravening the provisions of section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹, read with Schedule 2 of the Criminal Law

¹ 32 of 2007.

Amendment Act² ("CLAA"); (b) kidnapping and; (c) assault with the intent to do grievous bodily harm or inflicting a dangerous wound read with the provisions of section 266 and 267 of the Criminal Procedure Act³ ("CPA").

- [2] The appellant was legally represented for the duration of the trial. The charge sheet reads as follows in relevant parts:

"COUNT 1

RAPE

THAT the accused is/are guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 - Rape (read with the provisions of Sections 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended and sections 265 and 261/51/77)

IN THAT on or about **16 June 2020** and at or near Diamond Park in the Regional Division of the Northern Cape, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant by penetrating her vagina with his penis and having sexual intercourse with her, without the consent of the said complainant.

*Section 51(1) and part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that: rape involving the infliction of grievous bodily harm.

COUNT 2

KIDNAPPING

THAT the accused is/are guilty of the crime of Kidnapping

IN THAT on or about **16 June 2020** and at or near Diamond Park Kimberley, in the Regional Division of Northern Cape, the accused did unlawfully and intentionally deprive the complainant of her freedom of movement by means of grabbing her and dragging her to a shack and or refusing her to leave without the said complainant's consent.

² 105 of 1997.

³ 51 of 1977.

COUNT 3ASSUALT WITH THE INTENT TO DO GRIEVOUS BODILY HARM OR INFLICTING DANGEROUS WOUND

THAT the accused is/are accused of the offence of assault with the intent to do grievous bodily or inflicting dangerous wound (read with the provisions of Section 266 AND 267 of the Criminal Procedure Act, 1977 (Act 51 of 1977))

In that on or about the 16th June 2020 and at or near Diamond Park Kimberley, in the regional district of Northern Cape, the accused did unlawfully and intentionally assault one the complainant by hitting the complainant with closed fist against the nose, slapped the complainant through the face, through the complainant on the ground and tramped the complainant with his tekkie against her neck with the intent to cause him/her grievous bodily harm OR inflicting him/her dangerous wound." (*Sic.*)

[3] The appellant pleaded not guilty to all three counts levelled against him, and on 28 July 2023, he was found guilty of all three charges. All three counts were taken as one for purposes of sentence, and on 28 August 2023, the appellant was sentenced to twenty years' imprisonment.

[4] The appellant was granted leave to appeal, on petition to the Judge President, against his convictions.

[5] The appellant's attack on the convictions is that the trial court erred:

5.1. In finding that the state had proved all three counts beyond a reasonable doubt;

5.2. In accepting the evidence of the complainant when she had contradicted herself in several material aspects;

5.3. In not attaching sufficient weight to the contradictions between the complainant and the other two state witnesses;

5.4. In finding that the J88 corroborated the complainant's version regarding the assault and the sexual penetration; and

5.5. In rejecting the version of the appellant.

[6] At the hearing, the parties were requested to file supplementary heads of argument in regard to:

6.1. Whether the court of appeal can interfere with the conviction on count 1 of rape and substitute the finding that the offence falls under section 51(1) of the CLAA with a finding that it falls under section 51(2), based on the evidence.

6.2. What gives the court of appeal jurisdiction to interfere with the sentence, if it does interfere with the conviction?

6.3. Whether the court of appeal is at large to impose a sentence, or whether the matter should be remitted to the trial court for sentencing?

Evidence before the trial court:

State's evidence

[7] The state called four witnesses: the complainant, the complainant's mother (Mrs R[...] M[...]), the complainant's friend (Ms L[...] L[...]), and a medical doctor who examined the complainant (Dr Mulomba Olivier Illunga). The trial court dealt extensively with the evidence of all four witnesses, and it serves no purpose to regurgitate it. Each of these witnesses' evidence shall therefore be discussed to the extent that is necessary for the determination of the issues on this appeal.

