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

Case Number: **A44/2017**

In the matter between:

ANDRIES SMITH Appellant

and

THE STATE Respondent

Date of hearing: 03 March 2017

Date of judgment: 10 March 2017

JUDGMENT

DOLAMO, J

INTRODUCTION

[1] On 21 July 2016 the appellant, who was 27 years old at the time, pleaded guilty to one count of housebreaking with intent to steal and theft of two pieces of cheese and a bar of soap to the value of R52-80. These items were stolen from a fellow farmworker who caught the appellant *in flagrante delicto* in the former's house. He

was convicted on his plea of guilty. The Regional Court thereafter declared him a habitual criminal in terms of section 286 of the Criminal Procedure Act[1] ("CPA"). The effect of this declaration is that the appellant would be detained in prison for at least seven years but would be released once he had served 15 years imprisonment. He was granted leave to appeal the sentence on 2 December 2016.

[2] Although not married the appellant is the father of four minor children who were born to and stayed with their different mothers. He was raised by his mother alone, his father having left them when he was young. He has virtually no formal education as he left school in Sub B (Grade 2). He has been a farm labourer since 2015 earning R500-00 per week. He has a string of previous convictions ranging from housebreaking with intent to commit theft and theft to theft *simpliciter*. His first offence was committed when he was only 15 years old with the last offence, which led to his declaration as an habitual criminal, committed on 15 January 2016. The particulars of his previous convictions are:

"2001-07-18 : Theft – on 2001-07-20 – In terms of section 297 (1)(a) and (e) the imposition of sentencing was postponed for 5 years. This sentence was later put into effect.

2001-07-19 : Housebreaking with intent to steal and theft.

2001-07-20 : Housebreaking with intent to steal and theft committed on the 2001-07-19 – 297 (1)(A).

2002-07- 21 : Theft – sentenced on 2002-07-23 to 6 months imprisonment.

[1] Act 51 of 1977.

2003-03-07 : Housebreaking with intent to steal and theft. He was sentenced on 2003-04-07 to 12 months' imprisonment. He was released on 2005-06-17 on the expiration of the sentence.

2003-04-06 : Theft – He was sentenced on 2003-05-31 to 12 months' imprisonment. It is not clear whether this sentence was ordered to run concurrently with the one which was imposed on 2003-04-07.

2005-07-14 : Theft – On 2005-07-18 the court sentenced him to 9 months' imprisonment. A further 9 months imprisonment was suspended for 4 years on the usual conditions of suspension.

2006-10-01 : Housebreaking with intent to steal an theft. He was sentenced on 2007-01-15. He was released on parole supervision on 2009-03-06 until 2010-01-14.

2007-01-15 : Housebreaking with intent to steal an theft as well as the contravention of section 36 of Act 62 of 1955. He was sentenced to 3 years imprisonment on each count. The second term of imprisonment was suspended for 5 years on the usual conditions of suspension.

2011-04-02 : Theft – He was sentenced on 2011-04-08 to 6 months imprisonment and released on 2011-11-30 on expiration of the sentence.

2011-04-14 : Housebreaking with intent to steal an theft. He was sentenced to 6 years imprisonment on 2012-05-10.

2012-04-14 : Housebreaking and intent to steal and theft. He was sentenced on 2012-05-10 to 6 years imprisonment and warned of the provisions of section 286 of the CPA.

PROCEEDINGS IN THE REGIONAL COURT

[3] After convicting the appellant and before commencing with sentencing the court *a quo* enquired from the appellant, who admitted that he was previously warned in terms of section 286 of the CPA that he ran the risk of being declared a habitual criminal. Secondly, the magistrate indicated that she intended to go the route of section 286 of the CPA and requested the appellant's legal representative, and the State, to address her on the circumstances of the previous convictions. For this reason the matter was postponed to enable his legal representative to prepare to address the court *a quo*. On the next appearance appellant's legal representative addressed the court *a quo* on the authorities applicable to section 286 of the CPA. The legal representative, however, did not utter a single word on the circumstances of the previous offences. The prosecution too did not touch on these circumstances. Despite this the court *a quo* commenced its sentencing judgment by declaring that it has all the necessary information to determine the type of sentence which it deemed appropriate for the appellant.

