REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: A441/2013
DPP REF: 9/2/5/1(2013/0459)

Reportable: Yes
Of Interest To Other Judges: Yes
Revised.

02 April 2014 .....
SIGNATURE

In the matter between:

Trichart, Kurt **Appellant**

and

The State **Respondent**

Judgment

Vally J

Introduction

1. The appellant was indicted at the Magistrates Court of Johannesburg on a charge of theft in that he, on or about 25 May 2011, unlawfully and intentionally stole one 900g of cheese to the value of R66.99 which was the lawful property of Shoprite. Upon being indicted, the appellant who was not legally represented pleaded guilty. The magistrate who presided over the matter, satisfied herself that the plea of guilty was competent

and thereafter convicted the appellant. Prior to imposing a sentence upon the appellant, the court adjourned in order for the prosecution to obtain what is generally referred to as the SAP 69, which is a list of previous convictions of the appellant. The list is extrapolated from the records of the Department of Justice. At the next hearing the list was furnished. It revealed that the appellant had thirteen previous convictions, dating from as far back as 1988. This revelation resulted in the matter being transferred to the Regional Court for sentencing.

2. The previous convictions of the appellant as reflected on the list are:

1	4 January 1988	Theft
2	15 July 1988	Housebreaking
3	12 September 1989	Housebreaking
4	30 January 1989	Housebreaking
5	22 August 1989	Housebreaking
6	6 March 1992	Theft
7	21 October 1992	Robbery
8	9 July 1993	Housebreaking
9	18 March 1999	Housebreaking
10	5 May 2003	Theft
11	11 September 2003	Theft
12	23 November 2004	Housebreaking
13	13 February 2006	Theft

3. The matter resumed on 7 July 2011. The prosecution read the list of previous convictions to the court. The matter was then transferred to the Regional Court in terms of s 114(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) because in the view of the magistrate the previous convictions of the accused were such that the offence for which he had been convicted merits a punishment that exceeded the jurisdiction of the Magistrates Court.

4. The matter came before the Regional Court on 15 August 2011. At this stage the appellant was legally represented. The appellant's legal representative confirmed the correctness of the list of previous convictions and submitted that the appellant was 39 years old, has two dependents, a six year old and a two month old daughter and was skilled as an upholsterer. The two children reside with his 79 year old mother as their mother had abandoned them. The magistrate noted that the appellant had thirteen previous convictions and asked if this is not a case which calls for the invocation of s 286 of the CPA? Taking advantage of this query by the magistrate, the prosecutor asked for the appellant to be declared a habitual criminal in terms of s 286 of the CPA. The magistrate postponed the matter and requested that a probation officer compile a report for the benefit of the court.

The Probation Officer's report and the judgment of the court *a quo*

5. The report was available at the next hearing which was on 14 November 2011.

6. The appellant's attorney placed on record that the appellant is addicted to drugs. The appellant accepted that he had "*a drug problem*" and asked that he be referred to a rehabilitation centre for treatment. He had sought the assistance of social workers at a public hospital but this failed to yield a positive result.The Probation Officer held the view that sending the appellant to prison is not in the interest of either the appellant or

society. She maintained that sending him for treatment for his drug addiction served both his as well as society's interest. She was available at the hearing, approached the magistrate for direction but he referred her to the prosecutor and the representative of the appellant. They took the view that they had no questions for her and accordingly decided to excuse her from further participation at the hearing. The magistrate did not believe it necessary to intervene. He did not deem it necessary to query any aspect of her report or raise any questions with her. Both the State and the appellant agreed that the magistrate should accept the report and make his decision on the basis of the contents therein.

