

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

CASE NO: A247/2010

In the matter between:

10/6/2011

WILLIE MARATHA WHICHEVER IS NOT APPLICABLE **APPELLANT**

And

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

THE STATE DATE **RESPONDENT**

JUDGMENT

MAVUNDLA J:

- [1] The appellant was convicted at the Regional Court on a count of theft of motor vehicle. He was on 7 November 2009 declared a habitual criminal in terms of section 286(1) of the Criminal Procedure Act. He now approach this Court with the leave of court against both conviction and sentence.

[2] The appellant through out the trial was dully represented by Mr. Van Der Merwe. He pleaded not guilty to the count of motor vehicle theft in that on 7 November 2008 and at or near Germiston Mall he unlawfully and intentionally stole a motor vehicle, to wit a VW Golf, Reg. No. RNX 664 GP valued at +- R15 000. 00 the property or in lawful possession of Mr. Manke Esau Motshwana.

[3] The defence of the appellant was disclosed. It was alleged that he was approached by Mr. Joe Ndlovu on 7 November 2008 who inquired from him whether he was not interested in purchasing a motor vehicle for an amount of R8 000. 00. The appellant indicated that he is interested. Mr. Ndlovu came with the vehicle and the appellant paid him an amount of R5 000. 00 and was given the vehicle. The registration documents would be handed to him on payment of the balance of R3 000. 00. After the appellant had taken possession of the vehicle, he drove to Dududuza where he was confronted by an unknown person who accused him of having stolen the motor vehicle. The police arrived and the appellant was arrested. The

appellant avers that he was a bona fide possessor of the motor vehicle.

[4] The issue in this case is whether the version of the appellant is reasonable possibly true, bearing in mind that the appellant need not prove his innocence but the State must prove his guilt beyond reasonable doubt. This question would have to be decided on the background of the evidence that was led.

[5] The motor vehicle was parked by its owner at Golden Mall on the day in question at 13:55. On his return he found the motor vehicle stolen. He reported the vehicle to the police as stolen. He was telephonically informed by his brother forty minutes later that the vehicle was found at Duduza. He went to identify his motor vehicle at Duduza police station at about 18:00 of the same day.

[6] Inspector Elias Jaco Rassool of the SAPS stationed at Duduza Police Station was stopped driving along Sonne Street at about 16:45 by Mr. Mbatha who informed him of having sported his

brother's vehicle which was stolen at Germiston driving along R550 in the direction of Nigel. He asked Mr. Mbatha to climb in his police motor vehicle. Along the road Mr. Mbatha pointed out to him a gold Golf 1 motor vehicle which was parked along the shoulder of the road. He approached the motor vehicle and noticed one occupant in it on the driver's sit. He tapped on the window. The drive, the appellant, did not want to open the door and he had to force it open. He identified himself to the driver. On inquiry the appellant said that it was his motor vehicle. The appellant had put the key he had in the ignition into his pocket. He said that the appellant did not tell him that he had purchased the vehicle for R3 000, 00 from a Mr Joe of Nelspruit. The appellant had an Allan key which was filed on the sides which was handed into the SAP13.

- [7] Under cross-examination Mr. Rassol denied that he stopped the vehicle of the appellant. He insisted that the motor vehicle the appellant was driving was parked on the side of the road. He denied that the appellant told him that he paid R5 000. 00 for the vehicle. He further said that the ignition point had been

tempered with and the key that was in the ignition was of a Toyota brand but could not turn. They had to use the Allen key to start the vehicle with. He learnt from the radio control that the motor vehicle was stolen at Golden Mall in Germiston.

- [8] Mr. Ebson Mbatha testified that the complainant is his brother-in-law. He further testified that the complainant informed him telephonically about 16:10 that his motor vehicle was stolen. He advised him to report the matter to the nearest police station. He was in a taxi on his way home when he saw the complainant's motor vehicle coming from the direction of Alberton heading in the direction of Nigel. He asked the driver of taxi to stop and he alighted. After a few minutes he got help from a passing polite motor vehicle and explained about having seen the stolen motor vehicle. He drove with the police in the direction he had seen the motor vehicle heading towards. They found the motor vehicle parked along the road. The appellant who was the driver of the motor vehicle informed them that he had bought it for R3 000.00. He informed the appellant that the motor vehicle was stolen about forty minutes ago.