[4] After outlining the objectives of sentencing and the factors which a sentencing court will take into consideration the trial court stated that[2]:

"Now in respect of section 286 the Court is supposed to look at your personal circumstances. Your attorney repeated them to this Court, because I wanted to

[2] Page 31 lines 10 – 23.

make sure that what she said on the last occasion is what she is going to say today. I also wanted to make sure just to see if she might add a few more things relating to your personal circumstances and I'm satisfied with her address.

It looks like you have a hard life since you were very young and because people make choices you chose to follow the criminal way of life a way of criminal behaviour.

I am not sure under what circumstances the previous convictions were committed but it is clear that they are all almost the same charges that of theft and that of housebreaking with the intend to steal and theft." (*my emphasis)*

[5] The trial court then went on to state that, if it were to decide that appellant should be declared a habitual criminal in terms of section 286, the charge for which he had to be sentenced would not play any significant role, his previous convictions being of paramount consideration; that though the value of the goods stolen would be taken into consideration emphasis, nevertheless, would be on his previous conviction; that it appeared that each time the appellant was released from prison he would commit an offence, which led to him going back to prison; and that his previous convictions showed that there was no point in time where he tried to be a dutiful citizen or refrained from committing offences. The court *a quo* then concluded that appellant constituted a danger to society and should be removed for a period of at least 7 to 15 years, and consistent with this assessment, declared him a habitual criminal.

[6] The declaration of a person as a habitual criminal was found by the Constitutional Court in *S v Niemand*[3] to serve a useful sentencing purpose. The

[3] *S v Niemand* 2001 (2) SACR 654

Constitutional Court further confirmed the jurisdictional facts which must be present before a court makes a declaration. It held that the court must be convinced (i) that the person habitually commits crimes; (ii) that detention for at least seven years is the right protection for the community against him/her; (iii) that he/she is not under the age of 18 years; and (iv) that the punishment does not warrant that the accused be sentenced to a term of imprisonment exceeding 15 years[4]. Thus, section 286 (1) has extended a court's discretionary powers to include the competency to impose an additional type of sentence, namely, declaration as a habitual criminal[5]. Such competency will arise only where the court is convinced that the person habitually commits offences and that the community should be protected[6]. A presiding officer who declares a person a habitual criminal must not only be convinced that the accused habitually commits offences but must also give cogent reasons which had convinced him/her to come to this conclusion[7].

[7] The phrase "*habitually commits offences*" is not defined in the CPA and accordingly must bare its ordinary grammatical meaning[8]. The Concise Oxford English Dictionary defines habitual, as an adjective, to mean [something] done constantly or as a habit (i.e. settled or regular tendency or practice). The court must therefore be convinced that the person regularly or has a tendency to commit offences. It was held in *S v Makoula*[9] that 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

[4] Per Madala J at paragraph [9].
[5] See the dissenting judgment of Murray AJ in the Stenga matter *infra*.
[6] See S *v Nawaseb* 1980 (1) SA 339 (SWA) at 344h- 345a.
[7] See *S v Stenge* 2008 (2) SACR 27
[8] 12th Edition
[9] 1978 (4) SA 763 (SWA).

he is capable of choosing between doing right or doing nothing or doing wrong, he makes the habit of doing the last[10].

[8] Usually a factor which would decisively convince the court that as accused habitually committed offences are his/her previous convictions. This would normally be reflected on the accused's SAP 69 form, being an official record of previous convictions. In terms of section 271 of the CPA the prosecution may, after conviction but before sentence has been imposed upon an accused person produce to the court for admission or denial by the accused a record of previous convictions alleged against him. Although this section makes it clear that it is the prerogative of the prosecution to provide the list of an accused's previous convictions, recent legislative measures relating to sentence, such as Act 105 of 1997 (the "Minimum Sentence Legislation"), make it imperative for the prosecution to produce the record of an accused's previous convictions to enable the sentencing court to properly discharge its sentencing function[11].

[9] The authorities however, are not *ad idem* as to how the evidence of the accused's previous conviction should be interrogated to assist the court in deciding whether the accused habitually commits offences and should accordingly be declared a habitual criminal. One school of thought holds the view that the court must first try to ascertain the circumstances under which the previous offences were

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[10] at page 767 G – H :"*Die begrip om misdrywe uit gewoonte te pleeg, impliseer dat die betrokkene 'n persoon moet wees wat oor die insig beskik om tussen reg en onreg te onderskei en oor die vermoë om hom van onreg te weerhou. Terwyl hy dan instaat is om te kies tussen regdoen of niksdoen of onregpleeg, maak hy 'n gewoonte daarvan om die laaste te doen. Die wil word telkens verkeerd ingespan met miskenning van ander se regte."*