7. The magistrate took note of two facts in the probation officer's report, namely: the appellant was unemployed at the time of the commission of the offence, and had eked out a living by collecting scrap metal which he sold for R80.00 per day. He dismissed her recommendation that the appellant be sent for drug rehabilitation. The reason for dismissing the recommendation is stated in the following terms:

> "I guess one must understand that the lady is very inexperienced. She only obtained her degree in 2010 and youth often being optimistic about things that while the heads know and understand are beyond a remedy or beyond a certain form of remedy. Let me put it like that. Accused has an interesting set of previous convictions."[1]

8. Such a patronising attitude towards the probation officer was unwarranted and unjustified. Moreover, the reason given for rejecting her recommendation is certainly irrational. It does not address the

[1] Judgment, p 17, lines 13-17 (the quote is verbatim).

recommendation at all, and instead only makes a comment on the person making the recommendation, which comment may itself be incorrect. The fact that the probation officer had only obtained her qualification recently does not mean that she is "*inexperienced*". There is no information about her experience on record, and unless the magistrate had this before him he should have abstained from pronouncing on it.

9. There is no serious engagement in the judgment with the concern of the probation officer, namely, that as a result of his addiction to drugs the appellant had found himself in a helpless situation which drove him to commit the offence. She is of the view that his criminal activity is directly linked to his drug dependency, and that his drug dependency is a clinical problem that requires clinical attention. In the light of this, she contended that sending him to prison would only exacerbate his situation and society would be all the poorer for that. Her views are not irrational nor are they inconsistent with the social order envisaged by the *Constitution of the Republic Act 108 of 1996* (the Constitution).

10. It is important for the courts to take these reports seriously and to give rational, even if only brief, reasons for rejecting the recommendations contained therein. The probation officers who are officers of every court established under the magistrate's court Act 32 of 1994[2], and who compile these reports, perform a valuable task, one that is of huge

[2]Section 2 of the *Probation Services Act No 116 of 1991* (the PSA)

assistance to judicial officers. The roles performed by the two enjoy a symbiotic relationship. The judicial officer considers factors such as the interests of the convicted individual, the nature and gravity of the crime(s) for which he or she has been convicted and the interests of society. In considering the interests of the individual the judicial officer receives invaluable information gathered by the probation officer and has the benefit of the probation officer's expertise regarding the psycho-social and other conditions and circumstances concerning the offender. S/he places the offence in the context of these conditions and circumstances. It bears reminding that the probation officers are social workers appointed by the Minister of Social Development to carry out work in fields of crime prevention, treatment of offenders and care and treatment of victims of crime. They work with families and communities.[3] They are required to place pertinent facts, which are supposed to be collected "*from a multiplicity of sources*" before the court.[4] These facts can often be very useful. Thus, the task of imposing an appropriate sentence, which in most cases is an anxiety-ridden one, is made easier when a carefully considered probation officer's report is placed before the court, and when the probation officer is available to attend to any queries or concerns the court may have. Of course, ultimately the decision as to what an appropriate sentence should be remains the preserve of the judicial officer. This overriding power of the judicial officer

[3]Sections 3of the PSA
[4]*S v Ngomane* 2007 (2) SACR 535 (W).

allows for the judicial officer to overlook the probation officer's report, but must, at least, furnish a rational reason for doing so.[5]

11. It is unfortunate that this benefit was not appreciated by the magistrate in this case. Having rejected the recommendation of the probation officer, the magistrate proceeded to consider the previous convictions of the appellant. In doing so he specifically avoided the comment of the probation officer that these were committed in the context of the appellant's drug addiction. Of equal concern are the inexplicable remarks that the magistrate made regarding the previous sentences imposed upon the appellant. Some of these are critical, and may even be construed as disrespectful, of the judicial officers that presided in those cases. Unfortunately, no factual basis is laid for the criticisms. The remarks are:

> "5 May 2003 the accused was convicted of theft and time was imposed but this was wholly suspended. How the person who imposed this sentence could arrive at that sentence is clearly incompetent"[6]
>
> And:
>
> "Again, on 11 September in 2003 accused convicted of the theft again a fine imposed, again suspended, same court, Sophiatown. So clearly the person who dealt with accused at that time, was not applying his mind properly. It annoys me."[7]

12. The magistrate goes on to comment about the appellant. In this regard he says:

---

[5] Compare, *S v Chetty* 2013 (2) SACR 142 (SCA)
[6] Judgment, p 18, lines 9-13 (the quotation is verbatim).
[7] Judgment, p 18, lines 14-17 (the quotation is verbatim).