[9] The version of the appellant was that he was found with the motor vehicle on the 8 November 2008. He had bought the motor vehicle from one Joe Ndlovu for R8 000.00 towards which he paid R5000.00.

[10] The improbability of the appellant's version lies in the very fact that it was never put to the State witnesses that the vehicle was recovered on the 8 November 2008. The evidence of the State witnesses that the vehicle was recovered on the 7 November 2008 was not challenged. Besides, a motor vehicle is a commodity that is not readily disposables. The vehicle was recovered within forty minutes of its theft. It is highly improbable that the thief of the motor vehicle could have had an opportunity within a matter of less than forty minutes to have sought a buyer and sold the vehicle. The appellant did not know where Mr Ndlovu was to be found. Yet this is the person who still had the registration documents of the vehicle. It bags the question as to how was the appellant to get hold of the registration documents when he eventually wanted to pay the balance of

the alleged R3 000. 00, if he did not know where Mr. Ndlovu was to be found. The inference to be made is that Mr. Ndlovu did not exist, and that the appellant was the person who stole the motor vehicle. In my view, the magistrate quite correctly rejected the version of the appellant to be not reasonably possibly true but falls and found him guilty as charged.

[11] The appellant was declared a habitual criminal in terms of section 286(1) of the Criminal Procedure Act. The appellant was at the time of sentencing 42 years old. His wife is deceased. He has one minor son aged 17 years old from his marriage and another three year old child with his girlfriend. He does not know who looks after the children since his arrest. He was employed at Okweta Trading Building Constructions where he earned not less than R4 000. 00 per month.

[12] The previous convictions of the appellant are that on 31 January 1985 he was convicted of theft and sentenced in terms of s294 of Act 51 of 1977 to 5 lashes; on 14 October 1985 he was convicted of 4 counts of theft and sentenced to 2 years

imprisonment on each count; on 14 October 1986 he was convicted of housebreaking with intent to steal and theft. He was sentenced to 4 years imprisonment which was ordered to run concurrently with the 8 years imprisonment of 14 October 1986. On 2 April 1993 he was convicted of the following offences: robbery and sentenced to 10 years imprisonment, on count 2 possession of weapon without a licence (Act 75 of 1969) and sentenced to 18 months imprisonment; count 3 possession of unlicensed ammunition (Act 75 of 1969) and sentenced to 6 months imprisonment. It was ordered that the sentences in respect of counts 2 and 3 to run concurrently with the sentence in count 1. He was released on parole on 1 July 1997 on parole observation until 1 August 2001; On 22 February 2001 he was convicted on theft committed on 16 August 2000 and sentenced to 5 years imprisonment; On 30 June 2001 he was convicted on possession of housebreaking and or car theft implements and not justify such possession (Act 129 of 1993 sec 2 Third General Amendment Act) and sentenced to 3 years imprisonment. The appellant was in respect of this matter arrested on 28 July 2005.

[13] The appellant was in terms of s286(1) declared a habitual criminal. This section requires that the court must be satisfied that the accused habitually commits crime and that circumstances warrant that he be declared a habitual criminal, *vide S v Stenge* 2008 (2) SACR 27.

[14] In the matter of *S v Niemand* 2002 (1) SA 21 at 26 E-G Madala J (as he then was) said:

"[12] The crux of the matter is that the law seeks to punish a person who manifests a persistent tendency to commit crime by sentencing him/her to what amounts to preventive detention. Under s65(4)(b)(iv) if CSA the consequence of a prisoner being declared an habitual criminal under s1 of CSA means 'a sentence of imprisonment for an indefinite period. Conversely a determinate sentence means a sentence of imprisonment for a determinate period. It also seeks to remove him/her from society for the protection of the public."

[15] In my view, an indeterminate sentence is intrinsically by its nature cruel and severe; *vide R v Edwards* 1953 (4) SA 168 (A); *S v Tcoeib* 1996 (1) SACR 390 (NmS) (1996 (7) BCLR

990; *S v Dodo* 2001 (1) SACR 594. The habitually declared person's faith is left to many imponderables to be decided by the prison authorities as to when he would be released.

