IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO. A848/10

In the matter between: 20/6/2012

THULANI GOODHOPE KUBHEKA **APPELLANT**

And

THE STATE **RESPONDENT**

20 June 2012 PP

JUDGMENT

MOLOPA-SETHOSA J

The Appellant was charged in the Nigel Regional Magistrate's Court with the following charges:

- Count 1. Housebreaking with intent to steal and theft;
- Count 2. Theft out of a motor vehicle.

The Appellant pleaded guilty on both counts on 5 November 2009 and a statement in terms of **section 112(2) of the Criminal Procedure Act, as amended, Act 51 of 1977 ("The Act")** was submitted to the trial court.

He was accordingly convicted on the same day 5 November 2009 on both counts.

The Appellant was in terms of section 286(1) of the Act declared a habitual criminal in respect of count 1. In respect of count 2 he was sentenced to 4 years' direct imprisonment. The trial court further ordered that the sentence in respect of count 1 shall run concurrently with any other sentence that the Appellant was serving at the time. The trial court ordered that the sentence in respect of count 2 shall run concurrently with that in respect of count 1. The Appellant was further declared unfit to posses a firearm.

The appellant brought an application for leave to appeal against his sentence on 22 August 2010 before the learned magistrate *a quo* and the leave to appeal was granted by the learned magistrate.

The appellant was legally represented during the trial.

The facts that led to the conviction can briefly be summarised as follows: in respect of **count 1,** the Appellant on or about 26 October 2008 and at Heidelburg, broke into the flat of one Neels Erasmus by removing a glass panel of the window, and opened the window to gain access into the flat with the intention to steal. He thereafter stole two (2) taps and a bore machine, valued at R350.00 and R500.00 respectively. In respect of **count 2,** the Appellant on or about 06 November 2008 and at Heidelburg, broke the passenger window of a motor vehicle, Opel Corsa, belonging to one Magdalena Burger. He thereafter stole a pair of sunglasses, [the value whereof is not stated], out of the vehicle in question.

The state proved the following previous convictions against the Appellant:

1. 1998 – Malicious damage to property, sentenced to 3 months imprisonment, wholly suspended.
2. 1999 – Housebreaking, sentenced to 18 months imprisonment.
3. 2002 – Theft, sentenced to R1 000 or 12 months imprisonment, of which half was suspended for 5 years.
4. 2002 – Theft, sentenced to R 1000 or 50 days imprisonment, of which half was suspended for 3 years.
5. 2003 – Theft, sentenced to R800 or 40 days imprisonment, which was wholly suspended for 3 years.
6. 2003 – Theft, of which he was cautioned and discharged.
7. 2004 – 3 Counts of Theft and 1 Count of Housebreaking; the 4 counts taken together for purposes of sentence and appellant sentenced to 8 years imprisonment, of which 3 years was suspended for 5 years.
8. 2005 – Theft, sentenced to 4 years imprisonment which was wholly suspended for 5 years
9. 2008 – Theft, sentenced to 3 years imprisonment, and declared unfit to possess a firearm in terms of s 103 (1) of Act 60 of 2000

It does not appear from the record [and on the list of previous convictions] that the appellant was at any stage warned that he could be declared a habitual criminal in terms of the provisions of s 281 of the Act.

7.

The following personal circumstances of the Appellant were placed on record:

- The Appellant was 32 years old;
- He is single;
- The Appellant had a girlfriend who was pregnant at the time of his arrest. At the time of sentencing he however did not know what had happened with the girlfriend.
- The Appellant was employed during January to April 2008 by JM Security in Heidelberg. He was however dismissed as he could not receive a certificate due to his list of previous convictions. [It was argued that because of the Appellant's failure to secure employment, he was placed in a position in which he stole to survive];
- The Appellant had passed grade 7 at school;
- The Appellant is not a sophisticated person;
- The Appellant pleaded guilty and did not waste the court's time;
- The Appellant is HIV positive and realises that he went astray in life by committing crimes, and that he was determined to change and live an honourable life.

The Appellant in essence appeals against the severity of the sentence and submits that the sentence in count 1 is shocking and not justified in the circumstances.

The imposition of a sentence is pre-eminently for the sentencing court. It is trite that a court of appeal does not lightly interfere with a sentence imposed by the court of first instance; see **R v Lindley, 1957 (2) SA 235 (N).** A court of appeal will interfere with the sentence only if there is a material misdirection or if the court could not, in the circumstances of the case, reasonably have imposed the particular sentence; see **S v Pieters 1987 (3) SA 717 (A) at 734 E.**

SECTION 286 (1) provides as follows:

"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 is 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 offences or offences of which he is convicted" [my underlining].

It appears that the trial court declared the Appellant a habitual criminal solely based on his previous convictions. The trial court found that the community ought to be protected from the Appellant.

Counsel for the Appellant, Ms Van Wyk submitted that the trial court failed to properly consider the facts of the charges in mitigation of sentence. That the low value of the stolen items was not properly considered by the trial court. She further submitted that an effective

period of 15 years imprisonment is too harsh given the facts of this case and is disproportionate to the facts of the case. That the list of previous convictions ought not to have outweighed the low value and small amount of items which were stolen.

