REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES.

CASE NO: A477/2016

1/3/2018

In the matter between:

MASANABO LUCKY JABU **APPELANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] The appellant, Jabu Lucky Masanabo, was arraigned in the regional court on three charges, namely, one count of rape of a 3 year old girl; one count of assault with intent to do grievous bodily harm and one count of assault with intent to do grievous bodily harm of a child under the age of 16 years. He pleaded guilty on count 2 and tendered a statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977. In respect of count 1 and 3 he pleaded not guilty.

[2] The evidence tendered by the state in count 1 is that the complainant, a 3 year old girl, went to the appellant's house looking for her friend. At the house the complainant did not find her friend but the appellant. The appellant instructed her to go into the bedroom. He followed her into the bedroom and ordered her to undress and then proceeded to rape her. After the rape he gave her an amount of 50 cents. When the little girl arrived back home her mother saw the money and enquired about it. The complainant told her mother what happened. The appellant was subsequently arrested. He was also implicated in the commission of the offence in count 1 by the DNA sample found on the underwear of the complainant.

[3] In respect of count 2 and 3 the evidence is that on the day in question T M, the mother of the complainant in count 1 and the complainant in count 2, was standing outside in the street where she was approached by the appellant. She was holding her 18 month old child, S M , the complainant in count 3, on her hip. When the appellant reached her he took out a sjambok and assaulted them both.

[4] On the basis of this evidence the trial court found the appellant guilty of attempted rape in count 1 and convicted the appellant as charged in count 3. He was consequently sentenced to: count 1 - 10 years imprisonment; count 2 - 2 years imprisonment and count 3 - 3years imprisonment. The sentence on count 3 was ordered to run concurrently with the sentence in count 1. The appellant was as a result sentenced to an effective sentence of 12 years imprisonment. He was also declared unfit to possess a firearm in terms of s 103 (1) of the Firearms Control Act 60 of 2000.

[5] On 28 October 2015 the trial court dismissed the appellant's application for leave to appeal the conviction and sentence. Nevertheless, the appellant was, on petition to this court, granted leave to appeal sentence. He is before us appealing the sentence only.

[6] The grounds of appeal stated in the appellant's heads of argument, and in argument before us, is that the trial court erred in sentencing the appellant to an effective sentence of 12 years imprisonment. In so doing the trial court over-emphasised the seriousness of the offence committed by the appellant and the interest of society and under-emphasised the personal circumstances of the

appellant. The submission is that the trial court ought to have considered the time spent by the appellant in custody awaiting trial - 2years and 8 months, together with the fact that he was a first offender. As such, the sentence of 12 years imprisonment is argued to be shockingly harsh and induces a sense of shock.

[7] In its heads of argument the submission by the respondent is that the sentence of 12 years imprisonment was arrived at by the trial court on consideration of all the traditional sentencing guidelines. The trial court did consider the personal circumstances of the appellant - that, he is 40 years old, has 4 minor children, he was kept in custody awaiting trial for 2 years and 8 months and is a first offender. The aggravating factors are that the appellant was convicted of very serious offences and showed no remorse. He attempted to rape a 3 year old girl and tried to convince the trial court that the evidence was planted by the family. The appellant also assaulted the complainant in count 2 whilst she was carrying an 18 month old baby on her hip. As such the sentence cannot be said to be shockingly harsh and induces a sense of shock, so it was argued.

[8] When imposing sentence the trial court considered the personal circumstances of the appellant as they were placed before it . In particular, the trail court took into account that the appellant was kept in custody awaiting trial for a period of 2 years, also that he was relatively young and had no previous convictions together with the extent of the injuries sustained by the complainants as substantial and compelling circumstances justifying deviation from the prescribed sentence. It should be mentioned that no evidence was led about the injuries of the complainant in count 2. In count 3 the complainant suffered very minimal injuries to his hand and foot.

