

SOUTH AFRICA / JUDGMENT

Birch v S (SS118/1999) [2006]

ZAWCHC 81 (24 March 2006)

[2006] ZAWCHC 81

COURT

Western Cape High Court, Cape Town

BEFORE

Davis

CASE / FILE NUMBER

SS118/1999

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IN

THE HIGH COURT OF SOUTH AFRICA

(CAPE

OF GOOD HOPE PROVINCIAL DIVISION)

CASE

NUMBER:

SS118/1999

DATE:

24
MARCH 2006
In

the matter between:

CLAUDE
BIRCH

.....APPELLANT

and

THE
STATE

.....RESPONDENT

JUDGMENT

(Application for Leave to Appeal)

DAVIS, J:

This is an appeal against a judgment in Magistrate's Court on the 20th April 1999 in which the appellant was convicted of a range of offences including two of rape, robbery, two counts of attempted murder and a series of other offences.

The matter then was referred to this Court for sentence in terms of the minimum sentence legislation under the Criminal Procedure Amendment Act of 1997. The date of sentence was the 27th November 2000 in which this Court confirmed the conviction and imposed a sentence of 20 years cumulatively. The basis upon which the sentence was formulated is as follows. On the two counts of rape 20 years for each count, on the count of assault with intent four years, on the two counts of robbery seven years on each count, on the count of arson six years and on the three counts of attempted murder six years for each count all to run cumulatively.

The appellant has been seeking to bring this matter on appeal for quite a considerable amount of time and it is most unfortunate that it has taken this length of time, that is on the 20th November 2000 until the 24th April 2006 for the appellant to come before Court to present his appeal. The State, represented by Mr Theron, quite sensibly did not oppose an application for condonation of the appeal. Accordingly I advised Mr Birch, who appeared on his own behalf, that I was prepared to hear the appeal. Mr Birch produced very competent and comprehensive heads of argument, indeed the quality of which sometimes is not achieved by many counsel who appear in this court. For this reason I was afforded the opportunity of being guided through each and every aspect of the appeal which Mr Birch has brought. In essence, the foundational argument of appeal concerns the defence which was raised by Mr Birch who was represented by counsel Mr Eia at the hearing, namely that Mr Birch was so intoxicated and so under the influence of drugs which he had consumed prior to the events which led up to the crimes which he committed that he was *doli incapax* at the time of the offence. The problem which faces this Court, both at the time when it confirmed the conviction and now, is that there was no evidence which was produced by the defence to substantiate or support the claim that the accused at the time had acted *doli incapax*. The only evidence which was made available to the Court concerned a report which had been produced upon the request of the Court by a specialist psychiatrist Dr E Jedaar on the 15th April

1999. That report was produced because during the course of the trial the magistrate, acting in terms of section 78(1) of the Criminal Procedure Act 51 of 1977, directed that the issue of *doli incapax* be subjected to an enquiry and that a report be produced by a psychiatrist. There is some dispute as to whether the appellant was remanded for the necessary 30 day period but suffice it to say that Dr Jedaar

produced his report and concluded thus: "He displayed a full range of appropriate emotion and engaged satisfactorily in conversations. He is not thought-disordered and provided a detailed and coherent account of himself. He alleged amnesia for the offences in question but this was inconsistent with any pathological nor non- pathological causes (sic)". Accordingly, Dr Jedaar concluded: "There was no objective evidence of mental illness nor any elicited despite his claim to hearing voices intermittently and this was assessed as pseudo hallucinations. He was cognitively intact and impressed as functioning in the average range of intelligence". There is no question that there is no evidence which would support the finding that the appellant discharged the onus of proving that he was *doli incapax* when the offences were committed. The magistrate in his judgment went further and sought to substantiate the finding that the accused was "goal-

directed throughout"

by reference to evidence of a number of the witnesses, evidence which I might add remained uncontested through cross-examination.

