

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

APPEAL NO. 27/2003

In the appeal between:

MATTHEWS MORALE

Appellant

and

THE STATE

Respondent

CORAM: **VAN DER MERWE J *et* VAN ZYL, AJ**

HEARD ON: **7 FEBRUARY 2005**

JUDGMENT BY: **VAN ZYL, AJ**

DELIVERED ON: **17 FEBRUARY 2005**

- [1] The appellant was charged in the Regional Court, Sasolburg, with two counts of housebreaking with the intent to steal and theft. With regard to the first defence, it was alleged that on or about **15 to 17 February 2003**, the appellant unlawfully and with the intent to steal, broke open and entered the building of JJV Engineering at Sasolburg, and that he

stole one overall and one pair of shoes to the total value of **R600.00**.

With regard to the second offence, it was alleged that the appellant unlawfully and with the intent to steal, broke open and entered the same premises on or about **21 February 2003**, and then stole shoes to the value of **R300.00** and clothes to the value of **R350.00**.

- [2] The appellant enjoyed legal representation in the Court *a quo* and pleaded guilty to both charges. A written statement in terms of Section 112(2) of the Criminal Procedure Act, 51 of 1977, duly signed by the appellant, was submitted to the Court *a quo* as exhibit A, in which statement the appellant freely and voluntarily admitted all the elements of the respective charges against him. The appellant was subsequently convicted on both charges and then sentenced in terms of Section 286 of the Criminal Procedure Act, in that he was declared an habitual criminal. The appellant was furthermore declared unfit to possess a firearm.
- [3] The appeal is directed against both the conviction and the sentence.
- [4] The appellant also lodged an application for condonation for the late filing of the appeal. It is evident from the record that the appellant was sentenced on **22 April 2003**, where after he filed his appeal on **20 May 2003**. In terms of Magistrate's Court rule 67, the appellant should have filed his appeal within **fifteen (15) days** from the date on which the sentence was imposed. The present appeal was therefore filed 3 days out of time. The appellant duly filed an affidavit in support of his application for condonation in which he set out a reasonable explanation for the said delay. Considering the short period of delay, the reasonable explanation for the delay and the appellant's good chances of success with the appeal, I am satisfied that the appellant met the requirements for an application for condonation and the

requested condonation is therefore granted.

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[5] Although the appeal is also directed against the conviction of the appellant, Mr Pretorius, who appeared on behalf of the appellant in the appeal hearing, conceded that he can make no valid submissions in support of the said appeal. This concession was, in my view, correctly made. It is evident from the statement made by the appellant in terms of Section 112(2) of the Criminal Procedure Act, that the appellant did admit all the elements of the respective offences. I am therefore satisfied that the appellant made the necessary admissions for a proper conviction on the two charges of housebreaking with the intent to steal and theft. The appeal against the conviction can therefore not succeed.

[6] When considering the appeal against the imposed sentence, I am mindful of the fact that a Court of appeal has only a restricted and limited right to interfere with the sentence imposed by the Court *a quo*. In this regard Rumpff JA stated as follows in **S v ANDERSON 1964 (3) SA 494 (A) at 495 G - H:**

“The decisions clearly indicate that a Court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The Court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence.”

[7] In terms of Section 286 of the Criminal Procedure Act, a convicted person may be declared an habitual criminal by a Court **“if it is**

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satisfied that the said person habitually commits offences and that the community should be protected against him.” The word “***satisfied***” has been interpreted as to mean that the Court has to be convinced of these facts. (See **S v MAKOUULA 1978 (4) SA 763 (SWA)**).

- [8] A rule of practice developed in our law according to which an offender should be warned that he may be declared an habitual criminal if he offends again. However, the warning is not an absolute requirement and an offender may be declared to be an habitual criminal even if no warning has been given. However, a Court will in such an instance be even more careful than usual before imposing this sentence.

Nienaber J set out these principles as follows in **S v SHABALALA 1984 (2) SA 234 (NPA)** at 237 A - C:

“Wat vermoedelik daarmee bedoel word, is dat ‘n verhoorhof ‘n beskuldigde meer geredelik tot gewoontemisdadiger sal verklaar as die waarskuwing wel gegee is, as wanneer die waarskuwing ontbreek; maar dat die vonnis, by ontstentenis van so ‘n waarskuwing, nie sonder meer op appèl ongedaan gemaak sal word nie.

