IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A 420/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

15/9/2020 .....
DATE SIGNATURE

In the matter between:

JOHN FANIE KHELE **APPELLANT**

vs

THE STATE **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The parties agreed that the appeal could be determined on the papers. The Appellant was convicted on 2 February 2016 on one count of robbery. He was declared a habitual criminal in terms of section 286 of Act 51 of 1977 (the Criminal Procedure Act), and accordingly it was ordered that he be detained for a maximum period of 15 (fifteen) years, but not less than 7 (seven) years. Leave to appeal was granted on petition on 2 June 2017. The court requested additional heads of argument pertaining to the declaration in terms of sec 286. Additional heads of argument were filed and considered.

[2] The Appellant pleaded not guilty to a charge of robbery. In the plea explanation in terms of section 115 (1) of the Criminal Procedure Act he stated, that on the day in question, being 26 November 2014, during the morning, he was waiting for transport, when two men approached him and accused him of being involved in a robbery that had just taken place. He told them that he was on his way to work and could not come with them. The one man produced a firearm and he was placed under arrest. An elderly white man approached them , he was carrying a black handbag. The Appellant was accused of robbing a white female. A police van arrived and he was taken to the place where the incident occurred. Two ladies were at the premises and were called to identity him. The one came out and said that the person who took the bag was much older. The other woman was called to identify the suspect, she

however said that she got her bag, nothing was missing and they must take, whoever was in the vehicle, away.

[3] Mrs Minnie testified that on the day in question at approximately 07:40 she parked her car in Voortrekker Street, Heidelberg, got out of the car and approached a shop, called Bon Marche. Her friend was at the door of the shop, busy unlocking the door and placed the lock of the door in her hand. The next moment someone grabbed her bag. She saw the man running away with her bag. He was wearing a blue shirt and pants and had a white cap on. She ran after him, shouting that he should please bring her bag back. He ran down Strydom Street to the back of the shopping centre. He climbed over the electric fence, she shouted at a Mr Pretorius, who was in the vicinity, that the man had grabbed her bag. Mr Pretorius got into his car and followed the culprit. After the man had jumped over the fence, she lost sight of him. When she got back to the shop the police was there. She was informed that they found him and her handbag was given back to her. Nothing was missing from her bag. She could not identify the accused.

[4] It is interesting to note that it was never put to the witness that her friend said that the perpetrator was much older than Appellant, and that he was not the one that robbed her. It was also not put to her that she refused to look at the accused, despite the fact that those allegations were made in the plea explanation.

[5] Mr Pretorius testified that on the day of the incident he was at the back of the shopping centre talking to one of his employees, when he heard a woman screaming. Someone ran past him and jumped over the fence, this man was dressed in a blue jacket and pants and had a black handbag with him. After he jumped over the fence, he ran past the Old Mutual building. The lady who was involved in the incident asked him to try and catch the perpetrator. He apparently followed him in his vehicle. When he entered the street he saw a police vehicle. He told them about the incident, they drove around the block and later returned with someone in the police van. He did not see the person's face when he ran past him and did not look at the person who was in the back of the police van.

[6] Mr Mandlati, who worked at Shoprite testified that he and a colleague, a certain Francois were at the corner of Voortrekker and Strydom Streets, near ShopRite at 07:30 on 26 November 2014. They heard the complainant screaming about her bag, they at the same time noticed a man running with a bag and they chased him. The witness could not remember what the man was wearing. He apparently lost sight of the man, who seemed to have jumped over a fence, but other people in the area told him in which direction he ran. Mr Mandlati followed the directions and noticed him again.He jumped over the gate of a church, in the process he saw him throwing the bag away, while he kept running, he followed the man and his colleague picked up the bag. He managed to catch the man. The police were in the vicinity and arrested the man

and put him in the back of the police van. His colleague, Francois, took the handbag to the complainant's workplace. Mr Mandlati testified that Francois resigned and that his present whereabouts were unknown. The witness identified the Appellant as the man that he saw on that day. He said that the man was about two metres from him, when he saw him with the bag, and three metres away when he saw him throwing the bag away. The witness was very clear that the person that he chased was the person he arrested.

[7] Constable Motahung testified that on 26 November 2014 he was doing patrols around Heidelberg, while doing that he was stopped by a member of the community, who alleged that there was someone who committed a robbery. He was told in which direction the alleged perpetrator had run. When he arrived at the corner of Ackerman and Strydom Streets, the suspect was already arrested. On his arrival the suspect was identified to him and he put him in the police van. Nothing was found in his possession and he was informed that the bag that was taken was handed back to the complainant. He then approached the complainant who told him what had happened. A docket was later opened and the suspect was placed in custody. Constable's Motahung testified that when he asked the suspect what happened, he told him that he tried his luck.

