THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1105/2023

and 885/2024

In the matter between:

WILLEM ANDRIES VAN JAARSVELD **APPELLANT**

and

THE STATE

And

HUGO RAS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Van Jaarsveld v The State* (1105/2023) and *Ras v The State* (885/2024) [2025] ZASCA 92 (20 June 2025)

Coram: MATOJANE, UNTERHALTER and BAARTMAN JJA and TOLMAY and MOLITSOANE AJJA

Heard: 26 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal

website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 20 June 2025.

Summary: Criminal Procedure Act 51 of 1977 (the Act) – section 298 of the Act does not grant the power to alter a verdict once it has been pronounced – sentence – whether the trial court correctly sentenced the appellants and whether the sentences imposed are just and in accordance with the law.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Millar J and Holland-Muter J, dismissing a petition in terms of s 309C of the Criminal Procedure Act 51 of 1977:

In respect of Willem Andries van Jaarsveld (Case no. 1105/2023)

1 The appeal against conviction and sentence in respect of count 2 is upheld.

2 The conviction and sentence imposed by the Regional Magistrate are set aside and replaced as follows:

> '1 For count 1 (fraud), the sentence of eight years of imprisonment is set aside and replaced with a sentence of four years' imprisonment.
>
> 2 For counts 2 (forgery) the conviction and sentence are set aside.
>
> 3 For count 5, the sentence of six years of imprisonment is set aside and replaced with a sentence of four years' imprisonment to run concurrently with the sentence imposed in respect of count 1. The sentences are antedated to 18 May 2021.
>
> 4 The effective sentence is four years' imprisonment.'

In respect of Hugo Ras (Case no. 885/2024)

The appeal against sentence is upheld.

1 The order of the Regional Magistrate as to sentence is set aside and replaced as follows:

> '1 For count 1 (fraud), the sentence of eight years' imprisonment is set aside and replaced with four years' imprisonment.
>
> 2 For count 5, the sentence of six years' imprisonment is set aside and replaced with three years' imprisonment to run concurrently with the sentence on count 1.
>
> 3 For count 6, the sentence of 15 years' imprisonment is set aside and replaced with seven years' imprisonment, wholly suspended for a period of five

years on condition that the appellant is not convicted of a contravention of the Firearms Control Act 60 of 2000.

4 For count 7 (possession of ammunition), one year imprisonment to run concurrently with the sentence imposed on count 6. The sentences are antedated to 21 May 2021.

5 The effective sentence is four years' imprisonment.'

JUDGMENT

Matojane JA (Unterhalter and Baartman JJA and Tolmay and Molitsoane AJJA concurring)

Introduction

[1] This matter came before this Court on 26 May 2025. At the conclusion of the arguments, the order below was granted and now the Court explains its rationale:

'**IT IS ORDERED THAT:**

The appeal is upheld as follows:

Counts 3 and 4 forgery and uttering is set aside.

In respect of count 1(fraud) the sentence of 8 years imprisonment is set aside and replaced with 4 years imprisonment.

In respect of count 5, the sentence of 6 years imprisonment is set aside and replaced with 4 years imprisonment to run concurrently with the sentence imposed in respect of count 1. The sentence is antedated to 18 May 2021.

In respect Hugo Ras

The appeal against sentence is upheld as follows:

Count 1, the sentence of 8 years imprisonment is set aside and replaced with 4 years imprisonment.

In respect of count 5, the sentence of 6 years imprisonment is set aside and replaced with 3 years imprisonment to run concurrently with the sentence on count 1.

In respect of count 6, the sentence of 15 years is set aside and replaced with 7 years imprisonment wholly suspended for a period of 5 years on condition that the appellant is not again convicted of a contravention of the Firearm's Control Act 60 of 2000.

In respect of count 7 (possession of a firearm), 1 year imprisonment to run concurrently with the sentence imposed on count 6. The sentence is antedated to 21 May 2021.
Effective sentence in respect of both appellants is 4 years imprisonment.'