Die afwesigheid van ‘n waarskuwing kan tog negatiewe werking hê, al is dit dan ook op ‘n ander vlak: of die waarskuwing gegee is, al dan nie, bly ‘n relevante faktor wat die verhoorhof in ag moet neem wanneer hy sy diskresie of die beskuldigde tot gewoontemisdadiger verklaar moet word of nie, moet uitoefen. Dit blyk uit die pertinente opmerkings van die Appèlhof in **R v EDWARDS 1953 (3) SA 168 (A)** waar daar, te 170A, verklaar is:

‘The absence of these two factors’

(nl die gewraakte waarskuwing en ‘n ander faktor wat nie nou tersake is nie)

‘is material in considering whether the indeterminate sentence should have been imposed.’

- [9] It is furthermore so that the list of previous convictions of an accused is an important factor when considering the appropriateness of the said

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sentence. In this regard the Court has a duty to enquire into the circumstances under which the previous convictions were committed. In **S v SHABALALA**, *supra*, at 237 G - 238 A, it was stated that:

“Na my mening het die verhoorhof oorhaastig opgetree deur sonder verdere ondersoek tot die gevolgtrekking te kom dat die appellante, ‘*uit gewoonte*’ die gewraakte misdrywe gepleeg het. Veral is dit die geval by die tweede appellant wat slegs een reeks vorige veroordeling het en wat vir ‘n tydperk van bykans agtien maande op vrye voet was alvorens hy die nuwe misdade gepleeg het wat tot sy huidige skuldigbevinding gelei het ... ‘n Ondersoek na die aard en omstandighede van daardie reeks misdrywe sou nie onvanpas gewees het alvorens die verhoorhof die appellante tot gewoontemisdadigers verklaar het nie. Nòg wat aard, nòg wat frekwensie betref vertoon die eerste appellant se vorige veroordelings die eweredige patroon wat op misdaad uit gewoonte dui.”

In fact, in **S v MASISI 1996 (1) SACR 147 (0)**, Lombard J held that it is desirable to hold an investigation into the nature and circumstances of the previous convictions of an accused who had not previously been warned in advance of the provisions of Section 286 of the Criminal Procedure Act. The failure of the trial court under the circumstances to so examine the nature and circumstances of previous convictions of the accused who was not previously warned, amounted to an improper exercise of its discretion and the Court of appeal therefore interfered with the imposed sentence.

- [10] It should also be noted that a further relevant consideration is that there should not be a long lapse of time between the present offence and the previous offences. This principle was stated in **S v MAKOUOLA**, *supra*, at 767 H - 768 A as follows:

“As die lang tydsverloop tussen die vroeëre en huidige diefstalle in ag geneem word, is daar ook geen regverdiging vir die streeklanddros se stelling dat appellant volhard het in die

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pleging van misdrywe tot so 'n mate dat die diefstal van R15 se damesskoene hom 'n gevaar vir die samelewing maak en die gemeenskap teen hom beskerm behoort te word deur die oplegging van die vonnis as gewoontemisdadiger nie.”

[11] In the present appeal it appears that the decision of the Court *a quo* to declare the appellant an habitual criminal was mainly based on the list of previous convictions of the appellant. It is therefore necessary to consider them in more detail:

Between the years **1982** and **1992**, the appellant was convicted and sentenced as follows:

1. 22 March 1982, dagga related offence, sentenced to R20.00 or 20 days imprisonment.
2. 25 September 1984, dagga related offence, sentenced to 6 months imprisonment.
3. 27 August 1985, two counts of theft, sentenced to R180.00 or 180 days imprisonment on each of the two charges.
4. 28 September 1989, theft, sentenced to 18 months imprisonment.
5. 2 October 1990, theft, sentence to R500.00 or 3 months imprisonment.
6. 18 April 1991, one count of attempted housebreaking, sentenced to 15 months imprisonment, which was wholly suspended on certain conditions for 3 years;
and,
two counts of housebreaking with the intent to steal and theft,

sentenced to 24 months imprisonment on each of the charges.

7. 18 August 1992, housebreaking with the intent to steal and theft, sentenced to 5 years imprisonment, of which 2 years were to run concurrent with the previous sentence imposed.
8. 17 November 1992, attempt to escape from prison, sentenced to 12 months imprisonment, of which 8 months were conditionally suspended for 4 years.

After the last mentioned conviction, there were no further convictions of the appellant until **5 May 1997**, on which date and subsequent to which date the appellant was convicted as follows:

1. 5 May 1997, malicious damage to property, sentenced to R900.00 or 90 days imprisonment, which was wholly suspended on certain conditions for 3 years.
2. 30 December 1998, theft, sentenced to R900.00 or 90 days imprisonment.
3. 2 August 2001, theft, sentenced to R200.00 or 3 months imprisonment, which was wholly suspended on certain conditions for 5 years.

