

SOUTH AFRICA / JUDGMENT

Chili v S (AR754/14) [2016] ZAKZPHC 12; [2017] 3 All SA 358 (KZP) (12 February 2016) [2016] ZAKZPHC 12

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D. Pillay, Koen, Van Zyl

CASE / FILE NUMBER

AR754/14

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IN THE

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION,

PIETERMARITZBURG

CASE NO:

AR754/14

DATE: 12

FEBRUARY 2016

In the

matter between:

SIBUSISO

RICHARD

CHILI.....APPELLANT

V

THE

STATE.....RESPONDE

NT

JUDGMENT

Date of hearing: 27 January 2016

Date of judgment: 12 February 2016

D. Pillay J (Koen J et Van Zyl J concurring)

Background

and evidence

- [1] With the leave of the Supreme Court of Appeal this appeal is against both conviction and sentence. The appellant was charged and convicted of rape committed between 2000 and 2003 upon a child of eleven years. He was sentenced to life imprisonment.
- [2] The complainant aged fourteen testified in chief that her stepfather raped her one morning six years earlier in

2000. She was in grade one at the time. Against her will he removed her clothing and penetrated her. He threatened to hit her if she reported him. Hence she did not report him. The last occasion that the appellant raped her was on a night in 2003 when she was in standard two. Her mother was asleep in another room. When the complainant tried to scream he stuffed her mouth with a cloth. On both occasions the complainant felt pain.
- [3] The morning following the last rape [V.....] a woman who lived in the neighbourhood questioned the complainant indicating that she was already aware that the appellant was abusing the complainant. The complainant reported that the appellant had raped her. This was her first report to anyone that she had been raped. [V.....] undertook to report the matter to the complainant's mother.
- [4] After the last rape the complainant escaped to her father's house. There her stepmother noticed that the complainant was walking awkwardly, that she was isolating herself from other children and that her panties were different from her sister's. She had her medically examined. Testifying three years later the appellant could not recall how long after the last incident she had reported to her stepmother. After school closed she had collected her report and ran off to her stepmother because after the first rape she had reported to her mother who chose to ignore her. Later she testified that she reported to her mother that she had been raped many times.
- [5] The doctor noticed white stuff emerging from her. She could not recall how long after her report to her stepmother she was taken for a medical examination. Nor could she recall the other incidents when the appellant had raped her, but they were more than five times.

- [6] She did not do well at school because she was 'heartbroken' thinking about being raped. Her mother did not know that she was not attending school and that she was alone at home while her mother and the appellant would be at work.
- [7] Under cross-examination she testified that the appellant raped her in 2002 when her mother had gone to the rural area. She could not recall what the appellant did after he had raped her. She noticed a 'whitish thing' when she went to bathe. She reported to her mother after the first incident. The appellant was in another room at the time.
- [8] By 2003 there was a bed in the kitchen for the complainant and her brother but on the night the appellant raped her she was asleep on a floor bed. She acknowledged that the appellant's sister [S.....] occupied the new bed. She had forgotten to mention this in chief. Before he gagged her with the cloth she made a little sound. She did not see but felt that he was dressed. He lowered his pants to his knees when he raped her. After this rape she went to sleep with her brother. The next morning she saw 'the whitish stuff' on her vagina.
- [9] She did not know how [V.....] knew that she had been raped before the complainant could report to her. She started visiting her father and stepmother in 2004 but later said that she did not recall. She conceded that she had started going to them since she was six years in 1998. She changed her evidence that she gave the previous day to say that her stepmother had also examined her.
- [10] She could not recall anything about the incidents between the first and the last rape other than that they occurred in the kitchen either on the new bed or on the floor with no one else but her younger brother present. She conceded that her mother had refused to let her go to her father until the appellant persuaded her that she should allow the complainant to do so. Since about September or October she stayed mostly with her father. In October or November 2003 her mother refused to allow her father to take her to visit his family. A month later she went with the police to arrest the appellant.
- [11] [B.....] [N.....] [N.....], the complainant's stepmother testified that the complainant came to live with them during the final examinations. She noticed the complainant walking awkwardly and isolating herself in the bedroom away from other children who were watching television. On hearing that the complainant felt pain in her vagina Ms [N.....] examined her without touching her and found a white substance. The complainant said that the appellant had slept with her the day before she had arrived at her stepfather's place. She was not in attendance when the doctor examined her but he did tell her later that the complainant had 'slept with a male person'.

