IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A436/15
REPORTABLE

In the matter between:

SIBUSISO MASUKU Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 23 JUNE 2016

SHER, AJ:

[1] This is a rather unusual matter. The appellant was arraigned before the Regional Magistrate, Cape Town on two counts of robbery with aggravating

circumstances, in that a firearm was allegedly involved, and one count of kidnapping. On the one count of robbery it was alleged that at the Regency Hotel, Sea Point, he robbed members of staff of cash, and a bag containing keys, a cellphone and various personal items. In respect of the other count, it was alleged that he had robbed one Gerhard Van Wyk of a red Alfa Romeo motor vehicle, and R9 000.00 cash at Kuilsriver. In respect of the remaining count of kidnapping it was alleged that he had deprived the said Van Wyk of his freedom of movement by transporting him in his own motor vehicle under threat of a firearm.

[2] The appellant pleaded not guilty to all three charges. He was legally represented and tendered a plea explanation. Other than admitting that he lived at the Regency Hotel for a period of two weeks, he denied any knowledge of the alleged robbery which had been committed there. As far as the alleged robbery of the red Alfa Romeo was concerned, he said that when he was arrested on this charge he was in the process of buying the motor vehicle from the owner, and that is why he had the key in his possession. He denied any knowledge of the alleged kidnapping. The state then proceeded to call a number of witnesses.

[3] Yolande Tsubentla testified that she started working as a receptionist at the hotel in June 1997. In September 1998 three men came to stay at the hotel for a week or so. The appellant was one of them. They became acquainted with one another, and the appellant spent some time talking to her whilst she was on duty at reception. About 6 months later, on 21 March 1999, and whilst

she was on duty, the appellant telephoned her and said he wished to see her. He later came to the hotel and they made arrangements to meet at a nearby convenience store, after Tsubentla's shift ended. At the appointed hour she found the appellant and two other men in a red motor vehicle, and she accompanied them to a parking lot near the beach. The appellant then asked her to tell him where the hotel's valuables were kept. She thought he was joking, but one of his compatriots pulled out a firearm and pointed it at her. She proceeded to give them a rundown of where the hotel's walk-in safe and guest safety deposit boxes were, and depicted the location thereof on two sketches she drew for them. The appellant warned her not to tell anyone what had transpired between them, and threatened to kill her if he ever found out she had spoken out of turn. Two days later, on 23 March 1999, when she reported at reception for the morning shift she was informed by a colleague that the hotel had been robbed. On 25 March 1999 she was approached by a Capt Swart of the SAPS who confronted her with the two sketches, at which point she admitted that she had drawn them and explained how this had come about. The police then asked her to assist them in setting a trap for the appellant. She was instructed to phone the appellant and to arrange a meeting with him outside a department store in the centre of Cape Town and, when he arrived, Capt Swart and other members of the police duly arrested him.

[4] I may point out at this juncture that in line with the evidence which was given by Tsubentla, and later Capt Swart, the charge-sheet reflects that the appellant was arrested on 25 March 1999. However, his first appearance in

the Regional Court was only on 27 March 2001, when it was noted that he was in custody on another matter.

[5] I will return to the aspect of the various attendances before the Regional Court later. It will suffice, at this stage, to point out that from his initial appearance in March 2001 and until he was sentenced on 20 December 2002, the appellant was reflected as being in custody.

[6] After the evidence of Tsubentla was concluded on 5 August 2002, the matter was remanded to the following day for the evidence of further witnesses. For the purposes of this matter it is not necessary to traverse such evidence in any detail. For the sake of completing the story, it may be simply be mentioned that evidence was led of how the Regency hotel and its staff were robbed by two men on 23 March 1999 and of how, at about midday on the selfsame day, a young woman and her father found two bags containing a number of identity documents, bank cards, and keys, as well as the hotel's register and the sketches that had been drawn by Tsubentla, on a piece of open ground next to Modderdam Road in Heideveld. The hotel was informed of the find and the police duly collected the bags. And that is how the police got to Tsubentla and the appellant.