[8] The complainant testified that, whilst she was waiting outside of L[...]’s aunt’s house, the appellant came towards her and put his arm around her neck. L[...] came out and took his arm off the complainant’s neck, and the appellant told L[...] that she is a snitch. L[...] returned to the house and left the complainant and the appellant outside. He again put his right arm around her neck, tightened his grip, and tried to pull her. She struggled with him to remove his arm from her neck. She tried to scream, but he put his hand over her mouth.

- [9] The appellant pulled the complainant through the graveyard to a shanty, kicked open the door, and threw her inside. She got up, and he came inside and closed the door. She opened the door and ran out, but fell outside the shanty. He came out and picked her up and pulled her back into the shanty, threw her on the bed, got on top of her, but she kicked him off onto the couch. She went towards the door again. She wanted to open the door, but he had closed it with a padlock. He pulled her to the ground by her hair. He stomped on her neck with his sneaker; she pleaded with him to stop. She asked him to take her home, but he refused.
- [10] The complainant proceeded to testify that the appellant then threw her on the bed, undid her blue jeans button, pulled off her jeans and panties, forced her legs open and put his penis into her vagina. She tried to push him off, but he was too strong. She cried and waited for him to finish. After he finished, she asked him to let her go home. He hit her with his right hand on her nose, and it started bleeding. She testified that she sustained injuries to her ankle and knee/leg when she fell outside the shanty when she attempted to run away before being brought back into the shanty by the appellant.
- [11] L[...], who was with the complainant on the day in question, testified that when she and the complainant were sitting together hours before the incident, the complainant was okay: not bleeding, her hair intact, and nothing wrong with her. She further testified that the complainant arrived at her (L[...]'s) house the next morning, looking scared, her clothes full of blood. She was walking as though she were a cripple, and her hair had been pulled out. The blood was from an open wound on her foot. L[...] testified that the appellant had come to the complainant's home on that morning, where he apologised for what he had done and asked the people at the house not to open a case against him. He also offered to pay for the medical expenses/a doctor.
- [12] Mrs M[...] testified that there was nothing wrong with the complainant in the evening when the complainant left home. It was Mrs M[...]’s evidence that the following morning, she saw the complainant struggling to walk properly as though she were crippled. She saw that the complainant was full of blood and that her knee was injured. She also testified that the appellant had said he had

done nothing to the complainant, that he apologised, and that he had offered to pay the complainant's medical fees.

- [13] Dr Ilunga examined the complainant on 18 June 2020 at 20:42 and completed a J88 medical report, which was handed in as evidence. His clinical findings reflect the following details with respect to the complainant: left arm bruises and swelling, right flank swelling, and right foot abrasions. He further reported that the complainant's bruises were caused by a blunt object and were in keeping with the patient's story. He reported that the bottom part of the complainant's vagina had bruises and some contact bleeding, and that there was a 0.5mm tear on the posterior wall. He testified that the tear was fresh and still bleeding, and further that he got the impression that the injury was caused by an external blunt force.

Appellant's evidence

- [14] The appellant was the only witness for the defence in the court *a quo*. The appellant, in essence, denied raping the complainant. His evidence portrays the sexual intercourse as a consensual encounter between two people in a relationship. He testified that they had a beautiful, open, but secret relationship. He testified in cross-examination that it was their first sexual encounter since they started seeing each other in February 2020, and that they never had sexual intercourse before because he would be drunk. He testified that on the day in question, he had been drinking since the morning and that he was drunk but not drunk to the extent that he would forget what happened.
- [15] His testimony details the incident as follows. The appellant was on his way to see a friend when he saw the complainant, his girlfriend, standing on the street. He approached her, put his arm around her neck, and she did not have a problem with it. Whilst they were still standing, the complainant's friend, L[...], came and she removed his arm from the complainant. The appellant again put his arm around the neck of the complainant, and L[...] left them and went back into the yard. The complainant agreed to leave with him, and as they were walking, his right shoelace became loose. She stepped on it, and as

he tried to move his right leg, he accidentally kicked her, and they fell to the ground. They stood up, dusted themselves off and then continued walking.