[12] When evaluating these previous convictions, it appears to me that neither their nature, nor their frequency constitutes a constant pattern that can be considered to be indicative of a habit to commit crime. Although the appellant was relatively frequently convicted during the period between **1982 and 1992**, there was a “*clean period*” between

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1992 and **1997**, during which he was not convicted. Even should it be accepted that the appellant probably spent some of this time in prison, the further relevant factor remains that since the conviction in **May 1997** until the present conviction in **April 2003**, the appellant was convicted on only three charges. On face value of the imposed sentences, which were all fines as an alternative to imprisonment, these three offences could not have been serious offences. However, referring to these last three previous convictions, the Court *a quo* remarked that the appellant's record was probably not available when those sentences were imposed. This remark was apparently made by the Court *a quo* in an effort to substantiate a conclusion that those offences were in fact serious in nature, despite the light sentences imposed. There is, however, no basis upon which the Court *a quo* could have reached this conclusion. It may just as well have been a case of those three offences in fact not having been of a serious nature. In my opinion this view of the Court *a quo* regarding the seriousness of the said three offences, without having held a proper investigation into the nature and circumstances of the relevant previous convictions, constitutes a misdirection, which had the result that the Court *a quo* in imposing the relevant sentence, did not exercise its discretion properly and reasonably.

- [13] In addition hereto, it should also be noted that it is evident from the record that the appellant was not previously warned that a declaration may follow. Although the Court *a quo* referred to the rule of practice that an accused should preferably receive a warning prior to him being declared an habitual criminal, as well as the applicable principles in circumstances where no such warning was in fact given, it is clear from the record that the Court *a quo* in fact failed to apply those principles when it exercised its discretion regarding an appropriate sentence. The Court *a quo* failed to make a careful enquiry and investigation into

the nature and circumstances of the appellant's previous convictions. Had it done so, one would have expected that it would also have referred to the lapse of time between the present offence and the previous offences as one of the relevant factors which it considered when exercising its discretion. However, the Court *a quo* made no reference to this very important factor, which factor is, in my view, strongly indicative of the absence of a habit to commit crime.

[14] For these reasons I am of the view that the Court *a quo* misdirected itself in finding that it was satisfied that the appellant habitually commits offences and that the community should be protected against him. The imposed sentence can therefore not stand and should be set aside.

[15] Irrespective of what the nature and circumstances of the appellant's previous convictions are, I am of the view that in this particular instance it would in any event not be an appropriate sentence to declare the appellant to an habitual offender. Therefore I deem it unnecessary to refer this matter back to the regional court for purposes of considering an appropriate sentence. I in fact consider it in the interest of justice that the matter be finalised on appeal.

[16] In considering an appropriate sentence, I take into consideration as an aggravating factor the fact that the two offences on which the accused was convicted, are of a serious nature, although the value of the stolen items are not that high. This type of offence is very prevalent within the jurisdiction area of this Court and therefore the seriousness of the offence should also be reflected in an appropriate sentence. The previous convictions of the appellant, especially the last three convictions, also constitute a further aggravating factor which needs to be considered when imposing an appropriate sentence.

[17] With regard to the appellant's personal circumstances, I take into consideration that at the time when the appellant was convicted, he was 42 years of age, not married, but with two children of 13 and 6 years old respectively. He was employed at the time of his conviction and earned **R1 000.00** per month.

[18] In the circumstances of this case, I also consider it appropriate that the appellant should now be warned that a declaration to an habitual criminal may follow in the future. I further consider it appropriate that the order made by the Court *a quo* to the effect that the appellant be declared unfit to possess a firearm, should remain effective.

[19] In the premises the following orders are made:

1. The appeal against the convictions is dismissed and both the convictions are confirmed.
2. The appeal against the sentence is upheld.
3. The sentence is set aside and replaced by a sentence of three (3) years imprisonment on each of the two charges, which sentence should be considered to have been imposed on **22 April 2003**.
4. The appellant is warned that should he again be convicted, he may be declared an habitual criminal in terms of Section 286 of the Criminal Procedure Act, 51 of 1977.

I CONCUR:

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C H G VAN DER MERWE, J

On behalf of appellant:

Mr K Pretorius
Bloemfontein Legal Centre

On behalf of respondent:

Adv H Amod
Director: Public Prosecutions