[11] See *S v Nhlapo* 2012 (2) SACR 358 (GSJ) where Splig J expressed the view that unless good reason exists such as to avoid a further remind it was unacceptable for the prosecution not to produce to the court the record of previous convictions for sentencing purposes.

committed, before declaring a person to be a habitual criminal[12]. The other school of thought believes that such an approach, of enquiring into the circumstances under which each previous offence was committed, was impractical as Van Schalkwyk AJ pointed out in *S v Erasmus*[13] that:

> *"Die benadering van Kritzinger WnR sou, na my oordeel, ook in baie gevalle onprakties wees. 'n Veroordeelde mag, bv, 'n lang lys vorige veroordelings hê wat oor 'n lang tydperk strek, ten opsigte van verskillende soorte misdrywe, wat in verskeie plekke in die land gepleeg is. Dit sou, in so 'n geval, 'n onbegonne taak wees om die omstandighede vas te stel waaronder die misdrwye gepleeg is. Die voorgestelde ondervraging van die veroordeelde sou ook, in meeste gevalle, onbevre-digend wees. Uit die aard van die saak sal die hof by so 'n ondervraging hom moet verlaat op die onbetwiste relaas van 'n persoon met 'n lang geskiedenis van misdaad. Die doeltreffendheid daarvan is dus te betwyfel."*[14]

[10] It was also suggested by Murray AJ in a dissenting judgment in *S v Stenge*[15] that cases may come before a court where the list of previous convictions was so long and where it appears that the offences were committed regularly that no other inference can reasonably be drawn than that the accused habitually committed

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[12] See *S v Nawase supra.*
[13] 1987 (4) SA 685 (K) at 690 F – I.
[14] Loosely translated the Learned Judge said: *"The approach adopted by Kritzinger AJ would, in my opinion, in many cases be impractical. A convicted person may, for example, have a long list of previous convictions spanning a lengthy period in respect of different offences committed in various parts of the country. It would, in such a case, be an impossible task to determine the circumstances under which these offences were committed. The suggested examination of the convicted person would also, in most cases, be entirely unsatisfactory. By its very nature, such an examination of the convicted person would result in the Court having to rely on the uncontested version of a person with a long criminal history. For this reason, the effectiveness of such an enquiry is doubtful."*
[15] at paragraph [44].

offences[16]. In the same matter of *Stenge* Allie J (with whom Hlophe JP concurred) disagreed with the approach propagated by Murray AJ. The learned Judge was not convinced that force of habit is the only reasonable inference that can be drawn from a long list of frequent previous convictions[17]. The learned Judge further held that the fact of a list of previous convictions alone does not justify the imposition of an ever increasing sentence and that it would be more appropriate to enquire why the person repeatedly committed offences than to assume that purely by virtue of their prevalence the offence were being committed out of habit[18].

[11] In my view, the Learned Judge in *Stenge* was advocating for an approach which required holding an enquiring into the circumstances which led to the commission of the previous offences. This is an approach which, in my view, may put a court in a better position to determine whether section 286 should find application. To act on the provisions of section 286, without such an enquiry may, in certain circumstances, infringe upon an accused's right to a fair trial. The problems envisaged and alluded to by Van Schalkwyk AJ in the *Erasmus* matter can, to a large extent, be circumvented by a thorough preparation before applying section 286 of the CPA, which preparation may include, but not limited to obtaining copies of the charge sheets in the matters in which the accused was tried and convicted as well as pre-sentencing report by a probation officer. I am mindful of the fact that this may cause delays in the finalisation of trials and result in additional expenses in securing these documents but modern technology and advanced means of communication would greatly facilitate and expedite this process.

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[16] With due respect this was made without any attempt to provide guidance as to what would be considered a long list of previous convictions to justify drawing an inferences that the accused was a habitual criminal.
[17] *S v Stenge supra* at para [14] and concluded.
[18] *S v Stenga supra* at para [18].

[12] From the documents obtained as stated *supra* the court can gain useful information on the circumstances under which the previous offences were committed including the accused's personal circumstances. This information can also be supplemented by the accused. While information by the accused, admittedly, may not be the best source, the accused may and should be invited to assist the Court in interpreting the information gathered from these documents[19]. In most cases accused should be able to furnish all the relevant circumstances of his previous convictions. The court should be able to verify the accused's information from the documents so obtained. After all it is in the accused's interest to assist the court to determine whether he/she habitually commits offences or whether there were extra ordinary circumstances which led him/her to the commission of the previous offences.