[2] This appeal, brought with the special leave of this Court, is directed against the judgment of the Gauteng Division of the High Court, Pretoria (the high court), which dismissed a petition, wherein the Regional Court for the Regional Division of Gauteng, Pretoria North on 5 February 2019 convicted Mr Willem Andries van Jaarsveld (Mr van Jaarsveld) and Mr Hugo Ras (Mr Ras), on various counts. Mr van Jaarsveld was convicted on one count of fraud (count 1), one count of forgery (count 2) and one count of theft (count 5). The appeal also challenges the sentences imposed by the trial court: six years imprisonment for fraud and uttering, one year direct imprisonment for forgery, and five years' imprisonment for theft, resulting in an effective sentence of twelve years' direct imprisonment.

[3] Mr Ras was convicted of fraud (count 1), theft (count 5), contravention of s 3(1) of the Firearms Control Act 60 of 2000 (the Firearms Control Act), read with the provisions of s 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 (the CLAA) (count 6), and contravention of s 90 of the Firearms Control Act (count 7). The trial court sentenced Mr Ras to eight years' direct imprisonment on count 1, six years' direct imprisonment on count 5, fifteen years' direct imprisonment on count 6 in terms of s 51(2)*(a)*(i) of the CLAA, and one year's direct imprisonment on count 7.

Background to the charges

[4] The charges against the appellants arose from events that occurred on or about 3 September 2011. The State alleged that Mr van Jaarsveld, acting in concert with his co-accused, Mr Ras, falsely represented to Mr Michael Lester Bolhuis (Mr Bolhuis) that they were the lawful owners of a boat and possessed the mandate to sell it, thereby inducing Mr Bolhuis to part with R200 000. The State further alleged that Mr van Jaarsveld forged a receipt to substantiate this misrepresentation and ultimately

stole the boat, which was the property of Mr Joseph Albertus Conroy du Plessis (Mr du Plessis).

Trial proceedings

[5] At trial, both appellants pleaded not guilty and elected not to provide a plea explanation. The State called several witnesses, including the complainants, Mr Bolhuis and Mr du Plessis and Mr Vincent Krause (Mr Krause), a forensic consultant, Ms Jana Butler and the investigating officer. Documentary evidence, including a copy of the allegedly forged receipt was also admitted.

[6] The trial court, in its initial pronouncement, found Mr van Jaarsveld guilty on the charges of fraud (count 1) and theft (count 5) and acquitted him on the charges of forgery and uttering (counts 2 and 3). However, this finding was subsequently amended within the same judgment to reflect a conviction on the forgery charge (count 2) as well. Mr van Jaarsveld was ultimately sentenced on the three counts of which he was convicted.

Procedural history of appeals

[7] On 18 May 2021, the trial court dismissed the appellants' application for leave to appeal against their convictions. Subsequently, on 24 March 2022, the trial court also dismissed their application for leave to appeal against their sentences. The appellants' petition in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against both conviction and sentence was also denied by the high court. This Court granted Mr van Jaarsveld special leave to appeal against both his conviction and sentence on 5 October 2023, while Mr Ras was granted special leave to appeal against sentence only. Mr Ras' application in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, for leave to appeal his conviction, was dismissed.

Appeal against conviction: Mr van Jaarsveld

[8] Mr van Jaarsveld's primary contention on appeal against his conviction is that the State failed to prove his guilt beyond a reasonable doubt. It is argued that the evidence presented by the State's witnesses, particularly Mr Bolhuis and Mr Krause, did not sufficiently implicate him in the commission of the offences. He

asserts that Mr Bolhuis admitted under cross-examination that he was not a party to the contract for the purchase and resale of the boat. Furthermore, it is contended that the evidence regarding Mr van Jaarsveld's involvement in the forgery was tenuous and that the State did not establish the requisite intention for the charge of theft.

[9] It is trite law that a court of appeal's power to interfere with a trial court's findings of fact and credibility is limited. Such findings are presumed to be correct unless there is a demonstrable and material misdirection by the trial court, or if the record reveals that the findings are clearly wrong.[1] In this matter, the trial court made specific findings regarding the credibility and reliability of the State witnesses, finding them to be honest and their versions of events consistent.

