

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

CASE NUMBER: A890/2014

11/6/2015

In the matter between:

ONIKA PHASHA

APPELLANT

and

(1) Reportable: No
(2) Of interest to other Judges: No

THE STATE

RESPONDENT

HEARD ON: 20 April 2015

JUDGMENT:

STRIJDOM AJ

1. This is an appeal against sentence. The Appellant, a [...] year old female was convicted of theft in the Magistrates Court, Hatfield. She has pleaded guilty on 26 February 2014, and in terms of Section 114 of the Criminal Procedure Act, Act 51 of 1977, the matter was referred to the Regional Court Atteridgeville for sentence.
2. On 3 June 2014, the Appellant was declared a habitual criminal in terms of Section 286 (1) of the Criminal Procedure Act.
3. The Appellant is [.....] years of age. She is unemployed and receives an old age pension of R1,300.00 per month. The Appellant takes care of two

grandchildren, who lives with her prior to her arrest. The mother of these two children are deceased. The Appellant only progressed to grade 5. Her mother passed away when she was [.....] years of age.

4. The Appellant has 45 previous convictions.
5. It was submitted on behalf of the Appellant that the following mitigating factors which are not in dispute between the State and the defence should be considered in favour of the Appellant:
 - 5.1. The Appellant admits responsibility for the offence and pleaded guilty.
 - 5.2. All the stolen items were recovered. The value of the stolen items amounts to R650.00.
 - 5.3. The Appellant is [.....] years of age.
 - 5.4. The offence was committed not out of greed, but out of necessity resulting from her dire circumstances, as is evident from the psycho social report, as well as the items that were stolen, being school shoes for the minor child and bedding.
 - 5.5. Although the Appellant may be regarded as a risk to society due to loss of property, her actions did not result in any bodily harm to any members of public. She is therefore not a danger to society.
 - 5.6. It seems evident from the sentences that were imposed for previous convictions, that most of these offences were relatively

small in nature. In the last seven offences, the prosecutor allowed the payment of an admission of guilt fine.

AD SECTION 286 (1) OF THE CRIMINAL PROCEDURE ACT:

6. Section 286 (1) of the Criminal Procedure Act 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 satisfied that the said person habitually commits offences and that the community should be protected against him, declare him a habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted."

7. In **S v Niemand 2001 (2) SACR 654** CC, the Constitutional Court held that a sentence in terms of which an offender is declared a habitual criminal must be read and applied as if it is subject to a maximum of 15 years imprisonment.
8. It was submitted by Mr Rudman for the Appellant that the Appellant commits these offences during times of financial hardship and not as a result of habit.

9. It is further submitted on behalf of the Appellant that the sentence imposed is shockingly inappropriate and disproportional to the crime, the offender and the legitimate needs of society.
10. Counsel for the Respondent conceded that this Court should interfere with the sentence imposed by the Court *a quo*.
11. In cases involving petty theft, the Court, in considering whether to apply Section 286 (1), should have regarded to the socio-economic conditions of the offender as well as other relevant factors in determining what motivated the person to commit offences. Precisely because an accused is effectively being punished for his previous convictions as well as for the present one, it is important to know the circumstances under which they were committed before such a declaration is made.

See: S v Stenge 1008 (2) SACR 27 CPD

12. It is evident that the Magistrate considered that previous sentencing options had not had a deterring effect. That fact alone does not justify the imposition of ever increasing sentences. It would be more appropriate to inquire why the Appellant repeatedly committed offences, involving an element of dishonesty than to assume, that purely by virtue of their prevalence the offences were being committed out of habit.
13. It is further evident from the history and background of the Appellant that the offences were committed out of need and not greed. The probation officer concluded in her report (Exhibit "C") that the Appellant committed

the offence to financially support her two grandchildren who are staying with her.

14. The intention of the Legislature in enacting Section 286 was clearly to vest a judicial officer with the discretion to depart from its provisions in certain circumstances, like in the present case.
15. In taking in consideration the goods stolen (a duvet set and children's school shoes), it is inconceivable that a person should spent seven to fifteen years in prison for the commission of such an offence.
16. In **S v Beja 2003 (1) SACR 168 (SE) at 170 d-e** the Learned Judge held the following:

"It is trite that the sentence must always fit the crime and the fact that the person to be punished has a 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 crime for which such a person must be punished."

17. I am not convinced that force of habit is the only reasonable inference that can be drawn from a long list of previous convictions.
18. In my view the sentence of seven fifteen years imprisonment is shocking inappropriate and disproportional to the crime, the offender and the interest of society.

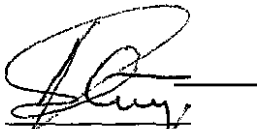
19. Accordingly, I propose that the Appeal against sentence is upheld and the following Order be made:

19.1. The sentence imposed by the Court *a quo* is set aside and replaced with the following:

"In terms of Section 276 (1) (i) Act 71 of 1977 the Accused is sentenced to five (5) years correctional supervision."

19.2. The sentence referred to in paragraph 19.1 is antedated in terms of Section 282 of Act 51 of 1977 to 3 June 2014.

19.3. The accused is declared unfit to possess a firearm.



J STRIJDOM

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

DATE:

I agree

JANSEN J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

DATE:

APPEARANCES:

On behalf of the Appellant:

AC Rudman

On behalf of Respondent:

Adv C Mnisi

Director Public Prosecutions