FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case number: **A02/2013**

In the appeal of:

BHEKI ISAAC SMITH Appellant

and

THE STATE Respondent

CORAM: MOLOI, J *et* SNELLENBURG, AJ

JUDGMENT: SNELLENBURG, AJ

HEARD: 3 JUNE 2013

DELIVERED: 27 JUNE 2013

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[1] The appellant was duly convicted on 1 June 2010 in the Kroonstad Regional Court on the count of house breaking with the intent to steal and theft.

[2] The appellant and one James Delheme Khumalo broke into the business premises of Jimmy Moloi during or about 12 - 13 June

2010, where they unlawfully and intentionally stole a Hi-Fi, clothes and other items to the value of R 31 960.00.

[3] Pursuant to the conviction and after proof of his previous convictions the regional magistrate declared the appellant an habitual criminal in terms of the provisions of Section 286(1) of the Criminal Procedure Act, 51 of 1971 ("the CPA").

[4] The appellant's application for leave to appeal against the conviction and sentence was dismissed by the court *a quo*. The appellant appeals against the said sentence with leave granted on petition.

[5] Section 286(1) of the CPA provides:

> "(1) Subject to the provisions of subsection (2), a Superior Court or a Regional Court which convicts a person of one or more offences, may, if it satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted."

The provisions of Section 286(2) do not find application in the present matter. Section 286(3) provides that the person declared an habitual criminal shall be dealt with in accordance with the laws relating to prisons.

[6] In terms of Section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959, subject to the remedial reading-in after the word 'parole'

of the words 'provided that no such prisoner shall be detained for a period exceeding fifteen years' as declared in **S v Niemand** 2001 (2) SA CR 654 (CC), the effect of the declaration as an habitual criminal is that such person 'shall be detained in prison until, after a period of at least seven years, is placed on parole, provided that no such prisoner shall be detained for a period exceeding fifteen years.'

[7] Section 286(1) has been the subject of much debate, specifically with regards to what is expected of the sentencing court before a declaration can be made that a person is an habitual criminal.

[8] This is undoubtedly so because, whilst accepting that Section 286 serves an useful sentencing purpose which is now [after the Constitutional Court's declaration referred to above] consistent with the Constitution and its fundamental values[1], it is admittedly a drastic and exceptional punishment. See **S v Van Eck** 2003 (2) SACR 563 (SCA) par 10; **S v Masisi** 1996 (1) SACR 147 (O) at 152d.

[9] The requirements for a declaration under Section 286(1) of the CPA were succinctly summarised by the Supreme Court of Appeal in **S v Van Eck** (*supra*) par [9]-

> "The requirements for a declaration under s 286(1) of the Act are therefore:

[1] S v Niemand 2001 (2) SACR 654 (CC)

(i) The Court must be 'satisfied' (in the sense of convinced; see *S v Makoula* 1978(4) SA 763 (*supra*) at 768 B – E) [2] both that the accused habitually commits crimes and that those crimes are of such a nature that the community should be protected from the accused for at least a period of seven years;

(ii) The accused must not be under the age of eighteen years, and

(iii) A punishment is warranted which does not exceed fifteen years imprisonment. However, even if all these requirements are satisfied the Court retains a discretion whether or not to make a declaration under s 286(1); it may in the exercise of its discretion impose some other appropriate sentence. The discretion is to be exercised in the light of all the relevant circumstances and in accordance with the ordinary principles governing the sentencing of offenders."

[10] Although Section 286 contains no requirement that an accused person must be warned that he is at risk of being declared an habitual criminal, prior to such a declaration being made (See **S v Van Eck** (*supra*); **S v Masisi** (*supra*)) and the fact that a warning has been given, or not, does not fetter the discretion of the court to impose such a sentence (see **S v Maggabi** 2004 (2) SACR 551 (E)), it is notwithstanding a well settled practise not to declare a person an habitual criminal without prior warning, save in exceptional circumstances.

[11] This practise, which was laid down by the Appellate Division, was thoroughly investigated in **S v Mache** 1980 (3) SA 224 (T) and **S v**

[2] S v Makoula 1978(4) SA 763 (SCA)

Erasmus 1987 (4) SA 685 (CPA). In the words of Scott JA in the **Van Eck** case (*supra*) par [9]-

> "A court will not ordinarily make a declaration in the absence of a prior warning to the accused of the provisions of s 286."