- [16] They arrived at the shack, he unlocked the door, he entered first, and she followed him. He then closed the door but did not lock it. He sat on the couch, the complainant came to him, stood between his legs, and they started kissing. They moved to the bed, continued to kiss and undressed themselves. They continued to kiss and eventually had sexual intercourse. They had a long session of sexual intercourse, and thereafter both lay on their back, tired. The complainant informed him that she wanted to pee, and he told her to go through the door and pee there, and if anyone tried to attack her, she should call him. The complainant instead peed in the shack, which he opposed. She returned to the bed, where he allowed her to rest her head on the right side of his chest. They cuddled, she asked if they could leave, and he said they could relax a little bit more. They fell asleep and woke up at quarter past six in the morning. They got dressed and left the shack.

Analysis:

Conviction on count 1

- [17] As alluded to above, the appellant was charged with rape read with the provisions of section 51(1), thus falling under Part I of Schedule 2, and a minimum sentence of life imprisonment must be imposed unless the court is satisfied that substantial and compelling circumstances justify the imposition of a lesser sentence of imprisonment.
- [18] The appellant contends that the court *a quo* misdirected itself in convicting him in respect of rape, read with the provisions of section 51(1), because the state failed to prove that grievous bodily harm was inflicted during the rape. Thus, the conviction must be set aside.
- [19] The state conceded that the court *a quo* had no evidence before it to show that the rape involved the infliction of serious bodily harm, and thus had erred in finding that the rape resorted under section 51(1) of the CLAA. The state

further submitted that the appellant was, in any event, convicted on count 3, namely, assault with intent to do grievous bodily harm.

- [20] It is trite that a court of appeal may only interfere with the trial court's findings if there was a clear misdirection on the part of the trial court.⁴ It is accepted that a trial court is best placed in a position to make such findings, and it should not be interfered with unless it is found that the trial court's assessment of the evidence was clearly wrong.⁵
- [21] In the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that the findings are clearly incorrect.⁶
- [22] The complainant was a single witness implicating the appellant in the rape. Therefore, her evidence called for a cautionary approach before it could be accepted. The court is entitled to convict on the evidence of a single witness if it is satisfied beyond a reasonable doubt that such evidence is true⁷ or that such evidence is substantially satisfactory in every material respect, or if there is corroboration.⁸ The court will weigh that evidence, consider its merits and demerits and, having done so, decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the evidence, it is satisfied that the truth has been told.⁹
- [23] From the record, it is evident that the court *a quo* was alive to this approach when analysing the complainant's evidence. The court *a quo* found that certain omissions existed in the complainant's testimony, but she made no attempt to cover up or alter her testimony to conceal them. The court *a quo* found that her version remained consistent with the version she presented in

⁴ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

⁵ In *S v Francis* 1991 (1) SACR 198 A at 204E the Court held:

"Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony. (*S v Robinson and Others* 1968 (1) SA 666 (A) at 675G-H)."

⁶ See *S v Jackson* 1998 (1) SACR 470 (SCA) at 473H.

⁷ *R v Abdoorham* 1954 (3) SA 163 (N) at 165E.

⁸ *S v Mahlangu and Another* 2011 (2) SACR 164 (SCA) para 21.

⁹ *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.

chief. The court *a quo* did not find that her version was contradictory, improbable or inconsistent.