[8] After this evidence the State closed its case, the representative of the Appellant requested a postponement in order to consult with a witness

a certain Vusi Mukwewu (Vusi), who apparently would confirm the Appellant's version. When the case resumed the court was informed that Vusi would no longer testify on behalf of the Appellant.

[9] The Appellant testified that on 26 November 2014 he was on his way from his home to his workplace in Nigel. He disembarked from a taxi in Verwoerd Street and walked to Jacob Street where he waited for his transport to arrive. While he was standing there, two people approached him and informed him that someone was robbed in Voortrekker Street. He told them that he did not see anything and was merely waiting for his transport. One of the people asked him to go with them back to the scene, so that the complainant or other people could identify him. He willingly went with them, while on their way , a white man approached him and told them that he had chased someone who was dressed like the Appellant. The white man was at the time in possession of a black bag. The police arrived and said that they were called and informed that there was a robbery in Voortrekker Street. The police took him to the place where the robbery occurred. According to the Appellant, Mr Mandlati, was one of the people who approached him. The Appellant was put in the police van and taken to a place where two white women were asked to come and identify him. One refused to and the other one said that he was not the person who committed the robbery, as the one who did it was much older. He was then taken to the police station, but before going there the police sprayed him with pepper spray.

[10] During cross-examination the Appellant for the first time stated that one of the two people who approached him in Jacob Street, threatened him with a firearm, this despite testifying in chief that he went willingly with them. It is suspicious that this threat was for the first time mentioned under cross-examination. He could not remember which of the two men threatened him with the firearm. It is important to note that this was never put to Mr Mandlati, who was on the Appellant's own version one of the men who approached him. Despite initially indicating that Vusi would support his version, Appellant testified under cross-examination that Vusi was not present when all of this occurred. In evidence he said that he did not see Vusi as he was busy with the people around him and first saw him at the police station. It was however put to Mr Mandlati that the Appellant would testify that Vusi was present when the Appellant was arrested and when the firearm was pointed at him. It must also be noted that it was never put to Constable Motaung that the Appellant was sprayed with pepper spray by the police.

[11] The learned magistrate did not misdirect himself when he found the Appellant guilty of robbery. The State proved beyond reasonable doubt that the Appellant committed the offence of robbery. Mr Pretorius chased after the perpetrator but could not identify him, nor could the complainant. Mr Mandlati however saw him running with the bag and although he at some point lost sight of him, caught up with him and saw him still running with the bag. He was approximately three metres away from him when he saw him throwing the bag away. He then arrested

him. Mr Mandlati's credibility was not question by the learned magistrate and correctly so. It would seem that the whole community was involved and assisted in catching the perpetrator.

[12] The Appellant's version is not reasonably possibly true. He contradicted himself on important aspects as set out above. His version deviated from his plea explanation and the version put on his behalf. The witness who was supposed to support his version was not called and his evidence regarding the presence of the witness deviated from the version put on his behalf.

[13] In the light of the aforesaid the conviction must stand.

SENTENCE

[14] The Appellant was 41 years old at the time of sentencing. Both the Appellant's parents and all his siblings are deceased. He was raised by his maternal grandmother as his parents worked elsewhere. He has 5 nephews, three of whom were in prison at the time of compilation of the probation officer's report.

[15] Although he described a positive childhood experience this was due to his grandmother, as he reported that his parents were alcoholics and he was exposed to domestic violence. He did not have contact with his paternal family as they denied his paternity. He had to leave school due to financial constraints, when he completed standard seven and became independent when he was eighteen years old. He has two children

respectively seven and nine years of age, who were in the care of their mother. The Appellant and the mother of his children separated some time ago and her whereabouts were unknown to him. The Appellant had not been permanently employed since 2010. He claimed not to have any friends, live alone and believes he is bewitched. His neighbours reported that they were scared of him. There is no doubt that the Appellant comes from extremely difficult circumstances, which must have contributed to the poor life choices he had made thus far. The Appellant spent nearly 15 months in custody, while awaiting trial.

[16] The learned magistrate took all of the above in account, as well as that the complainant was not injured and that all her belonging were returned to her when he considered the sentence.

[17] The learned magistrate however based his sentence, declaring the Appellant a habitual criminal in terms of section 286 solely on his previous convictions and did not hold an enquiry into the circumstances in which the crimes were committed.

[18] According to the SAP 69 the Appellant has the following previous convictions:

a) on 27 April 1990 the accused was convicted of theft and was given 5 strokes with a light cane;

b) on 7 May1993 the accused was convicted of theft and was sentenced to 16 hours of community service;

c) on 30 August 1994 the accused was convicted of theft and was sentenced to 12 months imprisonment;

d) on 6 November 1995 the accused was convicted of theft and was sentenced to 12 months imprisonment;

e) 17 July 1997 the accused was convicted of theft and was sentenced to 4 years imprisonment;

f) On 19 July 1999 the accused was convicted of use and possession of dagga and was sentenced to 6 months imprisonment;

g) on 16 May 2002 the accused was convicted of robbery and was sentenced to 3 years imprisonment;

h) on 22 October 2002 the accused was convicted of malicious damage to property and was sentenced to 3 years imprisonment;

i) on 24 October 2002 the accused was convicted of attempted housebreaking and was sentenced to 3 years imprisonment;

j) on 28 March 2007 the accused was convicted of housebreaking and theft and was sentenced to 3 years imprisonment;

k) on 19 May 2011 accused was convicted of escaping from custody and was sentenced to 12 months imprisonment, wholly suspended;

l) on 29 November 2011 accused was convicted of possession of a firearm and was sentenced to 12 months imprisonment.

[19] The Appellant has no less than 12 previous convictions. Eight of the previous convictions has an element of theft.

[20] The Appellant was declared a habitual criminal in terms of section 286 of the Criminal Procedure Act, which reads as follows:

"*286 Declaration of certain person as habitual criminals*

(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 it is 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.

(2) No person shall be declared an habitual criminal –

(a) If he is under the age of eighteen years; or

(b) …

[para (b) deleted by 56 of Act 107 of 1990]

(c) If in the opinion of the court the offence warrants the imposition of punishment which by itself or together with any punishment warranted or required in respect of any other offence of which the accused is simultaneously convicted, would entail imprionsment for a period exceeding's 15 years.

[para (c) substituted by 537 of Act 105 of 1997]

3. A person declared an habitual criminal shall be dealt with in accordance with the laws relating the prisons.

[21] It is trite that an appeal court will not easily interfere with the discretion of the trial court and will only intervene when such discretion has not been judicially and properly exercised.[1]

[22] In **S v Van Eck**[2] the requirements in terms of section 286 of the Act was summarized as follows:

"*(i) the Court must be 'satisfied' (in the sense of convinced; see S v Makoula* 1978 (4) SA 763 *(supra) at 768B-E) both that the accused habitually commits crimes and that those crimes are of such a nature that the community should be protected from the accused for at least a period of seven years; (ii) the accused must not be under the age of 18 years, and (iii) a punishment is warranted which does not exceed 15 years imprisonment.*"

In the same matter it was further held that even if all the requirements were met the sentencing court retained a discretion to make a declaration in terms of section 286 and that such a declaration will not ordinarily be made without a prior warning. In this regard it was stated as follows:

"However, even if all these requirements are satisfied the court retains a discretion whether or not to make a declaration under s 286(1); it may

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[1] S v Rabie 1975(4) SA 855 (A) at 857 D-F
[2] (636/02) [2003] ZASCA 92 (23 September 2003) at Par [9]

in the exercise of its discretion impose some other appropriate sentence. The discretion is to be exercised in the light of all the relevant circumstances and in accordance with the ordinary principles governing the sentencing of offenders. A court will not ordinarily make a declaration in the absence of a prior warning to the accused of the provisions of s 286."[3]

[23] In the matter of **Willem Hendrik Niemand vs The State**[4] the Court stated as follows:

"The rationale behind such declaration is the acceptance of the fact that there are certain persistent and intractable offenders who are not only a nuisance 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 purpose of rehabilitating them."

[24] After the Appellant was convicted he admitted his list of previous convictions. Thereafter the presiding regional magistrate enquired from the defence counsel if he was ready to address the court on the provisions of section 286 regarding the declaration of the appellant as an habitual criminal. The matter was postponed for a probation officer's report. The regional magistrate instructed the appellant's counsel to be ready to address him on section 286 in regards to the declaration of the

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[3] Van Eck, para 9
[4] (Constitutional Court case no. CCT 28/00) at par [24]

appellant as an habitual criminal on resumption of the matter. It is thus clear that the Appellant was warned and given an opportunity to address the trial court on this issue

[25] Section 286 stipulates two elements that need to be considered when a declaration as a habitual criminal is considered, namely that the accused habitually commits offences and secondly that the community should be protected against him.[5]

[26] In this instance I have no doubt that the Magistrate gave the Appellant fair warning of his intent to apply section 286, nor that the Appellant has a tendency to commit crimes. Despite the fact that there are some lapses of time between certain of his convictions, one must keep in mind that he spent some time in jail and that must have contributed to the time periods between the commitment of the offences, however time and again he returned to a life of crime.