WARNING THE ACCUSED OF A POSSIBLE DECLARATION

[13] Although it is not a requirement in terms of section 286 of the CPA that an accused person should have been previously warned about the risk of being declared a habitual criminal before the section is applied it has become an established practice, and is indeed prudent, to warn him/her that on further accumulation of convictions[20] he/she runs the risk of being so declared. Is such a previous warning sufficient to guarantee an accused person's right to a fair trial where he is not again reminded of this risk before he pleads in the proceedings wherein the implementation of the provisions of section 286 of the CPA is contemplated? The ultimate question is whether the appellant enjoyed a fair trial if he

[19] i.e. the records of the previous proceedings.
[20] See *S v Smith* 2014 (2) SACR 190 (FB) at paragraph [10].

was not sufficiently apprised, in good time, of the risk of being declared a habitual criminal and the severity of the sentence prescribed by section 286 of the CPA.

[14] Mr *Ntela*, who appeared for the State, submitted that a warning in the proceedings in which a declaration is contemplated would have resulted in a disclosure to the presiding officer of the appellant's previous convictions before conviction, which is prohibited. This prohibition is aimed at shielding the accused against the presiding officer forming a prejudicial view on learning about the accused's previous criminal conduct before conviction. According to Mr *Ntela* the previous warning of the appellant by the Magistrates' Court, Oudtshoorn, on 10 May 2012 was sufficient to warn him of the risk he was running in the proceedings in *casu*: that the record of his previous conviction was available before the trial commenced and that his legal representative would have had access thereto and warned the appellant accordingly. Mr *Klopper,* for the appellant, suggested a practical solution to the problem. According to Mr *Klopper* the solution lies in placing the *onus* on the prosecution, once conviction is secured, to prove to the presiding officer that the accused was warned of the risk of declaration, prior to pleading or commencement of the proceedings.

[15] There is merit in the suggestion by Mr *Klopper* that a duty to inform the accused of the provision of section 286 and its consequences and to remind him/her of a previous warning, if there was any, should rest upon the State. This not an onerous burden and can be discharged by providing a certificate, alternatively, any written proof that the accused's attention was drawn, first to the fact that he was previously warned of the risk of declaration and, secondly, of the possibility of section 286 being

applied and, lastly, the nature and extend of the sentence it provides. This certificate or proof of warning can be produced contemporaneously with the accused's SAP69 record. In this way the court will not know of the accused's previous convictions before conviction while at the same time the accused was alerted of this risk and enabled him/her to make an informed decision on his/her course of action in the trial.

[16] Warning an accused prior to pleading, that he runs the risk of being declared a habitual criminal, will enhance his/her right to a fair trial. This approach accords with the jurisprudence which has developed around the interpretation of and application of the Criminal Law Amendment Act[21] which requires that an accused be warned of the application of the minimum prescribed sentence, in a particular case, which must be imposed unless substantial and compelling circumstances exist justifying a lesser sentence[22]. The difference lies only in that the warning was section 286 is applicable would be done by the Public Prosecutors. The presiding officer would then require proof of this warning before applying the provisions of section 286. The rational for this warning is to afford an accused person the opportunity to make an informed decision. A declaration in terms of section 286 has the same effect as a minimum sentence in that an accused must serve at least a minimum period of 7 years in person with the possibility that it may go up to 15 years. There is no reason why it should stand on a different footing.

[17] In my view the appellant would not have enjoyed a fair trial if the fact that section 286 would be applied was not brought to his attention prior to pleading to the

[21] Act 105 of 1997.
[22] *S v Ndlovu* 2004 (2) SACR 70 (W); *S v Legoa* 2013 (1) SACR 13 (SCA); *S v Shabalala* 2006 (1) SACR 328 N; *S v Makatu* 2006 (2) SACR 582 (SCA).

charges in the present matter. Section 286 of the CPA carries a drastic and exceptional punishment[23] and enjoins a sentencing court to carefully consider an accused' right to a fair trial before it is implemented. The right of an accused to a fair trial requires, where the state proposes to call for the application of section 286 or where it is apparent that the court would *mero motu* decide to apply the provision of section 286, to bring to the attention of the accused the provisions of the section before he pleads, especially when the record of his previous conviction is available at that stage. In this way the accused would be timeously informed, not only of the charge against him but also of the risk he runs that upon conviction, and after compliance with the specified requirements of section 286 of the CPA, he may be declared a habitual criminal. An accused person will not enjoy a fair trial if he is only advised after conviction that he is at risk of being declared a habitual criminal.