[12] It has been held consistently that the fact that the appellant was declared an habitual criminal without prior warning that he was running the risk of such declaration, constitutes a factor which a court of appeal may consider when adjudicating whether the trial court exercised its discretion reasonably/judicially. See **S v Erasmus** (*supra*) at 691C.

[13] The regional magistrate after consideration of the appellant's previous convictions came to the conclusion that appellant habitually commits offences and that the community should be protected from him. It is common cause that the magistrate came to this conclusion based solely on the appellant's criminal record which was contained in the SAP 69c form (criminal record).

[14] The debate regarding Section 286(1) has been mainly concerned with what would be required for a court to be 'convinced' that the jurisdictional requirements of Section 286(1) has been met so that the sentencing court could be said to have exercised its discretion judicially when making the declaration. In **S v Nawaseb** 1980 (1) SA 339 (SWA) it was held that a list of previous convictions without an investigation into the circumstances in which the previous crimes were committed could never be sufficient in itself to

convince the sentencing court that a person habitually commits offences and that the community should be protected from him.

[15] In **S v Mache** (*supra*) and **S v Erasmus** (*supra*) the aforementioned 'investigation' as prerequisite before a court could be 'convinced' that the jurisdictional requirements that would justify the declaration have been satisfied, was criticised.

[16] The differing views were considered and discussed in this division in **S v Masisi** (*supra*). The Court held that neither of the afore-mentioned approaches (the **Nawaseb** and **Erasmus** cases) are correct and that the approach as set out in **S v Shabalala en 'n Ander** 1984 (2) SA 234 (N) "waar hy 'n ondersoek in sekere omstandighede as 'nie onvanpas' beskou", is the preferable approach.

[17] This approach preferred in the **Masisi** case however comprises of nothing more than what is expected of the sentencing court when exercising its discretion properly in terms of Section 286. It follows that in the exercise of its discretion with regards to the specific facts of each case the court needs to decide whether the evidence presented, for instance the list of previous convictions, by itself will be enough to justify the court to come to the conclusion that declaration should be made or whether it needs more information with regards to the previous convictions for instance. In light of the afore-mentioned considerations a more careful enquiry and investigation into the personal circumstances, including the nature and frequency of criminal conduct in the past, the kind of punishment metered out and its apparent effect, becomes

necessary (also referred to as a critical investigation[3]) where a declaration was made in absence of a prior warning.

[18] Section 274(1) of the CPA provides that

> "A Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to a proper sentence to be passed."

(See also **S v Masisi** (*supra*) at 151c).

[19] At the sentencing stage of proceedings the court is no longer solely reliant on the parties for the presentation of evidence. As stated in **S v Masisi** (*supra*) at 149h with reference to **S v Dlamini** 1991 (2) SACR 665 (A) at 666 h to 667 f-

> "Terwyl dit nog gaan om skuldigbevinding is die Hof hoofsaaklik op die partye aangewesig vir die voorlegging van getuienis. By die oorweging van vonnis tree die Hof egter sterker na vore en moet hy desnoods die inisiatief neem."

During the sentencing stage, formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. See **S v Olivier** 2010 (2) SACR 178 (SCA) par [8]. As was explained in **S v Siebert** 1998 (1) SACR 554 (SCA) at 558j – 559a-

> "Sentencing is a judicial function *sui generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial

[3] S v Lindani [2004] ZAECHC 37 per Jones and Chetty JJ

> role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court."

(Also see **S v Samuels** 2011 (1) SACR 9 (SCA) par [8]; **S v Pillay** 2011 (2) SACR 409 (SCA) par [24].) This also entails that the court is at liberty to investigate the situation in order to impose a proper sentence. Legal representation does not absolve a court from its duty to exercise a proper judicial discretion. See **S v Zuma** 2006 (2) SACR 257 (W) at 261g.

[20] In the **Masisi** case the court considered various options, each with the advantages and disadvantages, that may be available to the court when considering whether to make a declaration in terms of section 286. The court concluded that this may or may not comprise of the information contained in the SAP 69; a pre-sentencing report as envisaged in Section 276(A)(1) or the examination of the accused (subject considerations and limitations as set out in the **Masisi** case at 159e), but whether any or all of the aforementioned is required will depend solely on the facts of each specific case.

[21] The facts pertinent to the matter, which were the sole basis on which the court *a quo* exercised its discretion, needs to be evaluated.

[22] The appellant was born on 5 April 1968. The list of previous convictions shows the following:

(a) On 2 July 1987 the appellant was convicted of robbery and sentenced to two lashes with a cane.