- [12] In 2003 she started noticing that the complainant walked awkwardly and that she had marks on her body, which suggested that the complainant had been beaten. The complainant explained to her that her mother and the appellant beat her when she did not do the dishes. This caused Ms [N.....] to become suspicious. Since 2003 the complainant was not doing well at school. She was forgetful. She developed the problem of bedwetting after she came to live with her father in 2003. Before 2003 she was not a shy child.
- [13] Under cross-examination she testified that the complainant started visiting them from 1994 when she was six years. (In 1994 the complainant was two years having been born on 2 January 1992.) Since 2000 the complainant stayed with her stepfather overnight or sometimes as long as a week. In 2002 she had noticed that the complainant was no longer jovial and her underwear was no longer bright. She persisted that the complainant had told her that her mother and the appellant had hit her when she did not wash dishes.
- [14] She disputed that the appellant and the complainant's mother were agreeable to the complainant visiting her father. The complainant had remained with her ever since she had reported the rape to her. The complainant informed her that whenever she reported it to her mother the latter ignored her. Her mother had not attempted to speak to Ms [N.....] nor had the complainant returned to see her mother.
- [15] The appellant testified that he knew the complainant since she was three years. He was arrested on 8 December
2003. When the police arrived at his home they informed him that the complainant had said that she was lost. They took the appellant purportedly to show them where the mother was at work. Instead they drove him to the police station where he learnt that the complainant had reported that he had raped her.
- [16] The appellant surmised that the complainant accused him falsely because her father wanted her to live with him and her mother was refusing to allow her to do so because a relative of the father had once raped the complainant. He disputed the complainant's evidence that the mother was working in 2000. According to him she started working in 2003. He denied that the complainant stayed alone with him. She had been allowed to stay with her father eventually but returned occasionally to visit her mother.
- [17] Under cross-examination he testified that in 2000 he had persuaded the complainant's mother to let her visit her father. He had a good relationship with the complainant. It was he who put her into grade one. Her mother had not told him but he had assumed that she did not want the complainant to stay with her father because a member of his family had raped her. What the mother did say was that the father had abandoned her with the complainant and if he needed to see the complainant he had to pay damages first.

Later he added that the father wanted to take the complainant to the rural areas. Her mother did not know where that was. He learnt of the father's wish to have her from the complainant herself and thereafter from her half siblings on her father's side, who also wanted her to stay with them. Before she was allowed to visit her father she appeared to be a child without a father. He wanted the complainant to visit her father because it was not the father who had raped her previously and the father had punished the person who did rape her; moreover her father needed her.

- [18] He did not disclose the rape by another person to his attorney because he was confused. Hence it was not put to the complainant. He remembered that rape when he learnt that morning that the doctor had confirmed that the complainant had been abused.
- [19] The complainant was away from him staying with her father for three months before he was arrested. The complainant would not have known about his attempts to persuade her mother to allow her to visit her father. She had reported to them that she was going with her father to the rural areas. Her mother had refused permission. The complainant stayed the night and went to her father's house the next day. She returned three months later in December 2003 with the police.
- [20] He assumed that it was a fabrication because the father wanted the complainant. She was allowed to visit but not to go with him to the rural areas. He disputed the complainant's evidence that she was left alone with him when her mother went to the rural areas because her mother always took her.
- [21] The defence reopened its case to call the complainant's mother to testify. [G.....] [Z.....] [Z.....] denied that the complainant ever brought to her attention that the appellant had raped her between 2000 and 2003. Neither did she notice anything wrong with the complainant over this period. She testified that she was not employed in 2000 but started working in April 2003.
- [22] She knew [V.....] as her neighbour. [V.....] had not mentioned to her that the appellant or anyone else had raped the complainant. She denied ever observing the complainant walking awkwardly or being withdrawn. Whenever the complainant stayed away from school Ms [Z.....] was aware of it. The complainant had a problem of bedwetting ever since she was born. Other than that Ms [Z.....] did not notice anything in her underwear.
- [23] She did object to the complainant staying with her father at the beginning because he did not support the complainant financially and had insisted that she bring her to stay with him. Ms [Z.....] decided to raise the complainant on her own. Another reason for keeping the child with her was that when the complainant was five years she was raped and the father merely gave the rapist a hiding. Ms [Z.....] was not happy that he did not want to report the matter to the police. The complainant did not