[7] At the conclusion of the evidence of Capt Swart on 6 August 2002, the matter was postponed for further trial on a number of occasions. When the matter was again called on 19 December 2002, the appellant's legal representative indicated that he wished to change his plea to one of guilty on all 3 charges. To this end, she proceeded to read out the contents of a statement which she

had prepared on his behalf in terms of s 220 of the Criminal Procedure Act 51 of 1977("*the Act*"), which contained a list of formal admissions by the appellant, and which had been signed by both of them. In terms of this statement the appellant admitted the essential elements of all the charges and he also admitted that inasmusch as a firearm had been used at the time, aggravating circumstances in terms of the provisions of s 1 of the Act were present. The appellant declared in the aforesaid statement that the admissions were made *"freely and voluntarily without any duress",* and that he was 'sorry' for what he had done, and he asked the honourable court to be "*merciful unto*" him. On questioning by the magistrate, the appellant confirmed that he was aware of the contents of the statement and that there was nothing therein which he disagreed with. He also confirmed that nothing was missing from the statement. As he put it: *"everything"* in the statement was *"in order",* and he further confirmed that he had signed the statement after reading it, and after *"understanding the contents"* (sic) thereof. As a result of these admissions the State closed its case and the magistrate duly proceeded to convict the appellant on all three charges.

[8] The appellant's attorney then informed the court that the appellant was serving two sentences: a sentence of 30 years imprisonment which had been imposed in August 2000, and a sentence of 40 years imprisonment which had been imposed in February 2001. She indicated that the 30-year sentence had been imposed in KwaZulu-Natal and the 40-year sentence had been imposed by the High Court in Cape Town. Because it was of importance for the magistrate to have exact details of the appellant's previous convictions, as

this would impact on the *"quantum"* of the sentence that he was to impose, he stood the matter down in order for the prosecutor to make further enquiries. On resumption, the prosecutor indicated to the court that the matter which was heard in KwaZulu-Natal had been before the Durban High Court on 26 July 2000 and concerned a charge of armed 'bank' robbery and numerous counts of kidnapping. The other matter before the High Court in Cape Town concerned a charge of so-called cash-in-transit robbery, various counts of attempted murder and possession of a firearm without a licence, as well as two counts of theft of a motor vehicle. The police dossier numbers in respect of these offences reflected that they were committed in or about December 1998.

[9] The prosecutor then pointed out that the offences of which the appellant had been convicted in the Regional Court that day, were committed in **March 1999**, shortly after the offences in respect of which he was convicted and sentenced by the High Court in Cape Town. As the magistrate was still not satisfied with the information that was before him, particularly in regard to whether the appellant was a first, second or third offender, as there were different prescribed sentences which might apply, the matter was further adjourned. On resumption of proceedings the following day the prosecutor informed the court that the offences in respect of which the appellant had been convicted and sentenced by the High Court in Durban, were committed on 6 November 1997. As a result, the appellant was due to be sentenced by the Regional Magistrate for the third time, on a charge of armed robbery.

[10] In a well-reasoned and fair-minded judgment on sentence, the Regional Magistrate set out the appellant's personal circumstances and made reference to the nature and gravity of the offences for which he had been convicted, and he paid particular attention to the cumulative effect which the sentence he was to impose would have on the appellant, in order not to punish him unduly harshly. To this end, although he sentenced the appellant to 25 years imprisonment on each of the two counts of robbery (counts 1 and 2), he ordered that they were to run concurrently, and in respect of the count of kidnapping (count 3), he sentenced the appellant to 10 years' imprisonment. But, in order to further ameliorate the effect of the sentences he imposed, he ordered that 15 years of the sentences in respect of counts 1 and 2 and the entire sentence in respect of count 3 were to run concurrently with the sentences which were being served by the appellant at the time. He also ordered that the balance of 10 years of the sentences on counts 1 and 2 should also run concurrently. In effect therefore he sentenced the appellant to only serve an additional 10 years on top of his existing sentences.

[11] On 1 September 2005, some 3 months short of 3 years after he had been sentenced, the appellant made application to the magistrate via a new attorney, for leave to appeal against the convictions and leave to lead further evidence. To say that the applications were paltry and sparse in the extreme would be to do justice to them. In a handwritten document which comprised all of 6 paragraphs, the appellant's legal representative simply stated that it was the appellant's 'submission' that the attorney who had dealt with his matter at his trial, had *"influenced"* him to make admissions *"knowing that they*

were not part of" his *"version of the events"*, and, even though the appellant had no right to do so absent leave being granted to him in this regard, she said the appellant intended to lead 'new' evidence to the effect that he was advised that, should he make the admissions he would be given a very 'lenient' sentence and it would be *"easier for him"* if the trial was not proceeded with, and he would in due course show *"good reason"* for why he had not led such evidence at the trial. She submitted further that, had the appellant testified in his own defence and put his version before the Court, instead of making admissions in terms of s 220, the magistrate *"may"* have acquitted him on all three counts.