(b) On 25 July 1988 the appellant was convicted on one count of theft and one count of assault, which were taken together for purposes of sentence, and sentenced to six lashes with a light cane.

(c) On 14 February 1989 the appellant was in terms of Section 14(1) of Act 23 of 1957 and sentenced to two years imprisonment which was suspended in total for four years on condition that the appellant not be convicted of a transgression of Section 14(1) of Act 23 of 1957 committed during the period of suspension. The appellant was also sentenced to seven lashes with a light cane.

(d) On 23 March 1989 the appellant was convicted of attempted theft and assault and sentenced respectively to a fine of R150.00 or 75 days imprisonment and a fine of R60.00 or 30 days imprisonment.

(e) On 28 April 1989 the appellant was convicted for robbery and sentenced to three years imprisonment.

(f) On 26 August 1991 the appellant was convicted of theft and sentenced to six months imprisonment.

(g) On 13 November 1992 the appellant was convicted of theft and sentenced to nine months imprisonment.

(h) On 26 November 1992 the appellant was convicted of kidnapping and sentenced to three months imprisonment which was suspended in total for a period of five years on condition that he not be found guilty of the same crime committed during the period of suspension.

(i) On 15 May 1995 the appellant was convicted of theft committed and sentenced to three years imprisonment.

(j) On 7 December 2000 the appellant was convicted of theft and sentenced to a R600.00 fine or sixty days imprisonment which was suspended in toto subject to the condition that he not be found guilty of the crime of theft committed during the period of suspension.

(k) On the 4 August 2003 the appellant was convicted of theft and sentenced to either R300.00 fine or one month imprisonment.

(l) On the 3 March 2008 the appellant was convicted of theft and sentenced to a fine of R1 000.00 or four months imprisonment.

(m) On 21April 2010 the appellant was convicted of theft and sentenced to a fine of R600.00 or three months imprisonment.

(n) Lastly, the list of previous convictions shows the conviction on 14 December 2010 for a theft committed on 24 August 2010, therefore after the date of the crime for which the appellant was charged in this matter. The appellant was sentenced to six years imprisonment of which a period of three years imprisonment was suspended for five years on condition that the accused not be found guilty of a similar offence of which dishonesty is an element, committed during the term of suspension which was imposed. Importantly the accused was warned in terms of the provisions of Section 286 of Act 51 of 1977 that he runs the risk of being declared an habitual criminal.

[23] A critical analyses of the previous convictions show that the appellant's first conviction occurred when he was nineteen years of age. A series of eight convictions followed in the next five years, including attempted theft, theft and robbery. Save for the crime, date of conviction and sentence imposed, no other information is available with regards to the appellant's personal circumstances at that stage or the specifics of the crimes. The sentences imposed may to some extent be an indication of the seriousness of the crimes, or not.

[24] After the spree, the appellant had no convictions for a period of two and a half years before the next conviction. Another five and a half years passed without any convictions. Again a period of two and a half years and thereafter a further period of four and a half years passed between convictions. A further two years passed before the conviction in April 2010 and the present theft which forms the subject matter of the proceedings on appeal. The crime for which the appellant was convicted during 24 August 2010 was committed whilst the appellant was out on bail awaiting trial in the matter that forms the subject of these proceedings. The court in that matter did issue a warning to the appellant that he runs a risk of being declared an habitual criminal.

[25] Several questions arise when simply considering the list of previous convictions of which but some are posed. What motivated the appellant as a young 19 year old to commit the number of crimes in quick succession during the following five years? What did the appellant steal or attempt to steal? The sentences were conspicuously light. The answers to these questions are unknown.

The details captured in the criminal record does not justify inferences that the periods between convictions were not substantial because the crime for which the next conviction followed would have had to have been committed between the convictions. That is nothing more than mere speculation. The last five entries do show that the period between the dates on which the crime was committed and the date of conviction were relatively short, in other words the conviction followed shortly after the crime was in fact committed. This illustrates how insufficient the mere recital of previous convictions can be when assessing whether the appellant commits crime habitually.

[26] It is clear that periods of four and five years did pass without any convictions. What caused the appellant to revert to his ways of crime is of course unknown. No inferences are justified in this matter based solely on the criminal record regarding the appellant's conduct during those impasses.

[27] The appellant has committed eleven crimes which were considered to be relevant by the court *a quo* over a 25 year period.

[28] This does not begin to compare with the 'bad' track record of the accused in the **Van Eck** case where the criminal record without more was considered to be sufficient to justify the declaration.