For example, there was the evidence of Mr Oranges who testified that the appellant had come to him on that evening and informed him that the police were looking for him, that he was in trouble and that he was in danger of being charged with rape. He sought money from Mr Oranges. There was further evidence of witnesses Nurse and Benner Smith who testified that they were assaulted and watches, one of which was produced before Mr Oranges, were taken from them. If one examines the evidence of Mr Oranges the account he produces shows explicitly how the appellant described the events that occurred. But there is further evidence which also supports this version of events. Ms Swanepoel testified how their house was petrol-bombed. There was evidence that it was the appellant who was in possession of the sherry bottle which was the instrument of the petrol bomb. In short, when one examines the evidence as a whole there is indeed

justification for the conclusion reached by the magistrate that the appellant's actions were "goal-directed throughout". One passage of the evidence of Mr Oranges which remains uncontested suffices, he testified: "He (appellant) said to me they're interfering in his life and he didn't like that so then he told me he took the Old Brown Sherry bottle, it was a brown bottle he explained to me, he put a cloth inside and there was stuff inside that he lit and he ran past and he threw it through the window". Uncontested, that evidence does not indicate that someone was *doli incapax* or did not know what he was doing at the time, nor that he had no recollection of the events. In short, I am satisfied that no Court could reasonably come to a conclusion on the evidence which was available on the record that the appellant was not guilty of the charges on which he was convicted. As I stated at the outset, the main defence, which is produced in the heads of argument, turn on the question of whether the appellant was *doli incapax*. There is indeed a subsidiary argument with regard to the second rape count that the 12 year old child who was raped did not precisely describe how the appellant inserted his penis into her vagina. It is true that the description is perhaps less lucid than the account of the first rape but, in my view, it is sufficiently coherent, particularly coming from the mouth of a 12 year old child, to indicate that there were two separate occasions when the appellant had sexual intercourse in forcible fashion with the 12 year old child. I now turn to the question of sentence. This is a shocking crime. According to the evidence of the complainant she was threatened with her life, the events took place where a small baby saw the events as they unfolded. The complainant was 12 at the time, it was a vicious crime. It was not an ordinary rape, if any rape can be considered to be ordinary, the Appellate Division has already indicated that when rape, as horrendous a crime as it is, comes before these courts, the courts when it comes to sentence need to take account of the nature of the rape. This was a rape which, if it could be suggested as such, must be located on the worst end of the spectrum. I can see nothing shocking, nor unfair, nor unjustifiable in having sentenced this appellant to 20 years cumulatively for all the crimes that were committed. Indeed, there is nothing which would suggest that this sentence would induce another Court in coming to

a different conclusion to the one which is reached in sentencing the appellant to the terms of imprisonment as indicated in the sentence. For all of these reasons therefore the appeal against both conviction and sentence are dismissed. DAVIS, J

The appellant has been seeking to bring this matter on appeal for quite a considerable amount of time and it is most unfortunate that it has taken this length of time, that is on the 20th November 2000 until the 24th April 2006 for the appellant to come before Court to present his appeal. The State, represented by Mr Theron, quite sensibly did not oppose an application for condonation of the appeal. Accordingly I advised Mr Birch, who appeared on his own behalf, that I was prepared to hear the appeal.

Mr Birch produced very competent and comprehensive heads of argument, indeed the quality of which sometimes is not achieved by many counsel who appear in this court. For this reason I was afforded the opportunity of being guided through each and every aspect of the appeal which Mr Birch has brought. In essence, the foundational argument of appeal concerns the defence which was raised by Mr Birch who was represented by counsel Mr Eia at the hearing, namely that Mr Birch was so intoxicated and so under the influence of drugs which he had consumed prior to the events which led up to the crimes which he committed that he was doli incapax at the time of the offence.

The problem which faces this Court, both at the time when it confirmed the conviction and now, is that there was no evidence which was produced by the defence to substantiate or support the claim that the accused at the time had acted doli incapax. The only evidence which was made available to the Court concerned a report which had been produced upon the request of the Court by a specialist psychiatrist Dr E Jedaar on the 15th April

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"He displayed a full range of appropriate emotion and engaged satisfactorily in conversations. He is not thought-disordered and provided a detailed and coherent account of himself. He alleged amnesia for the offences in question but this was inconsistent with any pathological nor non-pathological causes (sic)". Accordingly, Dr Jedaar concluded:

"There was no objective evidence of mental illness nor any elicited despite his claim to hearing voices intermittently and this was assessed as pseudo hallucinations. He was cognitively intact and impressed as functioning in the average range of intelligence".

There is no question that there is no evidence which would support the finding that the appellant discharged the onus of proving that he was doli incapax when the offences were committed.

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