[12] As far as the application for condonation for the late filing of the application for leave to appeal and leave to lead further evidence was concerned, this too was utterly sparse, and in a similar handwritten document which was a single page long, the appellant simply contended that after he had been sentenced he was transferred to various prisons, and had made enquiries as to what the applicable procedures were in order to apply for leave to appeal and *"it took him some time to find out what to do"*. The appellant said that thereafter, he had to apply for legal aid and his new attorney had to apply for the transcripts which then had to be *"perused"*. No dates, names or further particulars were provided in regard to these endeavours or why it took the appellant some 3 years to carry them out.

[13] In my view, neither the application for leave to appeal nor the application for condonation complied, even cursorily, with the requirements which have been

laid down for such applications, and they should never have been entertained by the magistrate. I may point out, in fairness to him, that neither of the applications were opposed by the State, a matter which is cause for concern. In my view, it is incumbent upon both the prosecutor and the presiding magistrate in applications such as these, not to simply go through the motions and to concede to leave to appeal being granted where such applications are ill-founded and have no merit, and in which the relief which is sought is not properly made out. I point out further that as far as the stated intention of leading further evidence on appeal was concerned, such application as there was in this regard was desultory and did not comply with even one of the well-established and trite requirements (*vide S v De Jager* 1965 (2) SA 612 (AD)). In granting leave to appeal against the convictions, the magistrate warned that it was predicated on the grounds that the appellant had been improperly advised by his legal representative at the trial, but that there was no such evidence on record and the appellant would have to make application before the High Court by way of an affidavit or further evidence, before the court of appeal would be at large to re-open the matter. No such application was however forthcoming.

[14] It appears that the appeal against the convictions was eventually enrolled for hearing on 29 September 2007 but for some reason which is not explained at all by the appellant on the papers, it only came before this court on 20 March 2009, at which time it was struck from the roll, in default of appearance and prosecution of the appeal. In this regard, counsel for the state has informed us that no heads of argument were ever presented by the appellant, and there

was no appearance on his behalf. In the circumstances the appellant clearly abandoned his appeal against the convictions.

[15] On 19 March 2015, a further 6 years after the appeal against the convictions was struck from the roll in this court, the appellant made application before the magistrate for leave to appeal against the sentence which had been imposed. On this occasion, the appellant deposed to an affidavit in support of his application. It is noteworthy that in this affidavit the appellant made absolutely no attempt to deal with the circumstances surrounding his failure to prosecute the appeal in respect of the convictions, and in fact the affidavit is utterly silent in this regard. The appellant simply stated therein that from the time the sentence had been imposed, he had felt that it was unduly harsh and *"too lengthy in time"* (sic). He said that, because of this, he knew that he had to appeal the sentence but as he was incarcerated he did not have the necessary funds and had to rely on his sister and other family members to assist him. He averred that he was not visited regularly by his sister and other family members and had to rely on promises they made that they had engaged various lawyers to assist him, without any success.

[16] On 30 May 2014 attorney Greeff of Matthewson Gess Inc attorneys was eventually instructed to investigate the possibility of lodging an appeal against sentence. Greeff consulted with the appellant in June 2014 and thereafter commissioned a copy of the transcript of the evidence, which was received on 9 July 2014. Having regard to what he read in the record and the fact that the appeal against conviction had been struck from the roll, Greeff advised the

appellant's family to obtain an opinion from senior counsel. Although such opinion was received on 24 September 2014, a further 5 months went by before the necessary funds were raised in order that instructions could finally be given to proceed.

[17] In his affidavit, appellant set out the basis for his proposed application for leave to appeal against sentence. He said that the result of the addition of a further 10 years imprisonment by way of the sentence which had been imposed on him by the Regional Magistrate, was to increase the overall term of his incarceration to 50 years, which he had been advised induced *"a sense of shock"* and amounted to a *"cruel and inhumane"* sentence which was 'destructive' rather than rehabilitative and which *"sacrificed"* him on the *"altar of deterrence"*.