> "The accused complains about the fact that he was turfed out of his family home, well he is 39 at some point you have to leave, is it not? At some point you must make your own way. So what is wrong with that? If it is wrong then I want to go and talk to may parents, you know, they also turfed me out. I was turfed out at 19 and I had to make my own way through life.
> Today I am happy they did that, at the time I was annoyed. I had to, I spent a couple of difficult years of my life trying to find my way, but it, all parents do that. It happens at times. To complain at age 39 that your parents turfed you out and then you say that they consume alcohol whilst yourself claim to be a drug addict. So you had all the opportunity in the world in the past to seek help for your problem."[8]

13. These comments demonstrate that the magistrate failed to appreciate the appellant's submission that the fact that he was thrown out of his mother's home by his mother and step-father (his own father having passed away when he was ten years old) at the age of fourteen rendered him homeless when he was already dependent on drugs. This only made his situation worse and prevented him from acquiring the necessary skills to cope with the demands of a normal life.

14. The magistrate commented on the nature of the crime and in this regard he said:

> "In this particular instance, you bought a bread but you stole a block of cheese. Why would anyone steal a block, almost a kilogram of cheese? If you are hungry and you want to steal food, you know people do things when they are in extreme circumstances. But I do not think that a block of cheese would be the best or the most nutritious meal that you could, the fact that you paid for bread, already indicates to me that it was not out of need. And for that reason I am not persuaded that there are any other (indistinct) but a long term imprisonment."[9]

---

[8] Judgment, p 19, lines 14-24 (the quotation is verbatim).
[9] Judgment, p 18, lines 9-13 (the quotation is verbatim).

15. For those reasons, the magistrate decided to declare the appellant a habitual criminal in terms of s 286 of the CPA.

16. Finally, it bears mentioning that in the judgment granting the appellant leave to appeal the magistrate commented further on his reasons for refusing to accept the recommendation of the probation officer. His comments in this regard show that he did not believe that by sending the appellant to prison for a long time he was being inconsistent with the concern of the probation officer that the drug dependency would not abate in prison. It was his view that the drug dependency could end simply by the appellant curbing his desire for drugs. He said:

> "The court pointed out that the accused had ample opportunity to deal with his drug dependency, from what I understand from his attorney now, is that there is direct programme available in prison, but as she conceded the accessibility of hard drugs is remote. Dagga appears to be available in prison, but I suspect that it is not freely available. You have to pay for it. Obviously, if one faces long term imprisonment and the possibility of being incarcerated indefinitely looms real and large ones behaviour might in other words determine your early release on parole or not. Surely it would be in the interest of that particular individual to curb his behaviour. So as far as the drug dependency is concerned I did consider it but, it became clear to me that the (appellant) had ample opportunity in the past."[10]

17. This, too, is of no assistance. To conclude that it is for the appellant to "*curb his behaviour*" is to fail to give due recognition to the severity of the appellant's problem of drug dependency. So severe is the appellant's problem that it leads the probation officer to conclude that it can only be

[10] Judgment on leave to appeal, p 32, lines 9-20 (the quotation is verbatim).

addressed by "*professional intervention*". Not only did the magistrate disregard the report and its recommendation, but he drew a conclusion that is the complete antithesis of that of the probation officer. This was done without having any regard to the evidence upon which the probation officer drew her conclusion, and without having any evidence to the contrary before him.