[9] The trial court could, however, not close its eyes to the prevalence of the type of the offence in count 1, that is, the rape of children at the tender age of the complainant, in its area of jurisdiction; the seriousness of the offence in that the person involved was a 3 year old child; and the interest of society which required protection from the courts particularly in respect of helpless children such as the complainant. In count 2 and 3 the gravity of the offence was aggravated by the use of a sjambok and the fact that the assault was aimed at intimidating or preventing the complainant in count 2 to come and testify in the case in count 1.

[10] It is settled law that an appeal court will not interfere with a sentence imposed, unless the trial court materially misdirected itself or the sentence is shockingly inappropriate. A trial court exercises its judicial discretion depending on the facts of each particular case. Each and every case must be judged on its own merits. Should the appeal court find that the discretion was not judicially exercised it will be at large to interfere.[1]

[11] The accepted test whether a sentence induces a sense of shock is whether there is a striking disparity between the sentence passed and that which the court of appeal would have imposed.[2]

[12] The appellant contents that the sentence of 12 years imprisonment is shockingly inappropriate . What, however, is at issue in the main, is the sentence of 10 years imposed in count 1. Before us his counsel argued that the appellant should be punished for what he has done, namely, the attempted rape of a 3 year old girl. The suggestion is that at least a period of 5 to 6 years imprisonment ought to have been imposed.

[13] The question is whether the sentence of 10 years imprisonment imposed by the trial court for the attempted rape of a 3 year old girl is shockingly inappropriate . I do not think so.

[14] Section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that -

> **"55. Attempt, conspiracy, incitement or inducing another person to commit sexual offence**
>
> Any person who -
>
> *(a)* attempts;
> *(b)* …
>
> To commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which

[1] See Nieuwenhuizen v S (20339/14) [2015] ZASCA 90 (29 May 2015) para 5.

> a person convicted of actually committing that offence would be liable."

[15] The punishment, to which a person convicted of actually committing he offence of rape of a 3 year old child, is provided for in Schedule 2 of Part 1 read with s 51 (1) of the Criminal Law Amendment Act 105 of 1997 and reads thus -

> **"Section 51 (1)**
>
> (1) Notwithstanding any other law but subject to subsection (3) and (6), a regional court or High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life."

Part 1 of Schedule 2, concerning rape reads as follows:

> "Rape as contemplated in section 3 of the Criminal Law (Sexual Offence and Related Matters) Amendment Act, 2007, where a victim is a girl under the age of 16 years."

[16] It is common cause that the complainant in this instance is a child under the age of 16 years thus, life imprisonment is the minimum sentence which the trial court ought to have imposed. The trial court having found substantial and compelling circumstances to exist deviated from the imposition of the prescribed minimum sentence of life imprisonment and instead imposed a sentence of 10 years imprisonment. The initial sentence, together with the other sentences in count 2 and count 3, was 15 years imprisonment but the trial court ordered the sentence of 3 years in count 3 to run concurrently with count 1 which reduced the sentence of 15 years imprisonment to 12 years imprisonment .

[17] The sentence imposed is, in my **view,** appropriate as I am unable to find any material misdirection on the part of the trial court to justify interference. It is

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[2] See S v De Jager & Another 1965 (2) SA 616 (A} at 628H -629.

obvious from the record that the trial court, when passing sentence, did not overlook the personal circumstances of the appellant, in particular the period spent in custody awaiting trial, his age and the fact that he was a first offender. These are the personal circumstances which the trial court took into account when considering whether there are substantial and compelling factors and it found such to exist, thus, the deviation.

[18] I find, as well, that the disparity between the sentence which I would have imposed and the one imposed is not striking nor is it shocking. I would have found that the factors taken by the trial court in aggravation of sentence overshadow the appellant's personal circumstances. The appeal on sentence, in my **view,** stands to be dismissed.

[19] In the premises I make the following order:

1. The appeal is dismissed
2. The conviction and sentence are confirmed

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E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur and it is so ordered

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F. DIEDERICKS

ACTING JUDGE OF THE HIGH COURT

Appearances:

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