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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: A94/13**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES:NO  
(3) REVISED: NO

31 January 2017

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In the matter between:

**NKOMO, BRUCE**

Appellant

**and**

**THE STATE**

Respondent

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**JUDGMENT**

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**FISHER J:**

[1] The appellant was charged with 1 count of kidnapping and 1 count of rape in the Johannesburg Regional Court. The accused allegedly dragged the 10 year old complainant to his flat where he raped her. The incident is detailed in the charge sheet as having occurred '*on or about March and/or April 2007*'. The accused was arrested on 14 April 2007 and remained in custody until he was convicted on 24 May 2011.

[2] The appellant was sentenced to life imprisonment on the rape charge and 5 years on the kidnapping charge. The appellant has spent nearly 10 years in custody in consequence of the charges and conviction.

[3] The State called the complainant, N. N (who was 15 years of age when she testified); the mother of the child N. M.; a social worker Patricia Mnyandu; and a nursing sister Nomawethu Douglas. The appellant testified on his own behalf.

[4] For ease of reference, I will refer to the State witnesses as the child, the mother, the social worker, and the nursing sister respectively.

[5] The child, her mother, step-father and younger sibling lived in the block of flats F[...] in Joubert Park. The child's family lived in flat number [...] together with other tenants (of which no details were given) and the appellant resided in flat [...] with other tenants who were both men and women. Accordingly, the child and her family and the appellant lived at close quarters – there was one flat between them. In addition, the child's family and the appellant shared shower facilities which were situated across the passage from the flat in which the family resided. It was not in dispute that this living arrangement had persisted for nearly 2 years at the time of the alleged incident.

[6] The accused and the family came into constant contact with one another in that the mother kept a key to the hot water shower (there being a cold water and hot water shower) and the appellant had constantly to engage with her to obtain access to the hot water shower in the early mornings before he left for his job.

[7] The appellant was 23 years of age at the time of the alleged incident. He was known to the child and her mother as a prophet who would pray for people in the community.

[8] The appellant testified that there was hostility between him and the mother in that he had remonstrated with her in relation to the fact that she would lock the hot water shower, thus barring access to him and others in the flats. He testified also that the mother had approached him to ask that he pray for her husband because he was said to be suffering from erectile dysfunction. According to the appellant, he refused to do so in the absence of her husband. This also, according to the appellant, angered the mother.

[9] The mother, however, attempted at the trial to distance herself from any knowledge of the appellant, stating she knew little of him and had had no dealings with him. The child also attempted to deny knowledge of the appellant, save that she stated she knew him to be a prophet and would pass him from time to time at the flats.

[10] In light of the close proximity in which the family and the appellant lived, it is entirely unlikely that they would only have had passing knowledge of each other. Indeed, the evidence to the effect that there was some hostility between the family and the appellant in light of the problems experienced with the sharing of the shower facilities is overwhelmingly probable. It is not unusual for neighbours to find themselves at loggerheads, especially in conditions which are overcrowded and where common areas are shared.

[11] The appellant states that the charge was made falsely against him. He contends that the mother, on an occasion threatened him, stating '*You will see what I will do to you.*'

[12] The appellant's version of the enmity between him and the mother appears to have foundation in the evidence and the mother and the child's attempt to distance themselves from their knowing the appellant is sinister in this context.

[13] The State alleged that the events leading to the charge occurred as follows: one late afternoon the child was playing with two other children on the steps of the flats when she encountered the appellant. He offered her R10.00 which she returned by placing it under his door. The other children later went home leaving her alone. It was then that the appellant forcibly dragged her into his flat whereupon he raped her. She felt pain in her vagina during the rape. He then gave her R10.00 which she accepted and she left the flat. After the rape, she saw '*white stuff*' coming from her vagina but there was no blood. After the incident she went back to playing with her friends, who had by then returned. The child told no-one of the incident at this stage.

[14] The timeframe in this matter is crucial to a determination of the appellant's guilt. The charge sheet as aforesaid describes the incident as having occurred in March and /or April 2007. This failure to pinpoint a more exact date for an incident of this nature gives concern. Both the child and the mother testified that the incident occurred at a stage when the mother was on leave and away in Newcastle, Kwa-Zulu Natal. The mother confirms that she left for Kwa-Zulu Natal on 6 March 2007 and returned 21 days later - this being the length of her leave from work. Thus the incident, according to the evidence of the mother and the child occurred between 6 and 27 March 2007. The child however made no report as to the alleged kidnapping and rape until the events of 13 and 14 April 2007. This is central to this case, as are the circumstances under which the report was made.

