

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**CASE NO.: CA&R115/2015**

In the matter between:

**JAPIE LOTTERING**

**Appellant**

And

**THE STATE**

**Respondent**

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**JUDGMENT**

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**BESHE, J:**

[1] The appellant who appeared before the Regional Court, Joubertina was convicted of:

- (i) culpable homicide and
- (ii) assault with intent to cause grievous bodily harm (assault gbh), having pleaded guilty to both counts.

He was sentenced to eight (8) years imprisonment for culpable homicide and two (2) years imprisonment for assault with intent to cause grievous bodily harm. Leave to appeal against sentence was granted by this court on petition.

[2] The circumstances under which the offences were committed appear from appellant's plea explanation. They are the following:

Appellant is the father of complainant in respect of the assault gbh charge, *Nadia Lottering (Nadia)*. On 2 December 2012, *Nadia* who was in the habit of swearing at him when she is drunk, once again hurled

insults at him. Appellant armed himself with a stick and proceeded to *Nadia's* bedroom. Once there he proceeded to hit the *Nadia* with the stick repeatedly. During the course of the assault, he inadvertently struck *Nadia's* five (5) months old baby, *Jody Lizane*, his grandchild, who was sleeping inside the room. Both *Nadia* and *Jody Lizane* sustained injuries as a result of the said assault. *Jody Lizane's* injury on the head turned out to be a fatal one.

[3] The sentence imposed is assailed on the basis that it is shockingly severe, harsh and inappropriate if one has regard to the following factors:  
Appellant pleaded guilty to both charges and expressed remorse;  
His previous convictions are for assaults that were committed more than sixteen (16) years ago;  
He is the sole breadwinner;  
The complainant relied on him for her upkeep;  
The complainant has forgiven him and harbours no resentment towards him;  
He was considered to be a suitable candidate for correctional supervision.

[4] It is trite that a court of appeal can interfere with the decision of the sentencing court only on limited and circumscribed grounds. The ground upon which the sentence *in casu* is assailed, namely, that it is startlingly inappropriate to induce a sense of shock is one of those grounds.

[5] In sentencing the appellant the Regional Magistrate took into account, amongst other factors, that appellant had a number of previous convictions for offences involving violence. That therefore imposing a suspended sentence or a correctional supervision sentence will send a

wrong message to the community. The learned magistrate also noted that 80% of the cases on the court book are offences that involve violence.

[6] It is indeed so that appellant has two (2) previous convictions of assault common, (committed on the same date) and two of assault with intent to do grievous bodily harm. The last such conviction is eighteen (18) years old. This in my view is an indication that the sentences imposed in respect of those convictions did serve the purpose of discouraging the appellant from assaulting others in the past sixteen (16) years when he was provoked by her daughter. The appellant was fifty one (51) years old when he was sentenced in respect of this matter in July 2013. He had been holding a steady job for eight (8) years at the time.

[7] There is no doubt that the appellant was convicted of two (2) serious offences. Be that as it may, it is now trite that it is possible to impose a severe punishment and to serve the interest of the community by imposing a deterrent and strict sentence, other than imprisonment. See *S v R 1993 (1) SACR 209 (A)*, *Commentary on the Criminal Procedure Act Du Toit et al 28 – 10H -2*.

[8] In view of the circumstances under which the offences were committed, coupled with appellant's personal circumstances, can it be said that a long term of direct imprisonment is the only appropriate sentence. In my view the sentence is disproportionately harsh and that interference is warranted. Based on the following factors, I am of the view that a correctional supervision sentence is appropriate in the circumstances:

- (i) The assault on *Nadia* was not unprovoked;
- (ii) Appellant did not intentionally cause the death of his grandchild or deliberately aim at the baby;

- (iii) He pleaded guilty to the charges;
- (iv) He has responsibilities towards his family which include fending for *Nadia*.
- (v) He had a steady job at the time of his conviction. He had been working for the same employer for eight (8) years.
- (vi) He was fifty two (52) years old at the time that he was sentenced.
- (vii) His previous convictions for assault are quite old.

I am of the view that correctional supervision sentence is appropriate in the circumstances.

**[9] In the result the following order will issue:**

**The appeal against sentence is allowed.**

**The sentence imposed by the Magistrate is set aside and replaced by the following sentence:**

- 1. The accused is sentenced to four (4) years imprisonment in terms of Section 276(1)(i) of the Criminal Procedure Act 51 of 1977.**
- 2. Both counts are treated as one for purposes of sentence.**
- 3. The sentence is ante dated to 27 July 2013.**

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**N G BESHE**  
**JUDGE OF THE HIGH COURT**

**MAJIKI J**

**I agree.**

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**B MAJIKI**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

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Date Heard : 16 September 2015  
Date Reserved : 16 September 2015  
Date Delivered : 22 September 2015