[10] On the charge of fraud, the State's case rested on the premise that Mr van Jaarsveld, acting in concert with Mr Ras misrepresented the ownership of the boat to Mr Bolhuis. While Mr van Jaarsveld may not have been directly involved in the initial negotiations, the evidence of Mr Krause indicates that he confirmed to Mr Krause that Mr Ras was the co-owner of Blue Anchor Marine and that the forged invoice originated from there, stating that the boat was sold to Mr Ras for cash. This evidence, coupled with the removal of the boat at his request and the subsequent assurances given to Mr Bolhuis, supports the trial court's finding that Mr van Jaarsveld indirectly participated in the misrepresentation. That finding cannot be faulted.

[11] On the charge of forgery, the evidence of Mr Jacques van der Westhuizen, a witness in terms of s 204 of the CPA, identified the handwriting on the forged invoice as that of the Mr van Jaarsveld. This witness also testified that Mr van Jaarsveld had requested to use the boat as security, contradicting the information contained in the forged invoice. The trial court was entitled to accept this evidence, and Mr van Jaarsveld's failure to testify and rebut this *prima facie* evidence strengthens the State's case.[2]

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[1] *S v Monyane and Others* [2006] ZASCA 113; [2006] SCA 141 (RSA); 2008 (1) SACR 543 (SCA) para 15.

[2] *S v Mthethwa* 1972 (3) SA 766 (A) at 769D-F. See also *Osman and Another v Attorney-General for the Transvaal* [1998] ZACC 14; 1998 (4) SA 1224; 1998 (11) BCLR 1362 para 22; *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC); 2001 (1) SACR 1 (CC) para 24.

[12] The trial court, in its initial pronouncement, found Mr van Jaarsveld guilty on the charges of fraud (count 1) and theft (count 5) and acquitted him on the charges of forgery and uttering (Counts 2 and 3). However, this finding was subsequently amended in the same judgment to reflect a conviction on the forgery charge (count 2) as well. Mr van Jaarsveld was ultimately sentenced on the three counts of which he was convicted. Section 298 of the CPA provides that '[w]hen by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence'. The Act thus provides a narrow window for a trial court to correct genuine, immediate errors in sentencing, but does not grant the power to alter a verdict once it has been pronounced. Once a court has delivered a verdict, it becomes *functus officio* regarding that verdict and it cannot altered.

[13] Any amendment to a verdict can only be done through an appeal or review by a higher court. From the record, it appears that the trial magistrate confirmed the acquittal on the two charges and later without any explanation reversed it. This deviation from established legal principles raises significant concerns about the validity of the subsequent conviction. This, in my view, constitutes a material misdirection that warrants the setting aside of the conviction on count 2. This Court made an error in the order it granted on 26 May 2025; it erroneously set aside the conviction on count 3, despite Mr van Jaarsveld never being convicted of it.

[14] Concerning the charge of theft, Mr van Jaarsveld argued that the State failed to prove the intention to permanently deprive the owner, Mr du Plessis, of the boat. However, the trial court found that Mr van Jaarsveld, acting with Mr Ras, recklessly abandoned the boat at Mr Bolhuis' premises without regard for whether the true owner would recover it. This, the trial court correctly held, could constitute the intention to permanently deprive in the form of *dolus eventualis*.[3]

[15] The trial court appropriately considered Mr van Jaarsveld's failure to testify in his own defence after the State had established a *prima facie* case. While Mr van Jaarsveld possesses a constitutional right to remain silent, the exercise of this right, in

[3] *R v Dorfling* [1954] 2 All SA 141 (E); 1954 2 SA 125 (EDL) 126–127; *S v Engelbrecht* 1966 (1) SA 210 (C) at 212E.

the face of incriminating evidence, can lead to the uncontradicted *prima facie* evidence being considered as proof beyond a reasonable doubt.