want to live with her father but was happy to visit him. She allowed the complainant to visit her father after her siblings from her father's side sought permission from Ms [Z.....] to allow her to visit them. She felt sorry for the children after they repeatedly asked her to allow the complainant to stay with them.

- [24] She went to the rural area in December taking her children with her. The complainant had informed her that her father wanted to ask Ms [Z.....] permission to take the complainant to his rural area. Ms [Z.....] waited but no such request came. She denied hitting the complainant if she did not do her chores. She did not notice any marks on the complainant's body.
- [25] The complainant got along well with the appellant; she would run to him when he returned home. She surmised that the complainant's father and her stepmother had influenced her to falsely implicate the appellant because they wanted to take her away.
- [26] After a short interval Ms [Z.....] returned to be cross-examined. She learnt from Ms [N.....] who, it emerges for the first time, was also the appellant's maternal aunt, that the appellant had been arrested the previous day.
- [27] She started living with the appellant in
1998. The complainant was eight years old. The complainant was six years when she started a relationship with the appellant. It was pointed out to her that the complainant would have been six years in 1998 having been born in 1992. She corrected herself to say that she met the accused in 1997 and they started living together in 1998. She surmised that the appellant was confused when he testified that the complainant was three years when they started living together. The complainant was five years when she was raped.
- [28] She last spoke to the complainant's father when the complainant was eleven months. The next occasion she spoke to him was when the complainant was five years old and had been raped. She had to contact him because the child was in danger and because she wanted his advice about whether to report the matter and go to court. When she decided to break communication with the complainant's father she was casually employed to wash laundry. She worked carrying her child on her back.
- [29] The boy of eleven years who had raped the complainant was from the neighbourhood. When the complainant's father was assaulting him that is when the boy's mother summoned the police and the dog unit arrived. Even though she was unhappy with the father's advice not to pursue the complaint she did nothing further about it because he had threatened to kill her if she did anything against his will. He threatened to shoot her when she applied for maintenance from him and when she insisted that he open a case against the rapist.

- [30] She did not take the child to the doctor because she did not have money and the complainant's father refused to give her any. She did take the child to the clinic a week later but the clinic did nothing for the complainant. She could not take the complainant to a clinic immediately because she had to work in order to feed her.
- [31] The complainant was in her second year of school at eight years when Ms [Z.....] allowed her to visit her father. The complainant's siblings had approached her on three occasions to ask permission for the complainant to visit them. Whenever the complainant stayed over at her father's Ms [Z.....] would look for her at school the following day to check why she had not come home. It was only in October that the complainant stayed away over many days with her father. About that time she also requested permission to go with her father to the rural area. Ms [Z.....] did not respond to the request; hence the complainant would not have known whether she had permission. Ms [Z.....] was adamant that she did not respond to the complainant's request but waited for her father to approach her. If the appellant had said that she had refused the complainant permission that would not be true.
- [32] After the appellant was arrested he was released on bail and returned to live with her. In re-examination she testified that she tried to see the complainant but was not allowed to do so. The social worker told her that she would have to wait until the case was over. The complainant never disclosed to her that the appellant had assaulted her. As far as she knew they were close.

Analysis

- [33] In this case as in most other sexual offence prosecutions it is difficult to establish where the truth lies. Compounding the difficulty is the fact that the complainant was a child of eleven years when the last incident allegedly occurred and fourteen years when she was testifying. The unexplained delay in prosecuting the complaint assisted neither the complainant nor any of the other witnesses. In these circumstances the watchwords for analysing the evidence are: caution, common sense and meticulous application of the rules of evidence to assess credibility.
- [34] For some perspective of the time frame the following evidence can be relied on: Ms [N.....] testified that the complainant arrived to stay with them during the final examinations. The complainant testified that she collected her report from school and went to live with her father. The police CAS number on the J88 records the date of reporting as November 2003. The J88 was completed on 24 November 2003, after the complainant made a statement to the police. Whether this was on her first or second visit to the hospital is not clear. The alleged last rape would have occurred around November 2003. Since then she had been living permanently with her father. She must have been living with her father from about November 2003.