It appears that the trial court mainly focused on the previous convictions of the Appellant to justify the sentence. Nowhere on the record does it show that an inquiry was held to investigate the nature and circumstances under which the Appellant had committed the previous crimes. The SAP 69's of the Appellant does not indicate that he had been warned at any stage of the existence and consequences of s 286 of the Act; i.e. that he is at risk to be declared a habitual criminal.

Also, the Appellant was not warned in this case, prior to the imposition of sentence, of the possibility that he may be declared a habitual criminal in terms of s 286 of the Act, nor was his legal representative invited to make submissions in this regard.

In essence the state also conceded that it also had problems with the fact that the learned magistrate *a quo* did not gather enough information pertaining to the nature and circumstances of the Appellant's previous and present convictions, to thoroughly inform himself prior to imposing the sentence herein.

Surely a court, when declaring an accused a habitual criminal, is punishing the accused also for his previous convictions. In my view it is prudent that a sentencing court should therefore enquire into the circumstances under which the previous convictions were committed. *Refer* ***S v Mdliva*** *1981 (2) SA 475 (E); and* ***S v Stenge*** *2008(2) SACR 27*

(C). This ought to be done especially in circumstances where such an accused had not previously been warned in advance of the provisions of s 286 of the Act.

Although a previous warning of the applicability of s 286 of the Act is not a legal requirement, a trial court ought then to hold a more careful inquiry into the nature and circumstances of the previous convictions and an investigation then becomes necessary. A prior warning however is a desirable practice. Refer **S v Dyani** 2004 (2) SACR 365 (E).

In my view a court of appeal would be entitled to interfere in the sentence where a sentencing court had failed in these circumstances, to examine the nature and circumstances of the previous convictions. Such a failure by a trial court amounted to an improper exercise of its discretion. Refer **S v Masisi** 1996 (1) SACR 147 (O)

A trial court has to find that an accused is committing crimes out of habit. See *S v Makoula 1978 (4) SA 763 (SWA)*, Strydom J said the following:

> *" The notion of committing crimes habitually, implies that the person concerned has to be a person who has the insight to distinguish between right and wrong and the ability to refrain from wrongdoing. While he is capable of choosing between doing right and doing nothing or doing wrong, he makes a habit of doing the last. It is like the habit of smoking, something which can be acquired and which is prejudicial and which he does not want to give up."*

The question a trial court has to answer is whether there are sufficient grounds for accepting that an accused is committing crimes out of habit. In this case it is clear that the trial court relied solely on the list of previous convictions to come to this conclusion.

The following was held in **S v Stenge** (supra) at paragraph [14]:

> *"I am not convinced that force of habit is the only reasonable inference that can be drawn from a long list of frequent previous convictions. In cases involving petty theft, the court, in considering whether to apply section 281 (1), should have regard to the socio-economic conditions of the offender as well as all other relevant factors in determining what motivated the person. In a country like South Africa, where, as at March 2005, 26, 5 % (statistics SA 2005 Labour Force Survey) of the population remained unemployed and where a vast proportion of the population remained unemployed and vast proportion of the population lived beneath the poverty line, it is reasonable to infer that there are cases where the frequent commission of petty theft could be born out of desperate poverty. That is not to say that committing an offence for that reason is excusable or even a mitigating factor in all circumstances. It does, however, provide a reason other than force of habit."*

The legal representative of the Appellant in mitigation at the court *a quo* addressed the trial court on the reason for the commission of the offences. It was argued that the Appellant lost his employment due to his previous convictions. The Appellant then gained an income by selling the

stolen items. The trial court ought to have investigated the circumstances under which the previous convictions were committed after this address by the legal representative.

I align myself with the views stated by the learned Murray AJ in Stenge supra ...that

"That is not to say that committing an offence for that reason is excusable or even a mitigating factor in all circumstances. It does, however, provide a reason other than force of habit."

The learned magistrate *a quo* did not advance any sound reasons why he was satisfied that the offences were committed out of habit. Although the list of previous convictions shows that the previous sentences did not have a deterrent effect, it would have been more appropriate to establish the reason for the continued transgressions, more especially because the Appellant's socio-economic circumstances were canvassed by his legal representative in mitigation.

On the facts of the case before us it is clear that the trial magistrate did not exercise his sentence discretion properly. The sentence thus ought to be set aside and replaced with a sentence proportionate to the facts of the case and taking into account the circumstances under which the Appellant had committed the offences.

The sentence in our view ought to be set aside and replaced with the following sentence:

1. On count 1 the accused is sentenced to 7 years imprisonment.

2. On count 2 the accused is sentenced to 4 years imprisonment.

3. The sentence in respect of count 2 shall run concurrently with the sentence in count 1.

4. The accused is warned that should he be convicted of an offence of which theft is an element he may be declared a habitual criminal in terms of section 286(1) of the Criminal Procedure Act 51 of 1977.

5. The prison authorities are directed to convey the said warning [prayer 4 hereto] to the Appellant and to favour the Registrar of this Court with a report confirming that they have done so.

6. In terms of ***section 282 of the Criminal Procedure Act, Act 51 of 1977, as amended,*** the sentence is ante-dated to the 5th of November 2009.

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

A P LEDWABA
JUDGE OF THE HIGH COURT

It is so ordered