[16] Having carefully considered the record and the arguments presented, this Court finds no material misdirection on the part of the trial court in its evaluation of the evidence, save for the court's misdirection in convicting Mr van Jaarsveld on count 2 subsequent to an initial finding of not guilty on the same charges. The findings of fact on other charges are not patently wrong, and the State presented sufficient evidence to prove Mr van Jaarsveld's guilt on two charges beyond a reasonable doubt.

Appeal against sentence: Mr van Jaarsveld

[17] Mr van Jaarsveld contends that the trial court erred in over-emphasising the seriousness of the offences and the retributive aspect of punishment, while disregarding his personal circumstances and the potential for rehabilitation. Mr van Jaarsveld was 47 years old at the time of his conviction and he claimed that he was the primary caregiver for his two minor children, one child was with the mother and he lived with his 17 years old son. It is contended that the lengthy imprisonment will have a devastating impact on his children.

[18] It is well-established that sentencing is the prerogative of the trial court, and a court of appeal will only interfere if the trial court misdirected itself in a material aspect or if the sentence imposed is shockingly inappropriate.[4] In considering an appropriate sentence, the trial court is obliged to take into account the triad of factors enunciated in *S v Zinn*,[5] namely the seriousness of the offence, the personal circumstances of the accused, and the interests of society. The trial court's judgment on sentence reflects that it did consider Mr van Jaarsveld's personal circumstances, including his age, marital status and employment.

[19] However, Mr van Jaarsveld correctly points out the constitutional imperative to give paramount importance to the best interests of the children in all matters affecting them, as enshrined in s 28(2) of the Constitution. Sentencing courts are required to

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[4] *S v Malgas* 2001 (2) SA 1232 (SCA) at 1232C-D.
[5] *S v Zinn* 1969 (2) SA 537 (A) 540G-H.

consider the impact of a custodial sentence on the children of the accused and to explore alternative sentencing options where appropriate. If, based on the *Zinn* triad approach (which considers the crime, the offender, and the interests of society), a prison sentence is clearly the right choice and the convicted person is a primary caregiver, the court must then focus on making sure the children will be properly looked after while their caregiver is in prison.[6]

[20] In the present case, the trial court imposed a lengthy period of imprisonment without explicitly addressing the potential impact on Mr van Jaarsveld's children or providing clear reasons why alternative sentencing options, such as correctional supervision, were not deemed appropriate. While the seriousness of the offences, particularly those involving dishonesty, cannot be understated, the unique circumstances of Mr van Jaarsveld as a primary caregiver necessitate a more nuanced consideration of the sentencing options. This Court is mindful of the trial court's discretion in sentencing. However, the apparent lack of explicit consideration of the best interests of Mr van Jaarsveld's children, as mandated by s 28(2) of the Constitution and the relevant case law, constitutes a misdirection. This also warrants this Court's intervention.

[21] Having considered the seriousness of the offences, Mr van Jaarsveld's personal circumstances, the interests of society and, crucially, the best interests of the his children, this Court is of the view that the effective sentence of twelve years direct imprisonment is unduly harsh and does not adequately balance all the relevant factors. While a custodial sentence may be unavoidable, given the nature of the crimes, a lesser period of direct imprisonment, coupled with other sentencing options, could better serve the interests of justice, including the rehabilitation of Mr van Jaarsveld and the mitigation of the adverse impact on his children.

[22] In the circumstances, this Court believes it is appropriate to set aside the Regional Magistrate's sentence and impose a cumulative sentence of four years' imprisonment.

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[6] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (2) SACR 539 (CC) para 36.

Appeal against sentence: Mr Hugo Ras

[23] Mr Hugo Ras appeals against the individual sentences imposed, arguing that they are shockingly harsh and inappropriate. Furthermore, he contends that the cumulative effect of the sentences, resulting in 29 years direct imprisonment, is also shockingly inappropriate and warrants interference by this Court. The sentences imposed by the trial court were as follows:

(a) Count 1 (Fraud): eight years' imprisonment

(b) Count 5 (Theft): six years' imprisonment

(c) Count 6 (Possession of an unlicensed firearm): 15 years' imprisonment

(d) Count 7 (Possession of ammunition): 1 year imprisonment The trial court ordered that the sentences on counts 6 and 7 run concurrently, resulting in an effective sentence of 29 years' imprisonment.