[18] However, notwithstanding that the basis for the appeal according to the appellant's affidavit in the application for leave to appeal pertained solely to the overall length of the period of imprisonment he would have to serve, when the matter was called before the magistrate on 19 March 2015 his counsel motivated that leave should be granted to appeal the sentence on a completely new ground, which was not foreshadowed or set out in the supporting affidavit, or the application itself, at all. In this regard, counsel submitted to the court that the appellant had been incorrectly sentenced to 25 years imprisonment on each of the robbery charges, on the basis that he was a third offender, when this was not the case, if one had regard for the 'facts' and the 'dates' in question. Faced with these submissions, the magistrate

said he felt he had no option but to grant leave to appeal against the sentences.

[19] Once again, it is disconcerting to note that no attempt was made by the magistrate to properly consider and evaluate the application which was before him, in the light of the record, which was by this time available. If he had proper regard therefor he would have noted that the appellant's convictions in the matter before him had occurred in 2002 and were in respect of offences that had been committed in 1999. Given the appellant's conviction in the High Court in Durban in 2000 for offences which had been committed in 1997 and his convictions before the High Court in Cape Town in 2001 in respect of offences which had been committed in 1998, the appellant was indeed liable, in my view, as a third offender, to the prescribed minimum sentence of 25 years, when he appeared before the magistrate in 2002 in respect of offences committed in March 1999. That this is indeed the case is also apparent from the fact that this point was not taken or proceeded with by the appellant's counsel either in the heads of argument which were filed, or in argument before us.

[20] However, notwithstanding that the appeal which is before us is only in respect of sentence, the submissions contained in the appellant's heads of argument are now directed at the merits of the convictions. And once again a new ground of appeal is raised that was not included in the application for leave to appeal. In this regard, appellant's counsel points out that inasmuch as the appellant was sentenced on 4 August 2000 to a term of 30 years

imprisonment, and on 22 February 2001 to a further term of 40 years imprisonment which was to run concurrently with the previous sentence imposed, the appellant had clearly been in custody from at least 4 August 2000 until his conviction and sentence in this matter on 20 December 2002. Consequently, it was submitted that insofar as the convictions on counts 2 and 3 were concerned ie the robbery and kidnapping of Van Wyk, which were alleged in the charge-sheet to have taken place on 3 March 2002, these could not 'stand' as the appellant was in prison at the time of the alleged commission of these offences, as a sentenced prisoner.

[21] In order to circumvent the difficulty which faced the appellant in regard to the fact that there was no appeal before us in respect of the convictions, the appellant resorted to invoking the review provisions of s 304(4) of the Act, which provide that where it is brought to the attention of any provincial or local division that proceedings in which a sentence was imposed were not in accordance with justice, the court shall have the same powers in respect thereof as if the record had been laid before it for the purposes of so-called automatic review, in terms of s 303. To my mind, what the appellant seeks to do is impermissible and amounts to nothing more than an attempt to appeal his convictions via the back door. In this regard, Hiemstra in *Criminal Procedure* (at p30 – 23), points out that the provisions of the section are not intended to be used as a *"back door for the shrewd, but an emergency exit for the needy"*.

[22] In a number of matters where an accused was in a position to afford legal assistance to launch a proper appeal, but chose instead to use the provisions of the section to attempt a 'back-door' appeal, the courts declined to assist *vide S v Matsane an 'n Ander* 1978 (3) SA 821 (T) 823d-e; *S v Singh* 2013 (2) SACR 372 (KZD) at para [14]. In addition, in a number of reported cases courts of appeal refused to make use of the provisions of s 304(4) to set aside sentences (which were imposed in the Magistrate's Court), on the basis of incorrect information being before the court at the time, pertaining to the appellant's previous convictions. In this regard *vide R v Miller* 1961 (4) SA 277 (C); *S v Smit* 1967 (2) SA 235 (C); and *S v Mazibuko* 1974 (2) SA 321 (T), *contra S v Monchanyana* 1968 (1) SA 56 (O).

