

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.:A137/2012

In the appeal of:

DAVID LEPHUTHING

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, J et THAMAGE, AJ

DELIVERED ON:

14 DECEMBER 2012

MOLEMELA, J

[1] The appellant was convicted of theft by the district court in Kroonstad. The case was subsequently transferred to the regional court, Kroonstad for sentencing. On the 31st March 2005 the regional court imposed a sentence in terms of section 286(1) of the Criminal Procedure Act 51 of 1977 (CPA) by declaring the appellant a habitual criminal. On the 10th May 2006 an application for leave to appeal was launched on behalf of the appellant but was unsuccessful. On the 16th October 2007 the appellant approached this court on petition and leave to appeal against sentence was granted. This appeal is thus directed against the sentence declaring the appellant a habitual criminal. The reasons for only enrolling the appeal five years after the granting of leave to appeal are not evident from the record. This court can only lament such a state of affairs. Needless to say, such delays impact negatively on access to justice and cannot be countenanced.

[2] It is trite that a court of appeal will interfere with the imposed sentence only if it is of the view that such sentence is unreasonable, unjust or is

vitiated by irregularities or if the court *a quo* has misdirected itself materially. See **S v MALGAS**¹.

- [3] By way of a background, it needs to be mentioned that as at the time of the appellant's appearance before the regional court for sentencing, the appellant had 19 previous convictions for various counts of theft, housebreaking with intention to steal and theft, as well as robbery. One previous conviction related to rape and one to escaping or attempting to escape from lawful custody. On the 24th July 1992, the appellant was sentenced to an effective 10 years imprisonment pursuant to being convicted of housebreaking with intent to steal and attempted rape. On that same day, he was formally warned about the provisions of section 286(1) of the Criminal Procedure Act, 1977 (CPA). On the 27th June 1994, the appellant was convicted on 3 counts of housebreaking with intent to commit theft and theft. Upon his conviction, he was declared a habitual criminal in terms of section 286(1)² of the CPA. After serving a period of 10 years in custody, the appellant was released on parole in May 2004.
- [4] On the 24th November 2004 the appellant was convicted of theft of chicken portions and concentrated cordial, both valued at R17.00. The matter was then transferred to the regional court (court *a quo*) for sentencing on account of the appellant's previous convictions as contemplated in section 116(1) of the CPA. On the 31st March 2005 the court *a quo* declared him a habitual criminal. It is clear from the record that the court *a quo* did not, prior to making this declaration, embark on any enquiry to establish the circumstances pertaining to the appellant's commission of the offence.

¹ 2001 (1) SACR 469 (SCA) at 478F

² This section provides that:

"Subject to the provisions of sub-section (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."

- [5] It was argued on behalf of the appellant that his declaration as a habitual criminal ought to be set aside, as it was not preceded by any investigation by the court *a quo*. The record reveals that before declaring the appellant as a habitual criminal, the court *a quo* remarked that it was aware that the appellant had previously been declared a habitual criminal by another court. It further stated that it was clear that previous sentences had not had a deterrent effect on the appellant.
- [6] The court *a quo* in its judgment nevertheless proceeded to declare the appellant a habitual criminal on the basis of its own conclusion that he was a person that habitually committed offences and that the society ought to be protected against him. This conclusion was purely on the basis of the appellant's previous convictions, which the court *a quo* found to be related to the offence the district court had convicted him of. In effect the same previous convictions relied upon by the first court that declared the appellant a habitual criminal plus one more conviction on petty theft led to the appellant being declared a habitual criminal for a second time.
- [7] During the hearing of the appeal, the state conceded that the court *a quo*'s declaration of the appellant as a habitual criminal was a material misdirection insofar as it was not preceded by an investigation of any sort. Indeed, it would seem that the appellant's prior declaration as a habitual criminal served as a main consideration for the court *a quo*'s decision.
- [8] In the case of **S v STENGE**³ ("Stenge case") at par 14 Allie, J stated as follows:

"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 s 286(1) should have regard

³ 2008 SACR 27 (C)

to the socio-economic conditions of the offender as well as all other relevant factors in determining what motivated that person.”

- [9] In agreeing with what was held in **S v NAWASEB**⁴ (where it was held that a presiding officer must advance sound reasons why he was satisfied that offences were committed out of habit), Allie J pointed out that he was not convinced that the only inference that can be drawn from a long list of frequent previous convictions was force of habit. The court observed that precisely because the accused was also being punished for his previous convictions, a court should know why they were committed. It concluded that it would be more appropriate to have an enquiry to determine why the appellant repeatedly committed certain offences rather than assuming that they were committed out of habit. I share this view and therefore believe that the respondent’s concession, that the court a quo committed a material misdirection, was correctly made.
- [10] The **STENGE** case bears the following similarities with the present one: the conviction pursuant to which the accused person was declared a habitual criminal was a petty offence. The following differences are important: (i) *in casu* the appellant’s previous convictions relate to more serious offences and (ii) the appellant had previously been declared a habitual criminal.
- [11] In the case of **S v NIEMAND**⁵ 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. Regarding release of such an offender from custody section 73(6)(c) of the Correctional Services Act III of 1998 provides that a person so declared may be detained in a prison for a period of

⁴ 1980 (1) SA 339 (SWA)

⁵ 2002 (3) BCLR 219 CC

15 years and may not be placed on parole until after a period of at least seven years.