- [35] The complainant's and her mother's evidence under cross-examination and the appellant's evidence in chief was that she gone to live with her father in September or October 2003 about three months before his arrest on 8 December 2003. In contrast Ms [N.....] denied that the complainant came to live with them in September or October 2003. If September or October 2003 is correct then the delay between October and reporting to the police in November 2003 is unexplained. The appellant was not reliable as far as assessing time went. For instance, he testified that he came to live with Ms [Z.....] and the complainant in 1998 when the latter was three years. The complainant was six years by then. It is possible that the complainant and her mother are also mistaken about the September/October dates. Linking her arrival to the examinations and collecting her report puts the date closer to November 2003.
- [36] When did the appellant allegedly rape the complainant? The complainant testified that it began in 2000 when she was in grade one. Her mother was at work. The last rape occurred one night in 2003 when her mother was asleep in another room. She corrected her cross-examiner to say that the appellant raped her when her mother was away in the rural areas in 2002, not 2000. So she did recall three occasions when she was raped even though she recalled little else about that occasion and the five or more other occasions. Regrettably why she did not mention the 2002 incident in chief was not canvassed further. It is possible she forgot to do so; equally she might have been constructing her version as she went along.
- [37] Did Ms [N.....] corroborate the complainant? Ms [N.....] gave a straight-forward account of the report the complainant made to her. She did not elaborate on the complainant's report that the appellant had 'slept with her'. She was not in attendance when the complainant gave her statement to the police. Nor was she present during the complainant's medical examination. When the court put the defence version to her she responded quite simply without defending the complainant that she had to 'act reasonably' on the complainant's report. The complainant was corroborated to some extent by Ms [N.....] who had observed that the complainant had walked awkwardly, was withdrawn and was wetting the bed, all of which are typical symptoms of an abused or disturbed person. However she did contradict the complainant materially.
- [38] In chief Ms [N.....] testified that she noticed the complainant's odd behaviour in 2003. Under cross-examination she changed this to 2002. The complainant's behaviour became obvious in 2003. If the complainant had been raped from 2000 it should have been obvious to Ms [N.....] as the complainant testified she was in pain after each rape. Her explanation that she had not noticed anything odd about the complainant before 2002 possibly because she was not paying attention, has to be weighed cumulatively with all the evidence.
- [39] In chief Ms [N.....] testified that in 2002 when she saw marks on the complainant's body the latter had told her that her mother and the appellant had hit her when she did not wash dishes. Yet the complainant had stated when she was examined to determine her competence that they never punished (hit) her but only scolded her. Her father brushed away the report as being the mother's way of disciplining the complainant.