18. Thus, I have no hesitation in holding that the magistrate committed a material irregularity by irrationally dismissing the probation officer's report. He committed another material irregularity by drawing unwarranted and unjustifiable conclusions about the previous sentences imposed by other judicial officers. As a result thereof he failed to exercise his discretion in a judicial manner. It is now settled that an appeal court can only interfere with the sentence imposed if it finds that the court a quo misdirected itself in a material manner.[11] The appellate court is not entitled to usurp the discretion of the trial court and impose a sentence of its own choosing simply because it prefers its own sentence to that of the trial court. It also cannot interfere in a situation where it finds the sentence imposed by the trial court is shockingly inappropriate.[12]

Section 286(1) of the CPA

19. Section 286(1) of the CPA provides for a serial offender to be declared a habitual criminal. The section has been subjected to scrutiny in a number

[11] *S v Cornick and Another* 2007 (2) SACR 115 (SCA) at [46]
[12] *S v Malgas* 2001 (1) SACR 469 (SCA) at [12]

of judgments – some of them are, *S v Niemand*[13], *S v Van Eck*[14], *S v Nawaseb*[15], *S v Wayi*[16] and *S v Stenge*[17].

20. In *Niemand* the Constitutional Court found that the section was constitutionally compliant. However, in all the cases it is recognised that by emphasising the preventative aspect of punishment, the section has far reaching implications. This is particularly so when the offender had already been punished for the previous offences. For this reason the courts have emphasised that a declaration to the effect that the offender offends out of habit must only result after all the facts have been carefully scrutinised. , *Wayi* counsels that the sentencing court should examine why the previous offences were committed "*for it is a matter of concern that a step so drastic as the present should be taken without a detailed and full enquiry in all the circumstances of the case.*"[18] This is endorsed by the majority judgment in *Stenge.*[19] In *Van Eck* the Supreme Court of Appeal reminds judicial officers that when applying this section, they should be "*satisfied (in the sense of convinced)*"[20] that the crimes were committed out of habit and that the crimes were of such a nature that society required protection from the offender for a period of at least seven years. They are further reminded that even if these two requirements were met they still retained a discretion not to declare the

[13] 2001 (2) SACR 654 (CC)
[14] 2003 (2) SACR 563 (SCA)
[15] 1980 (1) SA 339 (SWA)
[16] 1994 (2) SACR (E)
[17] 2008 (2) SACR (C)
[18] 1994 (2) SACR (E) at 335i-336a
[19] 2008 (2) SACR (C) at [10]-[15]. In my view the minority judgment in this case is wrong on this point.
[20] 2003 (2) SACR 563 (SCA) at 567c

offender a habitual criminal if they find that the other traditional considerations (nature of offence, interests of the offender and interest of society) leads to the conclusion that a declaration of habitual criminal is inappropriate.Thus a long list of previous convictions does not automatically result in the offender being declared a habitual criminal. In my view it is necessary to also give careful attention to the nature of the actual crime for which the offender has been convicted before the offender is declared to be a habitual criminal. In this regard it must be noted that such a declaration can lead to an unduly harsh punishment for a minor misdemeanour. This concern has been highlighted in *Stenge*.[21] It is a concern that I share.

The declaration of the appellant as a habitual criminal

21. As mentioned above, the magistrate materially misdirected himself by rejecting the probation officer's report and by drawing inappropriate conclusions about the previous sentences meted out to the appellant. He further misdirected himself by drawing the inference that the appellant was a habitual criminal simply by looking at the list of previous offences. This approach is incorrect and constitutes a material misdirection.[22]

22. It is, furthermore, my view that in the light of the facts of this case the declaration of the appellant as a habitual criminal is disturbing. It results in an unduly heavy sentence for a not so serious misdemeanour. The

[21] 2008 (2) SACR 27 (C) at [14], [19], [21] and [22],
[22] In *Stenge* A it was pointed out that a list of previous convictions is, in and of itself, insufficient factual evidence to draw the inference that the offender is a habitual criminal. Much more is needed. See also *Thulanigoodhope Kubheka v S* ZAGPPHC 120 (20 June 2012)