[18] Whether or not to declare a person a habitual criminal remains a matter for the discretion of the sentencing court[24]. This discretion, however, must be exercised judicially. Even if the court is convinced that a person habitually commits crimes and that the community ought to be protected, the Court still has a discretion whether to make the declaration. The power of this Court to interfere with the sentence imposed by the trial court is, however, limited[25]. It may only interfere where the exercise of the trial court's discretion is vitiated by misdirection or the sentence imposed is so inappropriate as to indicate that the discretion was not properly exercised[26]. A discretion is also not judicially exercised where a court was moved by irrelevant considerations or ignored relevant circumstances to impose a particular sentence.

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[23] See *S v Masis* 1996 (1) SACR 147 (O) at 152d.
[24] See *S v Van Eck* 2003 (2) SACR 563 (SCA) at para [9].
[25] At para [12].
[26] At para [12].

[19] From the record it does not appear that the appellant, who clearly is illiterate, was reminded prior to pleading in the proceedings in *casu* of the fact that he was previously warned of the possibility of section 286 being applied and the drastic consequences it held for him. The previous warning made on the 10 May 2012, approximately 4 years before he came to be confronted by the consequences of this warning, may have faded from the appellant's memory and was only reminded thereof after he had pleaded guilty. From the record it further appears that his legal representative was not aware of the warning, hence her request for a postponement to prepare to address the court *a quo* on the provisions of section 286. As stated supra when she ultimately addressed the court she only dealt with the authorities applicable to section 286 but did not bring to light the circumstances under which appellant's previous offences were committed. The court *a quo* was in no better position: it did not have any information, gathered from any source, which could assist it to determine whether the appellant committed these offences out of habit. It therefore appears that the trial court declared the appellant a habitual criminal solely on the basis of the record of his previous convictions. While the list of previous convictions can serve as a useful starting point it will not be conclusive without any additional information to justify a finding that these previous offences were committed out of habit.

[20] The appellant's personal circumstances as placed on record by his legal representative did not reveal much about his personality to enable the trial court to conclude that he committed offences out of habit. As the trial court itself admitted, it was not sure under which circumstances were the previous offences committed, which led to his convictions. The trial court arrived at the conclusion that appellant

has a tendency to steal and break into people's homes and steal from them without sufficient background information, or a factual supporting basis. It goes without saying that what followed, namely the conclusion that society ought to be protected against the appellant, was equally reached without adequate information. In this respect the trial court committed a material misdirection which warrants interference with the sentence by this court.

[21] The appellant's previous convictions include 5 offences of housebreaking with intent to steal and theft and 6 of theft. He served various forms of sentences. For the first two offences committed when he was only 15 years old the imposition of sentence was postponed for 5 years in terms of section 297(1) of the CPA and the appellant was placed under the care and control of a probation officer. The sentence was later put into effect on 7 October 2005. By that time he had already committed 5 other offences and had been sentenced to various terms of imprisonment ranging from 6 months imprisonment, and subsequently, to 6 years imprisonment. It is obvious from these sentences that they did not have the desired effect despite having been increased from short to long term imprisonment. But this, does not mean that a heavier sentence is called for in the present matter: the punishment must always fit the crime. This principle was restated by Erasmus J (Pillay J concurring) in *S v Beja*[27] who held that:

> *"It is trite that the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the*

[27] 2003 (1) SA 168 (SECLD) at 170 D – E.

crime for which such a person must be punished. A period of imprisonment must always be reasonable in relation to the seriousness of the offence.

[22] An appropriate sentence in my view, which will fit the crime and the offender of appellant's calibre, is a sentence of imprisonment for a period of 3 years. The appeal against a declaration of habitual criminal and the concomitant sentence in terms of section 286 of the CPA must be upheld.

[23] The order I make is the following:

1. the appeal is upheld.
2. the sentence imposed by the Regional Court in terms of section 286 of the Criminal Procedure Act is set aside.
3. the appellant is sentenced as follows:

   "*accused is sentenced to 3 years imprisonment*".
4. the sentence is antedated to 21 July 2016.

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DOLAMO, J

I agree.

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SALIE-HLOPHE, J