- [40] Under cross-examination she denied that the appellant had persuaded the mother to allow the complainant to visit her father because the complainant had informed her that both of them were opposed to her visiting her father. Furthermore, the mother and the appellant had confirmed this one day when they met at the supermarket. This evidence conflicts with the appellant's concession that the appellant did persuade her mother to allow her to visit her father.
- [41] Did the complainant report to her mother about being raped by the appellant? In chief she testified that after the first rape she did not report it to anyone because the appellant threatened to hit her. After the last rape [V.....] was the first person to whom she had reported being raped. Later she testified that she ran off to her father because she had reported to her mother that the appellant had raped her many times but her mother had ignored her. In response to questions from the court the complainant replied that her mother had said that she was not truthful about her complaint against her stepfather.
- [42] In response to questions from the court Ms [N.....] stated that the complainant had informed her that she did not report the matter because the appellant would give her R1 and tell her to remain quiet; sometimes he threatened her. It was never the complainant's testimony that the appellant silenced her with R1. Ms [N.....] also testified that the complainant had reported to her that her mother would remain quiet whenever she reported the appellant to her. The complainant's evidence about reporting to her mother varies. Her mother denied ever receiving such a report from the complainant. Her testimony that [V.....] already knew before she could report the alleged rape to her seems genuine but the court has no explanation as to why [V.....] did not testify. The first report is material in sexual offence cases. Given the contradictions and variations in the complainant's evidence the court has no reliable evidence that she reported to her mother and what the latter's reaction was.
- [43] Ms [N.....] had testified that on questioning the complainant about her panties in 2002 the latter dismissed the subject with the explanation that they were dirty. This would have been an opportunity for the complainant to report to Ms [N.....] with whom she had a good relationship and who cared for her. There is no explanation as to why she did not report to Ms [N.....] sooner than 2003.
- [44] The appellant presented a picture of a caring stepfather who maturely encouraged the mother to allow the father access to the complainant. He admitted the contents of the medical report to be 'true and correct'. The regional magistrate should not have drawn inferences from the measurement of the hymen being enlarged to 24 mm by 18 mm as being caused by the appellant and not the youth of 11 years without better facts and medical evidence. The high water mark of the medical report is that the complainant had been penetrated. The question remained: By whom?

[45] Damaging to the appellant's case was his failure to recall the rape of the complainant by a youth in time to put that to the complainant when she testified. Considering that he assumed that to be the reason for the mother refusing to send the complainant to her father, it is hard to accept that he forgot about that rape. His explanation for the failure was that he had forgotten about it until the medical report, which had been handed in at the end of the state's case and just before he testified, reminded

him that day of that rape. When his representative received the J88 is not evident from the record. If she had received it a while before he testified the prosecution would have pressed this point. His evidence that he had informed his previous attorney about that rape could also not be gainsaid. How much weight should be attached to his omission must be assessed cumulatively.

[46] Ms [Z.....] corroborated the appellant in the material respect that the complainant had previously been raped and she had initially refused to allow the complainant to visit her father. Differences in their evidence as to whether the youth who raped the complainant was a relative of the father or a neighbour can be explained away by the appellant's mild interest in the issue as it had occurred before he came to live with them. In the nature of narratives some details are sometimes lost in

the retelling. I might have found against the appellant on this point but for Ms [Z.....]'s particular reference to the dog squad arriving when the father was beating the youth. Ms [Z.....]'s account of the previous rape adds weight to the appellant's version.

[47] Ms [Z.....]'s evidence could not be faulted. Whenever the complainant stayed over with her father Ms [Z.....] would check on her at school the following day. She did so when the complainant left to live permanently with her father. Damaging to the prosecution's case was Ms [Z.....]'s denial that the complainant ever reported being raped by the appellant to her.

[48] Did the appellant rape the complainant? During the last rape in 2003 her evidence was that the appellant was dressed, that he lowered his pants to his knees and that he gagged her. Although the presence of his sister [S.....] asleep in the same room suggests that the appellant was unlikely to commit rape, rape has occurred in families confined to sleeping in a single room. [S.....]'s presence would explain the gag and his being clothed. However, towards the end of her cross-examination the appellant responded that only [F.....] was asleep with her in the kitchen. She must have forgotten that she had confirmed under cross-examination earlier the appellant's version that [S.....] slept on the bed in the kitchen with her. Her evidence in cross-examination that she slipped into her brother's bed after the last rape seems to have been a genuine search for comfort or refuge.

[49] The complainant's testimony at the outset that in grade one when the rapes started her siblings would ask her why she stayed away from school; this suggests that she stayed away from school many times considering she was allegedly raped more than five times. However, at the end of her examination in chief she testified that she stayed away from school only one or two times. As she went to Ms [N.....] after school it is possible that she did not stay away from school after every incident. What the significance of staying away from

school was, was not fully explored and I can draw no inference from this evidence.

[50] Some flaws in the complainant's evidence were explained away by her youthfulness and the lengthy passage of time. However, the material contradictions discussed above weigh against her.