[24] In respect of the sentence on fraud, Mr Ras was sentenced to eight years' imprisonment for fraud. The facts reveal a simulated loan agreement where the complainant, Mr Bolhuis, advanced R200 000 to Mr Ras for the purchase of a boat, with an agreement for repurchase at R300 000 after one month. Mr Ras facilitated this transaction. The evidence indicates that Mr Bolhuis received R75 000 in cash from Mr Ras and that a further R50 000 was allegedly collected by Mr Bolhuis' agent. Additionally, Mr Bolhuis received 'four or six Claerhout paintings' in lieu of the outstanding amount, which he accepted and still possesses.

[25] Mr Ras contends that Mr Bolhuis did not suffer actual loss, as a substantial portion of the R200 000 was reimbursed through cash and the paintings. Mr Ras submits that the sentence of eight years' imprisonment is disproportionate, especially considering the partial reimbursement. While fraud is a serious offence, the trial court appears not to have given sufficient weight to the significant reimbursement made to the complainant. While the initial intention might have been fraudulent, the subsequent actions of Mr Ras in partially compensating Mr Bolhuis are a relevant factor in assessing the seriousness of the eventual harm suffered. A sentence of eight years, in these specific circumstances, appears unduly harsh.

[26] As for the theft sentence, Mr Ras was sentenced to six years imprisonment for theft of a boat. The owner, Mr du Plessis, recovered the boat intact. The only

quantifiable loss suffered by Mr du Plessis was the legal cost, of approximately R8 000, to retrieve the boat. The trial court found that the element of *contrectatio* was satisfied by Mr Ras' 'reckless abandonment' of the boat. However, the fact remains that the actual physical loss of the asset was averted. Considering the value of the boat (R500,000 after upgrades) and the limited actual financial loss suffered by the owner, a sentence of six years' imprisonment appears disproportionate.

[27] In respect of the sentence on unlawful possession of a firearm and ammunition, Mr Ras was sentenced to 15 years' imprisonment for the unlawful possession of a semi-automatic firearm and one year's imprisonment for the unlawful possession of ammunition, with these sentences running concurrently. This was in line with the prescribed minimum sentence for the unlawful possession of a semi-automatic firearm in terms of s 51(2)*(a)*(i) of the CLAA, as the trial court found no substantial and compelling circumstances to deviate therefrom.

[28] The undisputed evidence is that the firearm belonged to the Mr Ras' wife, who was the licensed holder. Mr Ras bought her the firearm. The trial magistrate admitted that the firearm was not intended for the commission of further offences. Despite this acknowledgement, the trial court did not find substantial and compelling circumstances to deviate from the prescribed minimum sentence. I respectfully disagree with this finding. The fact that the firearm belonged to Mr Ras' wife, who was licensed to possess it, and that there was no indication it was intended for criminal activity, constitutes a significant mitigating factor. While his possession was unlawful, the circumstances surrounding it are materially different from cases where the firearm is inherently linked to criminal intent or activity.

[29] The comparative case law cited by Mr Ras, particularly *S v Madikane*[7] and *S v Sibisi*,[8] highlights instances where courts have found the prescribed minimum sentence of 15 years to be disproportionate in cases involving the unlawful possession of a semi-automatic firearm where the aggravating factors were less pronounced than

[7] *S v Madikane* 2011 (2) SACR 11 (ECG) paras 24-26.
[8] *S v Sibisi* 1998 (1) SACR 248 (SCA); [1998] 1 All SA 297 at 249C.

in cases like *S v Jansen*[9] and *S v Delport*,[10] where the minimum sentence was upheld due to clear links to criminal activity or intent. In the present matter, the absence of any indication that the firearm was intended for unlawful use, coupled with the fact that it was legally owned by the appellant's spouse, constitutes substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence. A sentence of 15 years in these circumstances is indeed shockingly inappropriate.