- [24] The court *a quo* found the state witnesses to be impressive. Despite the contradictions in their testimonies, it found them immaterial. It found that the three witnesses corroborated each other's evidence, especially in relation to the aspects of the complainant's evidence that were unsatisfactory. The court *a quo* found that the appellant was not a good witness, that he was elusive and that his version of events was perforated with contradictions, inconsistencies, improbabilities and inherent improbabilities.
- [25] The evidence before the court on the nature and extent of the injuries in respect of the rape is the medical report completed by Dr Ilunga. The appellant did not dispute the correctness thereof. The tears and bleeding on the posterior wall are indicative of forced sexual penetration. However, these do not establish the infliction of grievous bodily harm; they are injuries inherent in this heinous crime of rape due to forced penetration. The other evidence surrounding the incident of rape relates to the stamping on the complainant's neck and the pulling of her hair by the appellant. The medical report does not reflect any injuries to the complainant's neck. Further, neither L[...] nor Mrs M[...] testified about injury(s) on the complainant's neck. Resultantly, the court cannot assess the seriousness of the neck injury(s), even if it is accepted, as the trial court did, that the appellant stamped on the complainant's neck. Resultantly, the stamping on the neck cannot be found to establish grievous bodily harm in relation to the rape.
- [26] Similarly, while it is the complainant's evidence that the appellant pulled her hair, it is also the complainant's evidence that the appellant had pulled her hair when he was kidnapping her. One cannot necessarily tell how much hair-pulling is attributed to the rape incident and how much is attributed to the kidnapping. It is so that there was continuity in the commission of the offences, and it becomes difficult to attach certain injuries to a specific offence. Nonetheless, even if one accepts, as the trial court did, that there was hair-

pulling during rape as well, it would be a stretch to hold that this, on its own, establishes grievous bodily harm in relation to the rape.¹⁰

- [27] On a consideration of the evidence, the injuries sustained by the complainant were not so serious as to warrant and justify a conviction in circumstances described in section 51(1) of the CLAA. Thus, the court *a quo* materially erred in convicting the appellant in terms of section 51(1), and the appellant should therefore be convicted of rape in terms of section 51(2) of the CLAA.

Conviction on counts 2 and 3

- [28] On acceptance of the complainant's evidence, it is clear that she was forced to leave with the appellant. She struggled with him to release her and also tried to scream, but he covered her mouth. She was dragged to the shanty where she was raped. She tried to run from the shanty on more than one occasion but was stopped from doing so by the appellant, who eventually locked the shanty. She asked the appellant to take her home, but he did not. She was kept in the shanty against her consent. The above facts show that the appellant unlawfully and intentionally deprived the complainant of her liberty.
- [29] Regarding the charge of assault with intent to do grievous bodily harm, the complainant testified that she was assaulted by the appellant. He denied having assaulted the complainant and that she sustained any injuries. On the other hand, the evidence from L[...] and Mrs M[...] regarding the complainant's condition the morning after the incident supports the complainant's account of her injuries. Her version of injuries is further corroborated by the medical

¹⁰ See for example *S v Herman* 2010 (2) SACR 263 (GSJ) where the appellant had been convicted *inter alia* of assault with the intent to cause grievous bodily harm on a child who had sustained fractured ribs. On appeal, the conviction was set aside because there was a possibility that the fracture could have been sustained at another time. The Court held in paragraph 18 that:

"Nevertheless, there was evidence that the child had fallen from a wall that day while playing. It is true that Rafika Hussein noticed Tamsin's discomfort *before* her fall from the wall, but it does not follow that the discomfort necessarily related to the fractured ribs, although, of course, it is probable. Therefore, while the fall from the wall does not appear to have caused the fractured ribs, I do not think this can be excluded. Furthermore, the child was in the company of many different people on that festive day and seemingly very active. One simply cannot be sufficiently certain precisely how or when the incident causing the fracture of the ribs occurred. The appellant must receive the benefit of the doubt."

report, which shows left arm bruises and swelling, right flank swelling, and right foot abrasions.

- [30] The conviction on kidnapping and assault with intent to do grievous bodily harm is supported by the evidence and thus in accordance with justice. As such, the court *a quo* did not misdirect itself in convicting the appellant, and the conviction must stand. As such, the appeal as regards the convictions on counts 2 and 3 must be dismissed.

Whether this Court should impose sentence?