[29] The list of previous convictions by itself in this matter did not justify the inference that the appellant committed crimes habitually and that the community needed to be protected against him.

[30] The Appellant's record does not justify the conclusion that the appellant committed offences whenever the occasion presented itself or whenever he found himself hard pressed financially or unable to afford something he wanted.

[31] The appellant's previous convictions do show a propensity towards crimes of dishonesty. To this end the appellant has been warned, during December 2010, that he runs the grave risk of being declared an habitual criminal.

[32] It is clear that the fact that the appellant perpetrated a theft whilst he was out on bail in this matter, an offence for which he was eventually convicted when the warning in terms of Section 286 was issued, played the overriding consideration in satisfying ("convincing") the court *a quo* that the appellant committed crimes habitually and that the community should be protected against him. For reasons already set out in this judgment, the facts in this matter to which the court *a quo* applied its mind, could not and to my mind did not justify the inference that the appellant habitually committed crimes and the community needs to be protected from him or that a declaration was justified without a warning having been made. The warning that had been issued could not be a relevant consideration during these proceedings for obvious reasons.

[33] There are also other indicators which show that the court *a quo* did not exercise its discretion judicially. The court *a quo* clearly did not appreciate what was expected of it prior to the declaration being made. It posed the question to the defence during the arguments

for leave to appeal regarding how an 'investigation' into previous convictions would be conducted. The magistrate was however referred to the **Masisi** judgment during the sentencing proceedings, on behalf of the appellant, and that judgment contains a convenient exposition with regards to what is expected of the court as well as the various options which may be utilised during the sentencing stage if the court is of the opinion that it needs to receive further evidence in order to inform itself as to proper sentence to be passed. See also **S v Mdliva** 1981 (2) SA 475 (E). Furthermore, the facts of this matter, as stated, were not such that a declaration in absence of a prior warning was justified.

[34] The sentence lacks compassion and amounts to insufficient weight having been given to the appellant's personal circumstances.

[35] For these reasons I find that the discretion was not exercised properly.

[36] Mr Pretorius, on behalf of the appellant, submitted that the declaration must be substituted with a sentence of ten (10) years imprisonment.

[37] The submission fails to take into consideration all the appellant's personal circumstances which were relevant when the sentence under consideration was imposed.

[38] Section 280 of the CPA provides as follows:

"**280 Cumulative or concurrent sentences**

(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.

[Sub-s. (2) substituted by s. 47 (a) of Act 129 of 1993.]"

[39] It needs to be considered whether on the facts of the matter it would be justified to order that the sentence or part thereof run concurrently with the sentence already undergone.

[40] The present crime of which the appellant was convicted was committed before the crime for which the appellant is undergoing the effective three year imprisonment sentence.

[41] The appellant's actions do show a propensity towards crimes of dishonesty, as stated. The appellant did not adduce any evidence to displace this conclusion.

[42] On the other hand it needs to considered what the effect of the sentences would be if it runs consecutively. The suggested sentence would mean that the appellant will serve an effective term of 13 years imprisonment.

[43] The court should in light of this personal circumstance consider whether it must ameliorate the effect of the sentence it will impose together with the sentence already served, by ordering that part of it be served concurrently with the term already undergone.

[44] All facts considered it will not be disproportionate to the crime or the interest of society if it be ordered that two years of the sentence imposed run concurrently with the sentence that is already undergone. The appellant will effectively serve a term of nine (9) years for the crimes of which he has been convicted.

[45] In these circumstances the conviction must be confirmed but the sentence is set aside and will be replaced with a sentence of eight (8) years imprisonment of which two (2) years of the eight (8) year sentence imposed shall run concurrently with the sentence that the appellant is already undergoing for theft with reference number 2010 WHY 667. The sentence will also be antedated to 2 June 2011.

IN RESULT:

1. The appeal succeeds.

2. The declaration that the appellant be declared an habitual criminal in terms of Section 286 of the Criminal Procedure Act 51 of 1977 is set aside and replaced with a sentence of eight (8) years imprisonment and it is ordered in terms of Section 280(2) of the Criminal Procedure Act 51 of 1977 that a period of two (2) years of the eight (8) year sentence imposed shall run concurrently with the sentence that the appellant is already undergoing for theft with reference number 2010 WHY 667.

3. The sentence is antedated to 2 June 2011.

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N. SNELLENBURG, AJ

I concur.

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K.J. MOLOI, J

On behalf of the appellant: Mr K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv S Giorgi
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

NS/sp