[30] The cumulative effective sentence imposed by the trial court is 29 years' imprisonment. Mr Ras contends that the trial court failed to adequately consider the cumulative effect of these sentences. We agree that the trial court has a duty to consider the totality of the sentences imposed. While each count represents a separate transgression, the combined effect must be just and proportionate. In *Moswathupa v S*[11] and *S v Kruger*,[12] this Court emphasised the need to avoid unduly severe aggregate penalties and to ensure that the element of mercy is not overlooked.

[31] Since the fraud and theft convictions stemmed from a single, ongoing scheme to defraud the complainant, the court should consider them as one transaction, or ensure their sentences run largely concurrently. A key mitigating factor is that the illegal firearm possession was entirely separate from the fraud and theft convictions, which should lead to more concurrent sentencing. While long sentences can incapacitate offenders, 29 years is excessive and disproportionate for these offenses, even if it prevents further crime. This period of imprisonment goes beyond what is needed to protect society, particularly if the individual is not a high-risk, repeat offender. Importantly, a sentence that removes all hope of a life outside prison sabotages any potential for rehabilitation and successful reintegration into the community.

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[9] *Jansen v S* [2019] ZAECGHC 105; 2020 (1) SACR 413 (ECG) paras 27 and 38.
[10] *Delport v S* [2016] ZAWCHC 26; [2016] 2 All SA 504 (WCC); 2016 (2) SACR 281 (WCC) paras 17 and 39-41.
[11] *Moswathupa v S* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA) paras 4 and 8.
[12] *S v Kruger* 2012 (1) SACR 369 para 9.

[32] In the result, the following orders are issued:

In respect of Willem Andries Van Jaarsveld (Case no. 1105/2023)

1 The appeal against conviction and sentence in respect of count 2 is upheld.

2 The conviction and sentence imposed by the Regional Magistrate are set aside and replaced as follows:

‘1 For count 1 (fraud), the sentence of eight years of imprisonment is set aside and replaced with a sentence of four years’ imprisonment.

2 For counts 2 and 3 (forgery) the conviction and sentence are set aside.

3 For Count 5, the sentence of six years of imprisonment is set aside and replaced with a sentence of four years’ imprisonment to run concurrently with the sentence imposed in respect of Count 1. The sentences are antedated to 18 May 2021.

4 The effective sentence is four years’ imprisonment.’

In respect of Hugo Ras (Case no. 885/2024)

1 The appeal against the sentence is upheld.

2 The order of the Regional Magistrate as to sentence is set aside and replaced as follows:

‘1 For Count 1 (fraud), the sentence of eight years’ imprisonment is set aside and replaced with four years’ imprisonment.

2 For Count 5, the sentence of six years’ imprisonment is set aside and replaced with three years’ imprisonment to run concurrently with the sentence on Count 1.

3 For Count 6, the sentence of 15 years’ imprisonment is set aside and replaced with seven years’ imprisonment, wholly suspended for a period of five years on condition that the appellant is not convicted of a contravention of the Firearms Control Act 60 of 2000.

4 For Count 7 (possession of a firearm), one year imprisonment to run concurrently with the sentence imposed on Count 6. The sentences are antedated to 21 May 2021.

5 The effective sentence is four years’ imprisonment.’

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K E MATOJANE

JUDGE OF APPEAL

Appearances

Case no. 1105/2023

For the appellant:	F van As
Instructed by:	Andre Steenkamp Attorneys, Haartebeespoort
	Honey Attorneys, Bloemfontein
For the respondent:	R van der Walt
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein

Case no. 885/2024

For the appellant:	A Steenkamp
Instructed by:	Legal-Aid South Africa, Pretoria
	Legal-Aid South Africa, Bloemfontein
For the respondent:	R van der Walt
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions.