THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 636/02

In the matter between:

ANDRé VAN ECK Appellant

and

THE STATE Respondent

Coram: SCOTT, HEHER JJA *et* MLAMBO AJA

Date of hearing: 16 SEPTEMBER 2003

Date of delivery: 23 SEPTEMBER 2003

Summary: Sentence – habitual criminal in terms of s 286(1) of Act 51 of 1977

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] Following a plea of guilty, the appellant was duly convicted on 19 February 1999 in the Port Elizabeth Regional court on one count of theft and 14 counts of fraud. At the time of his trial he was 37 years of age. He had no fewer than 43 previous convictions, all of which, save one, involved dishonesty. After hearing evidence in mitigation the Regional Court declared him an habitual criminal in terms of s 286(1) of the Criminal Procedure Act, 51 of 1977 ('the Act'). His appeal against sentence to the Eastern Cape Provincial Division was unsuccessful. The present appeal is with the leave of that Court.

[2] The count of theft related to the theft of a cheque book on 12 August 1997. Thereafter, and during the period 1 to 6 September 1997, the appellant on 14 occasions used forged cheques either to obtain cash at banks or to purchase goods at various retailers. Each occasion constituted the subject of one of the 14 counts of fraud. The appellant's purchases included luxuries such as a camera and a watch. Apart from the cost of the cheque book, the total amount involved was, however, the relatively modest sum of R3 172,02.

[3] The appellant's record of previous convictions makes distressing reading. His first brush with the law occurred in May

1984 at the age of 22 years. During the period May to November 1984 he was convicted on no fewer than 21 counts of offences involving dishonesty in the course of six separate appearances in court. The offences in question comprised one count of housebreaking with intent to steal and theft, four of theft of cheques and 16 counts of fraud relating to cheques. Once again the amounts involved were relatively modest and no doubt for this reason the sentences imposed were lenient. On one occasion he was cautioned and discharged. On the other occasions he was either fined or sentenced to periods of imprisonment which were wholly suspended.

[4] On 6 February 1985 the appellant was again convicted of housebreaking with intent to steal and theft. The value of the goods stolen is stated in the police record (the SAP69 form) to have been R860. On this occasion the appellant was finally sent to prison. He was then just 23 years of age. The sentence was two years imprisonment. Furthermore, on 19 September 1985 a suspended sentence of 4 months imprisonment previously imposed was put into operation. In the meantime, on 28 March 1985, the appellant was back in Court on charges relating to crimes committed prior to his imprisonment. On this occasion he was convicted of the theft of a cheque as well as on one count of

forgery and one count of uttering. The three counts were taken together for the purpose of sentence and the period of six months imprisonment which was imposed was ordered to run concurrently with the sentence he was then serving. On 24 May 1986, after serving just short of 16 months imprisonment, the appellant was released on parole.

[5] It appears that for a period of some four years the appellant kept out of trouble. On 25 October 1991 he was again convicted of stealing a cheque book and fraud. He was sentenced to 12 months imprisonment. Two months later on 12 December 1991 he faced a further charge of theft of a cheque book and one count of forgery and one of uttering. He was sentenced to a further period of 12 months for these offences which were committed either during or before May 1990, ie some four years after his release on parole.

[6] On 31 March 1992 he was convicted of fraud relating to the failure to pay an account. The offence appears not to have been serious and he was cautioned and discharged. On 22 July 1992 he was convicted on two counts of fraud committed prior to his imprisonment in October 1991 and sentenced to five years imprisonment. Once again the offences related to cheques. On this occasion he was warned of the provisions of s 286 of the Act. A month later on 25 August 1992 he was back in court facing further

charges relating to offences committed prior to his imprisonment in October 1991. These comprised a total of seven counts of fraud, once again involving cheques, one count of theft of a cheque book and one count of driving a motor vehicle without the owner's permission. On the counts of fraud and theft he was sentenced to a total of nine years imprisonment of which four years were conditionally suspended. On the count of driving a motor vehicle without the owner's permission he was sentenced to six months imprisonment. However, the sentence was ordered to run concurrently with the sentence imposed on the other counts. The effective period of imprisonment imposed on 22 July and 25 August 1992, therefore, amounted in total to ten years.

[7] On 20 June 1997 the appellant escaped from Pollsmoor prison in the Western Cape where he was being detained. It appears that three years previously he had become a monitor. This enabled him simply to 'walk out' of prison after being refused permission to make a phone-call. At the time, his date of parole had been fixed at 23 March 1998. He remained on the run until 28 November 1997 when he gave himself up to the police at Kempton Park. He explained in evidence that he realised that he could not remain a fugitive for the rest of his life. He was subsequently sentenced to five months imprisonment for escaping. The offences

which are the subject matter of the present case were committed shortly before the appellant gave himself up.