[15] The mother testified that the child spent long periods of time living with the mother's sister in Soweto. The child travelled between Soweto and Park Station alone and would walk from the station in Soweto to her sister's home, which was approximately a 10 minute walk. There is no evidence as to whether a similar arrangement was followed between Park Station and F[...] – but this appears likely. In any event, the child was allowed an inappropriate amount of independence given her tender age. The mother testified that the child, at a stage, became unruly and went missing on a number of occasions. On one such occasion she was reported missing and appeared on television as a missing person. This evidence was given in the context of the child's apparent post-traumatic stress after the rape, which allegedly affected her behaviour and temperament. What the evidence of the mother

reveals however is that the child was allowed to catch trains and roam around the streets of Johannesburg and Soweto unattended even before the alleged rape. This is of concern in this case. Indeed, the Magistrate in the trial court expressed some disquiet at the fact that the child was allowed to travel in this manner.

[16] The mother's testimony was to the effect that the child was to travel from Soweto to Johannesburg on Friday 13 April 2007. The child, however, failed to arrive in Johannesburg at the time she was expected. The mother was frantic. She approached the social worker who was the director of a care centre situated not far from Flaming Hall. The social worker testified that she knew the mother and child in that she had had previous dealings with the child.

[17] The social worker and the mother spent from approximately 23h00 on 13 April 2007 to 04h30 on 14 April 2007 searching for the child during which period she was reported missing at the police station. The social worker then retired to bed.

[18] She was woken after 05h00 on 14 April 2007 with the news that the child had been discovered at the flats. Thus the child was missing overnight from 13 to 14 April 2007.

[19] There was consternation when the child was ultimately discovered. As the social worker had been involved in the search and knew the family, the mother took the child to her office at approximately 05h30 on 14 April 2007. When at the office, the mother told the social worker that the child refused to disclose her whereabouts overnight. She asked that the social worker question the child in an attempt to find out where the child had been.

[20] It is extremely significant that it was made clear by the social worker in her evidence that the child, upon such questioning by the social worker, explained as the reason for her being missing that she had been dragged to flat number 506 by the appellant and raped by him.

[21] The wheels were thus, on 14 April 2007, set in motion for the examination of the child by the nursing sister, the report to the police of the rape, and ultimately the

arrest and incarceration of the appellant. It is clear that there is a glaring anomaly in the narrative: the child gave as her explanation for being missing overnight on 13 / 14 April 2007 a kidnapping and rape which the child then testified occurred on an afternoon in March 2007 at a time when the child's mother was away in Kwa-Zulu Natal.

[22] The probability is that the child, when pressed to provide an explanation, fabricated the version which led to the charge. The enmity between the mother and the appellant was possibly a catalyst for him being named as the perpetrator.

[23] The evidence of the nursing sister who examined the child on the morning of 14 April 2007 and prepared the Form J88, which was put into evidence, suggested that there had been penetration of the child's vagina with a blunt object. She testified that she found tears at the opening to the vagina which were 'old' and not 'fresh'. She stated that she was not able to age the tears as she was not an expert in that field but the tears could have been weeks or even months old. It is a certainty, however, that they were not the result of a rape which had occurred hours before whilst the child was missing. Hence, a further glaring incongruity in relation to the State's version: If the reason for the child being missing overnight on 13 / 14 April 2007 was her kidnapping and rape, why, when she was examined on 14 April 2007, was there no evidence of recent penetration. Indeed, the nursing sister conceded that the tears found on the child's vagina could have been self-inflicted.

[24] The child was never asked at the trial as to her true whereabouts on 13 to 14 April 2007.

[25] The appellant denied any knowledge of the rape and kidnapping. He was able to indicate only that he knew that he was disliked by the mother and that she had threatened him.

[26] In an overly lengthy, convoluted, and ill considered judgment, which goes on for more than 70 pages, and which was handed down at intervals over 2 to 3 days, the Magistrate embarked on an evaluation of the evidence which took no account of the glaring incongruities in the evidence. The judgment is replete with *non sequiturs*

and reveals a failure to consider the matter carefully and competently. This has resulted in a miscarriage of justice of the worst order. There was no basis for the conviction and this is obvious from a reading of the record.

[27] In the circumstances, the following order is made:

1. The appeal succeeds and the conviction and sentence are set aside.
2. The appellant is to be released immediately.

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**FISHER J**  
**JUDGE OF THE HIGH COURT**

**I agree**

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**MAKUME J**  
**JUDGE OF THE HIGH COURT**

**Date of Hearing: 31 January 2017**  
**Judgment Delivered: 31 January 2017**

**APPEARANCES**

**For the Appellant: Adv Y.J. BRITZ**

Instructed By:

Johannesburg Justice Centre

**For the Respondent:**

**Adv Z PECK**

Instructed By:

Office of the Director of Public Prosecutions  
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