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

CASE NO: CA152/2018
Date heard: 20 August 2018
Date delivered: 22 August 2018

In the matter between

HANISI HIGHBOY NTOZONKE **Appellant**

Vs

THE STATE **Respondent**

JUDGMENT

PICKERING J:

[1] Appellant was charged in the Eastern Cape Local Division, East London, with rape, it being alleged that on diverse occasions between November 2012 and September 2016 near Orange Grove Informal Settlement, East London, he committed various acts of sexual penetration with the complainant from the time that she was twelve years old, by having sexual intercourse with her per vagina against her will and without her consent.

[2] Despite his plea of not guilty appellant was convicted as charged by Hartle J and sentenced to undergo life imprisonment. He appeals now against this sentence with the leave of the court a quo.

[3] Complainant, who was born on 2 July 2000, testified that she lived with her mother and appellant who was her stepfather. During November 2012 on a day that her mother was at work she was alone at home with appellant when he approached her and told her that he was going to teach her about life so that when she eventually had a boyfriend "*things would just go easy.*" He told her to "*relax and be free*" and told her to underdress completely and to lie down on her mother's bed. He proceeded to touch her private parts and then inserted his penis into her vagina. She told him that it was painful

but he told her to relax. After he was finished he warned her not to tell anyone about the incident. The following week, as also at the beginning of 2013, appellant again had sexual intercourse with her.

[4] Shortly after these incidents she began to feel nauseous. It was discovered that she was pregnant. On being told of this appellant suggested ways of aborting the foetus. Complainant, who at this stage was also having sexual relations with her boyfriend, told her mother that the boyfriend had impregnated her although in fact she was certain that appellant was the father because he had, unlike the boyfriend, not used a condom. Eventually the pregnancy was terminated at Frere Hospital at the instance of her mother.

[5] Barely a month after the foetus had been aborted appellant again had sexual intercourse with complainant. As was stated by Hartle J "*this pattern continued with sporadic sexual encounters on dates when she cannot recall. According to her, however, it was a thing that happened continuously.*" Complainant testified further as to certain specific incidents of sexual intercourse with appellant. In 2015, when she came home from sport at school and wished to take a bath appellant accused her of having had sexual intercourse with a boy and wanted to inspect her vagina. Eventually he had sexual intercourse with her after her bath.

[6] On 2 September 2016 she was asleep in bed when appellant got on top of her and had sexual intercourse with her. Following upon this incident she confided in her mother as to how appellant had been sexually violating her from November 2012.

[7] In her judgment on sentence Hartle J emphasized that appellant had for his own sexual gratification sexually groomed and taken advantage of his young stepchild over a lengthy period of time since 2012 at which stage she was a young impressionable child of twelve years. Hartle J stated that in so doing appellant had abused her trust in him and had manipulated and deceived her into believing that what he was doing with her was natural and consistent with what a father would teach his child in order to prepare

her for life. Hartle J concluded that appellant's personal circumstances were outweighed by the extremely serious nature of the offence, the serious psychological impact of the offence on complainant as well as appellant's absolute lack of remorse for his reprehensible conduct.

[8] In sentencing appellant Hartle J took into account a victim impact report prepared by a clinical psychologist, Ms. Andrews, in which she stated that sexual abuse by a parent is the most traumatic form of abuse. She stated that complainant's trauma was expressed in psychological distress and in self-destructive manifestations including damage to her self-concept and abnormal psychological development. Complainant's mental state was characterized by "*pseudo-maturity, that is presenting a subjectivity that is older and more mature than her actual age*" which has deprived complainant of normal adolescent growth and development which has long-term negative consequences. Because of appellant's actions there is a high risk that complainant will suffer psychiatric complaints in future. At the very least, according to Ms. Andrews, she will certainly suffer personality and emotional difficulties.

[9] Ms. Mtini, who appeared for appellant at the appeal, submitted that Hartle J had erred in finding that no substantial and compelling circumstances existed. In her submission the mitigating factors in favour of appellant were that he was 48 years of age and a first offender and that there was prospects of his rehabilitation. She submitted further that the rape in question could not be described as the worst type of rape justifying a sentence of life imprisonment. She submitted that the learned Judge had overemphasized the aggravating circumstances at the expense of factors personal to the appellant.

[10] It is trite that the imposition of sentence is a matter for the discretion of the trial court and that the right of a court of appeal to interfere with the exercise with that discretion is limited to cases where the discretion has not been exercised in a reasonable and judicial manner.

[11] In my view the learned Judge did not misdirect herself in any way. The circumstances of this particular matter are, in my view, particularly aggravating. In S v D 1995 (1) SACR 259 (A) the following was stated at 260g – 261a:

> "*Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often too. Even where an offence is brought to light, our adversarial system often results in the courts failing the victims… Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the court's strongest disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children. His victim was doubly vulnerable. Not only was she very young, but she had neither safe haven to return to nor any of the armour caring parents tried to provide for their children.*"

[12] It is particularly aggravating, in my view, that appellant was viewed by complainant as a father figure and that the rape took place in the sanctuary of her home while complainant's mother was away at work. Appellant completely abused his position of trust by taking advantage of complainant's obvious immaturity and naivety. In so doing he has condemned complainant to a future life fraught with emotional and personal difficulties. Compare: S v Bailey [2012] ZASCA 154 (SCA).

[13] In my view Hartle J correctly found that no substantial and compelling circumstances existed such as to justify a lesser sentence than the prescribed minimum sentence of life imprisonment. There is, in my view, no merit in the appeal against the sentence imposed.

[14] Accordingly the appeal against sentence is dismissed.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

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F.B.A. DAWOOD
JUDGE OF THE HIGH COURT

I agree,

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N.W. GQAMANA
ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Adv. Mtini
Instructed on behalf of Legal Aid, South Africa

Appearing on behalf of Respondent: Adv. Zantsi
Instructed on behalf of the Director of Public Prosecutions, Grahamstown