[51] The complainant and possibly Ms [N.....] had a motive to falsely implicate the appellant. The complainant wanted to stay with Ms [N.....] and her father and they wanted her to be with them. Equally the appellant and Ms [Z.....]

would do their best to spare the appellant of a life sentence. Ms [Z.....] would lose her breadwinner and partner if the appellant was convicted. With the facts balanced as they are applying the proof beyond a reasonable doubt test must result in a finding in favour of the appellant.

[52] Another crucial factor that tips the balance in favour of the appellant is the prosecution's failure to call a material witness. Neither the trial court that convicted the accused nor the high court that sentenced him and refused leave to appeal, considered this omission. The material witness was [V.....] the neighbour who the complainant testified already knew about her

being raped. There is no explanation as to why this witness was not called. If she was not available to testify that should have been placed on record. If she was not willing to testify she should have been subpoenaed.

[53] The quality of the services rendered might also have been compromised in other ways. The cross-examination by both representatives could have been more robust and thorough. The representative for the appellant asked to cross-examine while she was seated might not been performing optimally. There is insufficient information as to how it came about that she was not aware when the complainant testified that the complainant had been raped by the youth when the appellant had allegedly informed his erstwhile attorney about this. The failure to put a version is usually detrimental to a party. In the circumstances of this case I cannot safely draw an adverse inference against the appellant. Furthermore, the prosecutor had to correct the interpreter occasionally. Whether Ms [N.....]'s evidence that she did not know the appellant or Ms [Z.....]'s evidence that she was the appellant's maternal aunt is a conflict cannot be resolved because neither party questioned this issue further. It might also be a misinterpretation of the evidence.

[54] The assessment of Ms [N.....] and Ms [Z.....] is against the backdrop of no information of their education, their ages, their intellect and any other factors that go to assessing their sophistication as witnesses. There were no social worker's or psychologist's reports to support or refute the complainant's evidence.

[55] Litigation about a deep-seated social scourge occurs against this backdrop. Although the constitutional rights of the complainant and the appellant have to determined through litigation, solving the causes of sexual offences is ill-suited to the forms and functions of

litigation. These cases strain the rules of evidence beyond their traditional limits. Constantly the court has to resist speculating about what might actually have happened. Applying the tried and tested techniques of assessing credibility by scouring the evidence for consistency and corroboration, and the standard of proof beyond a reasonable doubt are all that is available to us to resolve the dispute. Much more is needed to solve the problem.

- [56] In the circumstances I find that the state has failed to prove the guilt of the appellant beyond a reasonable doubt. The defence raised two procedural and preliminary issues. In the light of my finding above it is not necessary to deal with them. I do so nevertheless for the sake of completeness.
- [57] The first issue is that the regional magistrate misdirected herself by calling on the prosecutor to question the complainant to test her competency as a witness. It submitted that the substantive flaw in this approach was that the prosecutor was leading her own witness whom she might have precognised earlier. Furthermore the defence had not been allowed an opportunity to cross-examine the complainant.
- [58] In this case the prosecutor asked questions that the regional magistrate might herself have asked. And if the questioning by the prosecutor was improper the learned magistrate cured any such impropriety when eventually she asked the complainant whether she understood what it meant to take the oath. She did and she was sworn in, which is more than can be expected of child witnesses who are often simply warned to tell the truth. Ideally presiding officers should question a witness to test for competency and offer the parties an opportunity to raise any concerns they might have about competency.
- [59] The second procedural point that was raised was that the charge was vague and that the appellant was not advised fully of the implications of the minimum sentence legislation; nor was he advised of his right to object to the charge or to request further particulars. There is no substance in this challenge too. The appellant was legally represented throughout the proceedings. His legal representative had ample opportunity to request further particulars and to advise the appellant of the implications of the minimum sentence legislation. On the record it is clear that the appellant was aware that he was being charged for rape of a minor of eleven years and that a conviction on that charge could attract a sentence of life imprisonment. In the circumstances the appellant had a clear presentation of the charges and what he had to overcome to avoid a sentence of life imprisonment.

[60] I propose an order in the following terms:

The conviction of the appellant by the regional magistrate and his sentence to life imprisonment by the high court are set aside and substituted with the following:

‘The appellant is found not guilty and is discharged.’

D. Pillay J

Koen J

Van Zyl J

APPEARANCES

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