- [31] It is a trite principle of our criminal jurisprudence that sentencing discretion generally lies pre-eminently in the trial court and must be exercised judiciously. In *S v Boogards*¹¹, the Court stated the following:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.”

- [32] In *S v Malgas*¹², the Supreme Court of Appeal held that:

“ . . . A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.”

- [33] A no-brainer on when an appeal court necessarily interferes with the sentence imposed by a trial court, irrespective of whether there was an appeal against

¹¹ 2013 (1) SACR 1 (CC) para 41.

¹² 2001 (1) SACR 469 (SCA) para 12.

sentence, is where a conviction is set aside and the result is an acquittal.¹³ However, it is different in that, as *in casu*, the setting aside of a conviction is accompanied by a substitution so that the result is not an acquittal but a conviction on another included offence. In the latter instances, some courts have, for various reasons- including the interests of justice in light of certain delays, stepped in and imposed the sentence,¹⁴ while others have remitted the matter to the trial court for sentencing.¹⁵

- [34] Accordingly, this Court, having substituted one of the convictions which may affect the sentence, can consider the sentence afresh under certain circumstances, despite the absence of an appeal against the sentence. However, *in casu*, there is no reason not to afford the trial court the opportunity to reconsider the sentence. Consequently, the matter ought to be remitted to the court *a quo* for reconsideration of the sentence in light of the conviction of rape under section 51(2). We have not been provided with information as to whether the appellant has commenced serving the impugned sentence. If that is the case, the trial court should take the period already into account when considering the appropriate sentence.
- [35] Despite having convicted the appellant in terms of section 51(1), the court *a quo* did not impose life imprisonment but instead imposed a sentence of twenty years' imprisonment all the counts taken together. This is one of those matters where a globular sentence creates a problem for an appellate court in dealing with a sentence. In the supplementary papers, both parties took issue with the competency of the globular sentence.¹⁶ Given that there is no appeal against the sentence, and the approach we adopt *in casu*, we shall say no more about the competency of the sentence. It suffices to say that the sentence remains *prima facie* tainted for having been based on an incorrect conviction in relation to one of the three counts whose impact on the sentence

¹³ See for example *S v Jackson* 1963 (2) SA 626 (A); *S v Musiker* 2013 (1) SACR 517 (SCA); *S v Makhalima* 2018 (1) SACR 625 (ECG); *S v Rantlai* 2018 (1) SACR 1 (SCA) para 16.

¹⁴ See for example *S v Vries* 2019 JDR 1835 (FB) paras 64-65; *S v Gabela* 2020 JDR 2281 (GJ) paras 45-46.

¹⁵ See for example *S v Herman* (*Supra* fn 13) paras 21-26.

¹⁶ The argument is that the trial court exceeded the sentencing jurisdiction of 15 years for assault with intent to do grievous bodily harm and kidnapping.

is not negligible.¹⁷ This is exacerbated by the very globular sentence because it is indeed difficult to apportion the sentence into individual counts.¹⁸

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

1. The appeal against the conviction in respect of count 1 is upheld.
2. The conviction on count 1 is set aside and replaced with the following:

‘The accused is found guilty of the offence of rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997’.

3. The appeal against the conviction in respect of counts 2 and 3 is dismissed.
4. The matter is remitted to the court *a quo* for reconsideration of the sentence to be imposed on counts 1, 2 and 3.

T TYUTHUZA
ACTING JUDGE
NORTHERN CAPE DIVISION

I agree

¹⁷ *Ibid.* See further *D v S* (769/2013) [2014] ZASCA 142 (26 September 2014) para 14; *Magopa v S* (CA 24/2019) [2024] ZANWHC 18 (8 February 2024) para 14.

¹⁸ See for example *S v Rantlai* (*Supra* fn 20) para 14.

LP TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

Appearances

For the Appellant: Mr H Steynberg
On instructions of: Legal-Aid South Africa

For the Respondent: Adv C Jansen
On instructions of: The Director of Public Prosecutions