[8] Section 286(1) reads:

'(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 an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.'

Section 286(2) provides that no person shall be declared an habitual criminal if under the age of 18 years or if in the opinion of the court the offence by itself or together with any offence in respect of which the accused is simultaneously convicted, warrants imprisonment for a period exceeding 15 years. In terms of s 286(3) a person declared an habitual criminal is to be dealt with in accordance with the laws relating to prisons. Section 65(4)(*b*)(*iv*) of the Correctional Services Act 8 of 1959 provides, in turn, that such a person 'shall be detained in prison until, after a period of at least seven years, he is placed on parole'.

[9] The requirements for a declaration under s 286(1) of the Act are therefore: (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. 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 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.

[10] Notwithstanding the amelioratory effect of the discretion, s 286 remains a far reaching provision which emphasises the preventative aspect of punishment and is aimed at punishing an offender for a persistent tendency to commit crime rather than for the crime or crimes of which he or she stands convicted. It has been described, not without justification, as a drastic and exceptional punishment. See *S v Masisi* 1996 (1) SACR 147 (O) at

152d. However, in *S v Niemand* 2001(2) SACR 654 (CC) the section was held to serve a useful sentencing purpose and, subject to the reading-in of a proviso in s 65(4)(*b*)(*iv*) to ensure that the sentence does not exceed 15 years, to be consistent with the provisions of the Constitution.

[11] Counsel for the appellant conceded that she was unable to contend that the trial Court had erred in finding that the appellant committed crimes habitually or that the crimes were such that the community should be protected from him. In my view, the concession was properly made. The appellant is a qualified panelbeater who was undoubtedly capable of earning an honest living. Indeed, he did not contend the contrary; nor did he suggest that he was compelled by necessity to commit his previous offences. It appears from his police record that at least some of these involved the theft of items of no great value, such as books, clothing and music cassettes, usually from a family member or friend. His typical *modus operandi*, however, was to steal a cheque or cheque book, more often than not from a member of his family or a friend, and then to use the cheques either to draw cash or to make sundry purchases. Even when a fugitive from justice his purchases with stolen cheques included items such as a watch, a

camera and clothing from retailers who could fairly be described as up-market. The inference is overwhelming that he habitually resorted to crime whenever the occasion presented itself or whenever he found himself financially hard pressed or unable to afford something he wanted. Admittedly, the amounts involved were relatively modest. But cheque fraud is a serious and prevalent offence. It harms not only its immediate victims but causes prejudice to the community at large. Because of its prevalence many retailers and other persons dealing with the public have become reluctant to receive payment by cheque and refuse to do so. The offences committed by the appellant are, undoubtedly serious enough to require the community to be protected from him.

[12] The thrust of counsel's argument was that the trial Court erred in not exercising its discretion to impose a sentence other than a declaration in terms of s 286(1) of the Act. As has been said time without measure, the power of a court of appeal to interfere with the sentence imposed by the trial court is limited. It may do so only when the exercise of the trial court's discretion is vitiated by misdirection or the sentence imposed is so inappropriate as to indicate that the discretion was not properly exercised. In the

instant case the trial Court had regard to the personal circumstances of the appellant and other considerations relevant to sentence. It also, and quite correctly, took into account that the appellant had previously been warned of the provisions of s 286, that he had once again resorted to his old ways in the face of a suspended sentence of four years hanging over his head and that he had done so while a fugitive from justice and to purchase items which included luxury goods. It is true that after serving a period of just short of 16 months in prison the appellant had previously succeeded in keeping out of trouble for some four years. This was commendable. But his return to crime was not an isolated incident. Had this been the case some significance could have been attached to the four-year gap in his criminal activities. Instead, he returned to his old ways with a vengeance, typically adopting the same *modus operandi* as before. Between the period from about May 1990 to October 1991 when the appellant was again imprisoned, he committed theft on two occasions and fraud involving a cheque on no fewer than 11 occasions. As I have said, after escaping from prison he again adopted the same *modus operandi* and was in due course convicted on one count of theft and 14 counts of cheque fraud. Counsel was unable to point to

any misdirection on the part of the trial Court and I can see no reason for interfering with the sentence imposed.

[13] The appeal is accordingly dismissed.

D G SCOTT
JUDGE OF APEAL

CONCUR:

HEHER JA

MLAMBO AJA