

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A402/2018

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED
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SIGNATURE	DATE

[Handwritten signature] *22/11/2019*

In the matter between:

ALBERT DUMISANI SITHOLE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

SENYATSI AJ

- [1] This is an appeal against declaration of the Appellant as a habitual criminal in terms of section 286(1) of the Criminal Procedure Act 51 of 1977.

- [2] The Appellant appeared before the Magistrate District Court of Merafong held at Oberholzer where he pleaded guilty to a count of theft of sandals valued at R349.00. He was found guilty of the offence.
- [3] After the previous convictions were proved against him, the case was transferred to the Regional Court for sentencing in terms of section 114(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA")
- [4] The Appellant was sentenced in the Regional Court and declared a habitual criminal in terms of section 286(1) of the CPA. His leave to appeal was dismissed in the Regional Court and after petitioning this Court, he was granted leave on the sentence.
- [5] The appellant raises, as one of the key grounds, the fact that the court *a quo* did not make an enquiry into the circumstances under which the string of theft cases were committed. The Appellant furthermore argues that his many previous convictions which were admitted ought not to have been the only consideration for declaring him habitual criminal.
- [6] Section 286(1) of the CPA provides for a serial offender to be declared a habitual criminal. The section has been subjected to scrutiny in a number of judgments such as *S v Niemand* 2001 (2) SACR 654 (CC); *S v Van Eck* 2003 (2) SACR 563 (SCA); *S v Nawaseb* 1980 (1) SA 339 (SWA); *S v Wayi* 1994 (2) SACR 6; and *S v Stenge* 2008 (2) SACR (C) ; *S v Trichard* 2014 (2) SACR 245 (GJ); *S v Smith* 2019 (1) SACR 500 (WCC).

[7] The section 286 of the CPA has the effect that once declared a habitual criminal, such person is sent to prison for an indeterminate period. The duration of sentence of a person declared a habitual criminal is determined by the Parole Board and the Commissioner of Correctional Services Department.

[8] Section 286 of the CPA provides as follows: -

"(1) *Subject to the provisions of ss (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 offence or offences of which he is convicted.*"

[9] Whether or not to make such a declaration is a matter of judicial discretion. (See Styetler: *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (Butterworth) 1998 at 421-2.) Even if the court is convinced that a person habitually commits crimes and that the community ought to be protected from, the court still has a discretion whether to make the declaration. [See *S v Niemand (supra)*].

[10] Once declared habitual criminal, the person "... may be kept in gaol for the rest of his life. He may be released on probation or on conditions. It is therefore a sentence that may operate with the utmost severity." [See *R v*

Edwards 1953 (3) SA 168 (A)]. The discretion to be exercised must be exercised judicially.

[12] In the case before us, counsel for the Appellant has argued that when a declaration was made, the court *a quo* failed to make an inquiry into reasons for committal of the various offences of petty theft. This point was conceded by Ms Williams on behalf of the Respondent.

[13] With such concession made, it is the respectful view of this Court that the Court *a quo* did not exercise its discretion judicially when it made a declaration of the Appellant as an habitual criminal. The nature of the offences were not of violent nature and the Appellant was no danger to society.

[14] It follows therefore that the appeal must succeed.

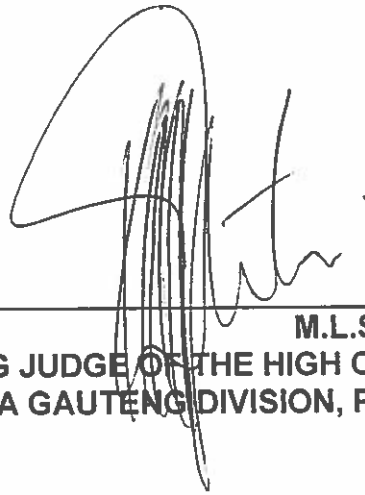
ORDER

[15] The following order is made:

(a) The appeal is upheld.

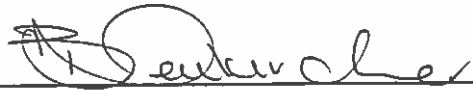
(b) The declaration of the Appellant as an habitual criminal is replaced with the following sentence:

“The accused is sentenced to five years imprisonment two of which are suspended for a period of five years on condition that the accused is not convicted of a similar offence.”



M.L.SENYATSI
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA

I agree



B NEUKIRCHER
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA

APPEARANCES

For The Appellant:

Instructed by:

For The Respondent:

Instructed by:

Date of Hearing:

Date of Judgment:

Mr R Du Plessis

Legal Aid South Africa, Pretoria

Adv Williams

The Director of Public Prosecutions

9 September 2019