[16] Madal J (as he then was) stated, inter alia, that:

"[24] The rationale behind declaration is the acceptance of the fact that there are certain persistent and intractable offenders who are not only nuisances but have a tendency to commit crimes repeatedly, consequently making themselves a menace to society. It then becomes imperative that such persons be removed from society for the purposes of rehabilitating them. In this way the protection of the public against such offenders is achieved. As was held in *S v Dodo* a sentence which is grossly disproportionate to the length of sentence merited by the offences in question postulate cruel, inhumane and degrading punishment or treatment."¹

[17] As stated pointed out by Ngcobo J. in the matter of *Veldman v Director of Public Prosecutions*, WLD 2006 (2) SACR319 (CC), at 349d-e that the right to a fair trial as guaranteed in the Bill of Rights embraces a broader and substantial fairness. In my view, where there is a minimum sentence to be imposed, that prescriptive tempers with the discretion of the court, then in such a situation the starting point by the sentencing authority must be that in accordance with the values of

¹ *S v Niemand supra* at 29D

fairness in the broader sentence he must first look at whether there is any need to impose a lesser sentence. This is nothing new since the very call for placing mitigating circumstances is calculated to determine whether a lesser sentence than that would be expected by society, which for ever will be paying for the blood of the offender should be imposed. Where this exercise has not been conducted then it cannot be said that the accused person has had a fair trial in so far as the sentencing is concerned. Then such sentencing is tainted as the result of the irregularity of not examining, as in this case, whether there exists substantial and compelling circumstances warranting a departure from the imposition of the prescribed minimum sentence.

[18] This Court has held that where the minimum sentence is likely to be imposed, the accused person must at the commencement of the trial be warned of the applicability of the Minimum Sentence Act². The appellant is entitled to, inter alia, the right to a fair trial;³ to be informed of the reason for the detention⁴ and its continuation; to conditions of detention that are consistent with human dignity. In my view, a declaration as an habitual criminal, on face value offends to the rights referred herein above. Any sentence that has the potential of encroaching to the rights of the offender, must be brought to his attention, not on the day of the imposition of such sentence, but well in

² S v Chowe (1) SACR 141 (GNP) at 149d para {22} & footnote 19 therein.

³ S35(3).

⁴ S35(2)(a)

advance. In my view, the appellant should have been at one or other stage been warned that on a subsequent conviction, he might be declared a habitual criminal.

[19] Having regard to the fact that the motor vehicle concerned was recovered, the appellant had not been previously warned of the risk of being declared an habitual criminal were he to be further convicted, his declaration as an habitual criminal is under the circumstances an inappropriate and shockingly severe sentence⁵. In my view, the magistrate misdirected himself in failing to have regard to the factors mentioned herein above when he declared the appellant an habitual criminal. In the circumstances this Court must interfere with the sentence and impose an appropriate sentence..

[20] In the premises I make the following order:

1. That the appeal on the conviction is dismissed;
2. That the conviction is confirmed;
3. That the appeal on sentence is upheld;

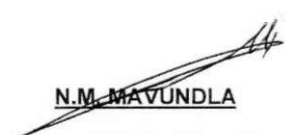
⁵ Vde S v Pillay 1977 (4) SA 531 (A); R v Dlumayo 1948 (2) SA 677 (A).

4. That the sentence imposed by the Regional Court on 7 November 2009 is set aside and substituted with the following sentence:

"The accused is sentenced to six years imprisonment;

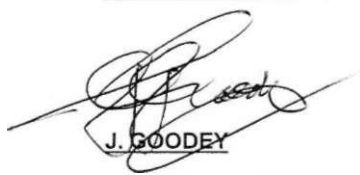
That the accused is warned that in the event of a further conviction he runs the risk of being declared an habitual criminal"

5. That the sentence is antedated to the 7 November 2009.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT



J. GOODEY

ACTING JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 10/06/2011

APPELLANT'S ATT : PRETORIA LEGAL AID CENTRE

APPELLANT'S 'S ADV : MR. M. G. BOTHA

RESPONDENTS' ATT : DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS' ADV : ADV H. CREIGHTON