offence involves theft of food in the amount of R66.99. The appellant pleaded guilty without much ado.The offence was committed in circumstances where the appellant is drug dependent. The same circumstances were present in the case of all the previous offences committed by him. However, the sentences imposed upon him in those previous cases indicate that not once was the issue of his drug dependency addressed. With regard to the present offence the probation officer draws specific attention to this issue, and places it squarely before the court. In this way the interest of the appellant (as someone whose volition is seriously impaired by his dependency on drugs),as well as the context within which the offence was committed, are given the necessary weight in determining a fair and balanced sentence. I find her report balanced and her recommendation sound. Sentencing the accused to imprisonment without addressing his drug dependency, as was done by the court *a quo,*unbalances the scales of justice. It apportions no weight at all to the interests of the appellant and to the nature and circumstances of the crime. Taking account of them would not necessarily result in the appellant escaping punishment for his offence altogether. In fact, I believe that in the light of his previous convictions he should be given a custodial sentence. However, he should also be given an opportunity to address the problem of his drug dependency. In my view, he has already served a period of imprisonment that goes beyond what is fair. He has served time for this conviction since 14 November 2011, plus he has been in prison since his arrest on 25 May 2011.[23]He

[23]Seven of these months were spent awaiting trial. In terms of the *S v Brophy and Another* (2007 (2)

has, therefore, spent 2 years, ten months and 7 days actual time in prison. In my view this is a sufficient period of imprisonment for the offence for which he has been convicted. What is now required is for him to be given an opportunity to attend a drug rehabilitation centre so that his addiction to drugs can be attended to. The probation officer recommends that he be referred to the Dr Fabien and Robeiro Centre for three months so that his dependency on drugs can be treated. In the light of the fact that he had already been imprisoned (for six months prior to his sentencing) this recommendation was eminently sensible. It should have been followed by the court *a quo* as it addressed the interests of the appellant as well as that of society. It is in the interests of society that he not only be punished with imprisonment but that he also gets the necessary treatment in order to assist him so that he does not re-offend.

23. For the reasons set out above, the appeal succeeds and the following order is made.

Order

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

1 The accused is sentenced to 2 years, 10 months and 7 days in prison

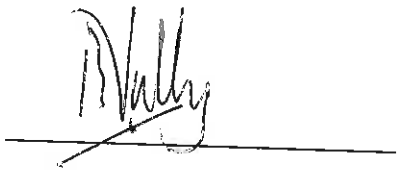
2 In terms of s 282 of the Criminal Procedure Act, 51 of 1977 (as amended) the sentence is ante-dated to 14 November 2011.

SACR 56 (W) at [19]) this period deserves special recognition. The full bench in *Brophy* followed *S v Stephen and Another* (1994 (2) SACR 163 (W) where it was said that "*Imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length.*".

3. The period of detention served by the accused as an awaiting trial prisoner, from 25 May 2011 to 14 November 2011, must be treated as time served in terms of the sentence referred to in paragraph 1 above.

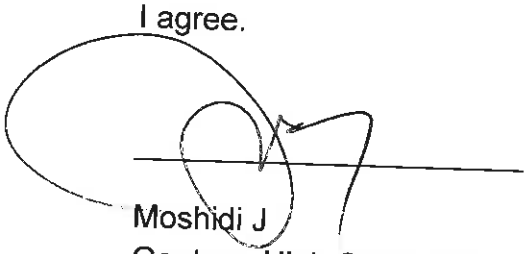
4. The accused is declared unfit to hold a firearm licence in terms of s 103 of Act 60 of 2000.

5. The accused is to be housed at the Dr Fabien and Robeiro Centre (the centre) for a period of three months for treatment of his drug dependency. Should the authorities of the centre be of the view that the period should be extended they may, upon giving notice to the accused, apply through the offices of the Directorate of Public Prosecutions to this court for the necessary extension of the time period.



Vally J
Gauteng High Court, Johannesburg Local Division

I agree.



Moshidi J
Gauteng High Court, Johannesburg Local Division

Appearances:
For the appellant: Adv E A Guarneri from Legal Aid SA
For the State : AdvA M Persad from National Directorate of Prosecutions

Date of hearing 01 April 2014
Date of judgment 02 April 2014

.....