- [12] As stated before, the appellant was released from prison on parole 10 years after his declaration as a habitual criminal. Applying the principle laid down in the Niemand case this means he could have been kept in custody for a further 5 years had it not been for his release on parole. The fact that he committed another offence after his release on parole obviously means that he violated his parole conditions and the parole board could order that he be re-incarcerated for another five years to complete the maximum period of incarceration.
- [13] The court *a quo* instead regarded the commission of the aforementioned offence as a basis for a new declaration of the appellant as a habitual criminal, which would mean that the appellant could technically spend another 15 years in custody on the basis of this new declaration, when he could have been released after a period of five years from his re-incarceration on account of violating his parole conditions and serving whatever sentence imposed for his petty theft. This approach is very drastic on an offender and cannot, in my view, be correct. Its draconian nature is borne out by the fact that the appellant has been in custody for a longer period than the 15 year period he would have served as the maximum period of incarceration on the basis of his first declaration as a habitual criminal.
- [14] Relying on the **STENGE** case, I am of the view that the court *a quo* ought to have made a fresh enquiry as to whether another declaration as a habitual criminal was justified. Of significant relevance, in this enquiry, would have been the fact that from the time of the first declaration as a habitual criminal, a period of 10 years passed without the appellant being involved in any further criminal acts. The court *a quo* was very dismissive of this aspect, stating that his lack of further involvement in crime was due to the fact that he was incarcerated

during that period and that consequently his opportunity for commission of crimes of dishonesty in a correctional facility was lessened. In my view, undue regard should not be paid to a person's incarceration during the period of his / her abstinence from involvement in crime because no matter how limited opportunities for commission of crime in a correctional facility may be, various offences are still committed there on a daily basis. In my view, irrespective of the appellant's incarceration, this period remains a period during which he did not commit offences and deserves to be acknowledged as such. It is thus a period that is relevant in an enquiry aimed at determining whether he was or is a person that habitually commits offences.

[15] In my view, the facts of this case demonstrate the need for a declaration as a habitual criminal to be preceded by an enquiry. The appellant, upon conviction on a very petty offence like theft of food valued at R17.00 was, for a second time in his life, declared a habitual criminal. Without entering the realm of speculation, there is a good chance that an enquiry would have revealed that the offence was motivated by need rather than a force of habit as the appellant was a self-employed painter, whose highest scholastic achievement was grade five, earning a meagre income, having a fourteen year old child to support. Under such circumstances, it is highly unlikely that such a declaration would have been made. The likelihood is that a suspended sentence would have been imposed. The circumstances of this case demonstrate that the interests of justice will be best served if a decision to declare an offender a habitual criminal is, in cases involving petty theft, preceded by the presiding officer holding an enquiry to determine the offender's motivation for committing such offences.

[16] Placing reliance on the **STENGE** case, I am of the view that the failure by the court a quo to hold such an enquiry constitutes a material misdirection that warrants the setting aside of its sentence. In my view, given the fact that this appeal was heard a very long time after the imposition of the sentence, this court ought to replace the court quo's

sentence with a suitable sentence without remitting the matter back for purposes of making an enquiry so as to determine whether a declaration is warranted or not. In the **STENGE** case, the court concluded that given the petty offence the appellant had been convicted of (*viz.* theft of two packets of chicken) the punishment imposed by the court *a quo* was excessive and fitted neither the crime nor the criminal. In that case, the declaration as a habitual criminal was set aside and, the appellant was sentenced to two years imprisonment wholly suspended on certain conditions.

[17] Having considered all the circumstances of this case, including the appellant's mitigating factors an appropriate order would be the following:

- (i) The appeal against sentence succeeds.
- (ii) The order of the court *a quo* made in terms of section 286(1) of CPA and declaring the appellant as a habitual criminal is set aside.
- (iii) The following sentence is imposed on the appellant:
Twelve months imprisonment wholly suspended for three years on condition that the appellant is not again found guilty of theft committed during the period of suspension.
- (iv) The sentence mentioned in paragraph (iii) above is antedated to the 31st March 2006.

I concur.

S. J. THAMAGE, AJ

On behalf of the applicant: K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. S Mthethwa
Instructed by:
The Director: Public Prosecutions
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