[27] The incident which is the subject of this appeal occurred in 2014. The last two convictions before this one were both committed during 2011. The one was for escape from lawful custody and the other for unlawful possession of a firearm. The sentences were quite lenient considering the crimes that were committed, however no background about these crimes are available. During 2002 the Appellant was convicted of three

[5] S v Trichardt 2014(2) SACR 245 (GJ); S v Stenge 2008(2) SACR 27 (CC); S v Makanla 1978(4) SA 763 (SWA)

offences, one of robbery, one of malicious damage to property and on of a housebreaking. He was sentenced to three years imprionsment on each of these crimes, which were committed on 16 May 2002, 22 October 2002 and 24 October 2002. His next conviction followed on 28 March 2007. One must accept that he spent time in jail between 2002 and 2007. It is therefore not as if he was by choice a law-abiding citizen for the period between 2002 and 2007. On 28 March 2007 he was sentenced for another housebreaking and sentenced to another three years imprisonment. He was again convicted during 2011, on 11 May and 29 November 2011. He then committed this crime on 26 November 2014. One therefore cannot argue that there were long periods of good behaviour between the commitment of the different offences and it is clear that sentences of imprionsment did not deter him at all.

[28] However, a trial court must advance sound reasons why he/she was satisfied that the offence was committed out of habit. In this instance the magistrate relied solely on the list of convictions and the fact that the previous sentences did not have any deterrent effect, no enquiry was made as to why the Appellant repeatedly committed offences where theft is an element.[6] In the matter of **S v Stenge**[7] the court dealt with the process that should be followed when a declaration in terms of section 286 is considered. In that case the previous convictions were petty offences, the offences in this matter, were for the most part,

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[6] Commentary on the Criminal Procedure Act, du Toit et al [service 59, 2017] 28 – 24B 1 – 2,
[7] S v Stenge 2008(2) SACR (C), see also S v Trichardt 2014(2) SACR 245 (GJ)
[8] S v Beja 2003(1) SACR 168 (SE)

certainly not petty, but in my view even in cases where one deals with more serious offences an enquiry into the circumstances and reasons for the criminal behaviour of the accused is essential, in order to properly exercise a discretion in terms of section 286. The accused is after all also punished for his previous convictions. His personal circumstances should be considered in the light of his tendency to commit crime. If a court does not do that, only lip services is paid to the principle that punishment should fit the crime as well as the criminal.[8]

[29] No hard and fast rule can be applied to determine when a person should be declared a habitual criminal and each case should be determined on its own merits,[9] but in my view, in order to act in accordance with justice at least a proper enquiry is needed to establish why a specific accused has a tendency to commit a crime. If this is not done justice will not be done.

[30] In not properly considering the probation officer's report, in the sense of taking into account the Appellant's extremely difficult circumstances and failing to establish the circumstances relating to the previous convictions , the learned magistrate misdirected himself in declaring the Appellant an habitual criminal.

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9 S v Brand 2019(1) SACR 264 (G)

[31] In the light of the failure of the learned magistrate to investigate the reasons for the Appellant's tendency to commit crimes, the declaration in terms of section 286 should be set aside. A prison term of 7 years is however appropriate, in the light of all the circumstances.

[32] The following order is made:

1. **The conviction is confirmed;**
2. **The declaration in terms of section 286 of the Criminal Procedure Act,51 of 1977 is set aside and substituted with the following:**

"The Appellant is sentenced to seven (7) years imprisonment backdated to 2 February 2016."

R G TOLMAY

JUDGE OF THE HIGH COURT

N DAVIS

JUDGE OF THE HIGH COURT

DATE OF HEARING:	**24 AUGUST 2020**
DATE OF JUDGMENT:	15 SEPTEMBER 2020
ATTORNEY FOR APPELLANT:	**PRETORIA JUSTICE CENTRE**
ADVOCATE FOR APPELLANT:	**ADV S MOENG**
ATTORNEY FOR RESPONDANT:	**DPP**
ADVOCATE FOR RESPONDENT:	**ADV K GERMISHUIS**

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