[23] In my view, given that the appellant was legally represented at the time of his trial *a quo*, and given that the appellant freely and voluntarily made certain admissions in terms of the provisions of s 220 of the Act whereby he admitted to each of the elements necessary in order to sustain a conviction in respect of all three charges which were preferred against him, and given the fact that the appellant is only before us in regard to sentence, the provisions of s 304(4) cannot be used as a back-door appeal against the appellant's conviction on the merits. Nor, in my view, can they be used to move this court to act in terms of its special powers of review under the section.

[24] However, even if we are wrong in this regard, and even if we are at liberty to assist the appellant notwithstanding the fact that his attempt to rely on the provisions in question has occurred some 13 years after his convictions, and

without even a cursory explanation for his gross dilatoriness, there is in our view no merit in the appellant's submissions, and in my view this is not a matter where, in terms of s 304(4) we can exercise our powers of review in favour of the appellant. I say this for the following reasons.

[25] It is apparent from the evidence which was tendered by all 5 of the State witnesses, which evidence was common cause, that the events in question, at least insofar as the robbery of the hotel is concerned, took place on 23 March 1999 and the appellant was arrested some 2 days later on 25 March 1999. From the time of his first appearance in this matter before the magistrate on 27 March 2001 and until he was sentenced on 20 December 2002, the appellant was in custody. One of his numerous attendances before the magistrate was on 1 March 2002, at which time it was again recorded that the appellant was in custody as he was serving a sentence in another matter, and he was remanded to 5 August 2002 for trial.

[26] It was thus indeed inconceivable that the appellant could have robbed Van Wyk of his red Alfa Romeo and that he could have kidnapped him on 3 March 2002 (ie some 2 days after the postponement on 1 March 2002 when he was remanded in custody for trial to 5 August 2002), and the date which was provided in the charge-sheet in respect of both these charges (ie counts 2 and 3) was thus clearly wrong. But this does not mean that the appellant did not commit these offences. Or that he was not properly convicted of having committed them.

[27] Had this date been correct, it is inconceivable that the appellant, who was legally represented at the time, would not immediately have brought this to the attention of his legal representative and the court, and it is inconceivable that, had it not been possible for the appellant to have committed these offences because he was in custody at the time, this would not have been revealed to the court either at the outset when the appellant tendered his plea explanation, or during the trial, or at some time thereafter on one of the various occasions when the appellant made application for leave to appeal before the magistrate. Instead, as I have previously pointed out, in his plea explanation in respect of the charges involving Van Wyk, appellant alleged that he had been arrested at a time when he was in the process of buying the motor vehicle from Van Wyk and that is why he had the vehicle's key in his possession. This was a clear and distinct indication on the part of the appellant that he was involved in the charge relating to the vehicle but had an innocent explanation therefor, and not an indication that the appellant could never have committed the offence in question because he was in prison at the time. It may be pointed out that even the date which was given in the charge-sheet in respect of the first charge ie the robbery at the hotel, was wrong, inasmuch as it was alleged that this took place on 23 February 1999 when it was clear from the evidence of all five State witnesses, and indeed common cause, that this in fact occurred on 23 March 1999.

[28] It is not without significance that Tsubentla referred to the appellant as having been in possession of a red motor vehicle at the time when she saw him some two days before the robbery, and it is to be noted that during her

evidence she was presented by the prosecutor with a photograph of a red motor vehicle but was unable to positively confirm that it was the vehicle in question or that it was an Alfa Romeo, because she said she was not *au fait* with the various makes and models of motor vehicles. In the circumstances the red motor vehicle she spoke of and in respect of which she was shown a photograph, was probably none other than the red Alfa Romeo which featured in respect of count 2, and which the appellant took by force from Van Wyk. And in due course, had the appellant not decided to change his plea to one of guilty, by making the necessary admissions, the State would no doubt have tendered the evidence of Van Wyk in regard to the robbery of this vehicle, and his kidnapping. And given the prosecutor's comments in his address to the court on sentence (as referred to in paragraph [9] above), it seems that the date in the charge-sheet in respect of these charges should possibly have been 3 March **1999**, and not 3 March 2002, and what could have happened is that the prosecutor at the time simply made an error in regard to the year, when filling out the *pro forma* charge-sheet.

[29] In this regard counsel for the respondent indicated in heads of argument that the state was in possession of an affidavit which was submitted by the erstwhile investigating officer, one Lieutenant-Colonel Brink of the SAPS, which would clear up the error in the dates, which affidavit, in the event that the matter were to have proceeded to be heard as a review, would, in due course, have been presented to the Court.

[30] Be that as it may, even if the robbery and the kidnapping occurred on some other date, it would in my view still not avail the appellant.

[31] In terms of the provisions of s 304(4), this court is only at liberty to interfere and to exercise its statutory power of review if there was an irregularity present which resulted in a failure of justice in the proceedings *a quo*. This means that there must have been a material or gross irregularity which occurred therein (*S v Moodie* 1961 (4) SA 752 (A) 758f; 759c). It is not necessary for the proceedings to have been strictly according to the very letter of the law, only that they were substantially in accordance with justice *vide S v Nteleki* 2009 (2) SACR 323 (OPD). The essential question which must be answered in this regard is whether the accused received a fair trial.

[32] In this matter, the only apparent irregularity which occurred was that the dates in the charge-sheet were incorrect which resulted in the statement in terms of s 220 also being incorrect in respect thereof, and the dates in both the charge-sheet and the statement in terms of s 220 should have been amended before the appellant was convicted.

[33] Although s 84 of the Act stipulates that a charge-sheet shall set forth the particulars of the offences with which an accused is charged, with sufficient particularity as to the time when, and the place where, such offences are alleged to have occurred so as to inform the accused of the nature of the charge, if any such particulars are unknown to the state it shall (in terms of s 84(2)) be sufficient to state this in the charge, and the absence of such particularity will thus not render the charge defective, unless the time when

the offence was committed is a material element of the offence (*vide* Du Toit *et al Commentary on the Criminal Procedure Act* at 14-16, and s 92(1) of the Act). In this instance, the dates when the robbery and kidnapping in respect of Van Wyk occurred were not material and essential elements of the offences, and as a matter of law it cannot be said that without such dates being established the appellant could not necessarily have been convicted of having committed the offences in question (see *Moodie* at 758e-h). Nor were such dates material to the defence that was pleaded by the appellant in regard thereto. It would have been otherwise in the event that the appellant had pleaded an alibi, because then it would obviously have been unfair to expect him to run the gamut of a trial on the basis of the offences having been committed on a certain day, or days, and then for the State to argue later that it didn't matter what the dates were, when the evidence showed otherwise (see s 93 rtw s 92(2) in regard to the effect of incorrect dates in a charge-sheet in respect of alibi defences). That would be an instance of true prejudice, to an accused. In this matter the defence raised was that the appellant had an innocent explanation for the vehicle being in his possession and that he had not robbed the owner thereof, and knew nothing of his alleged kidnapping. The date was immaterial to the appellant's defence, and to his later decision to make the necessary formal admissions.

[34] Even when the time of commission is a material element of an offence, where this is stated incorrectly in a charge-sheet such a defect may be cured by way of evidence (in terms of s 88) or formally rectified by the court (in terms of s 86(1) of the Act). In addition, in terms of s 86(1) where a charge is defective

for want of an essential averment, or where there appears to be any variance between an averment in the charge and the evidence which is adduced in support thereof, or where there is "*any other error*" in a charge, it may be amended by a court at any time before judgment, even where the charge-sheet is so defective that it fails to disclose an offence, provided it does not prejudice an accused. Importantly, s 86(4) provides that where a charge which is defective in any one of the meanings referred to, is not amended by a court, this shall *not* effect the validity of the proceedings thereunder.

[35] Lastly, I point out that s 92(2) provides that a charge shall not be held to be defective because the offence pertaining thereto is stated to have been committed on a day "*subsequent to the laying of the complaint, or the service of the charge, or on an impossible day, or on a day that never happened*". Whilst it was not possible for the appellant to have robbed and kidnapped Van Wyk on 3 March 2002, on the evidence before us it was certainly possible for him to have done so in March 1999.

[36] In my view, the irregularity, such as it was, in respect of the incorrect dates in the charge-sheet thus did not render the proceedings unfair and does not vitiate the convictions, and given the undisputed evidence which was tendered and the appellant's admissions which were freely and voluntarily made in terms of s 220, there can be no question that the appellant's trial was substantially in accordance with justice.

[37] In the circumstances, for the reasons set out above there is in my view no merit in the appeal and I would accordingly dismiss it, and confirm the convictions and the sentences that were imposed.

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SHER AJ

I agree, and it is so ordered.

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YEKISO J