

IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: SS118/1999

DATE: 30 NOVEMBER 2000

In the matter between:

THE STATE

versus

CLAUDE BIRCH

**S E N T E N C E**

DAVIS. J:

[1] On the 20<sup>th</sup> April 1999 Claude Birch was convicted on ten counts of which he had been charged which included two counts of raping one Natalie Clayton, a 12 year old girl, a count of assault with intent to do grievous bodily harm to one Petra Binnars, two counts of robbery with aggravating circumstances, one count of arson and three counts of attempted murder. All of these charges and convictions stemmed from what can only be termed a four hour spree which exhibited madness unquestionably induced by the alcohol and drugs on the 25<sup>th</sup> July 1998.

[2] Given that a number of these convictions fall within the scope of section 51 of the Criminal Law Amendment Act 105 of 1997, the question of sentence was referred to this Court. In short, in terms of section 51(1) the fact that Mr Birch has been convicted of an offence which falls within Part I of

Schedule 2, namely rape of a girl under the age of 16, means that this Court is obliged to sentence him to imprisonment for life save if in terms of subsection (3)(a) of the Act the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsection (1).

[3] In addition, Mr Birch has been convicted of two counts of robbery with aggravating circumstances which means that in terms of subsection (2) of Act 51 the Court is obliged, given that for the purposes of these sentences Mr Birch would be a first offender, to impose imprisonment for a period of not less than 15 years, save if the Court can justify exercising its discretion in terms of subsection (3)(a).

[4] Before dealing with the questions of sentence, section 52 of the Act enjoins the Court to consider whether it is satisfied that the process of conviction for the Regional Court is justified and that the Court must be satisfied that the accused is guilty for which he or she has been convicted. The Court is so satisfied and therefore confirms the finding of guilt in respect of all the charges which have been set out above. On this basis the Court can proceed to deal with the questions of sentence.

[5] Mr Theron, who appeared on behalf of the State, suggested a range of approaches which could be adopted by the Court insofar as these offences were concerned. He submitted that the Court could all of the counts together for the purposes of sentence in that, as has already been mentioned, all of these charges flowed from events which took place over a mere four hours

on the same day. Or, alternatively Mr Theron submitted, that the Court could classify the convictions into three groups, namely the two charges of rape and convictions thereof, the two counts of robbery with aggravating circumstances and finally the attempted arson together with the three counts of attempted murder in that insofar as the latter was concerned it all stemmed from the use of a petrol bomb by the accused.

[6] The Court proposes to adopt the latter course and to deal with the various convictions by means of a threefold classification. It is trite law that in dealing with the questions of sentence the Court must consider the crime, the offender and the interests of the community, although as I have stated previously it appears to me that the more appropriate approach is to adopt a fourfold classification being the crime, the offender, the broader interests of our constitutional community and the particular interests of the victim and her family.

[7] There can be no doubt that insofar as the two crimes of rape are concerned these were dastardly deeds. The complainant, a twelve year old girl, the manner in which the accused raped her was, as is the case with all rapes, a violent, brutal and inhuman action. In this case it is even compounded by the manner in which the rape was conducted by the accused's utter and complete disregard for the humanity and dignity of a twelve year old child and by the fact that the sequence of events insofar as the two rapes were concerned took over a sufficiently sustained period as to create an even more appalling climate of fear for the complainant. The fact

that to some extent the complainant would have not only known the accused but would have some basis to believe that she could trust him only compounds the nature of the crime.

[7] Mr Birch, who appeared on his own behalf for reasons which I shall mention shortly, submitted that he was heavily under the influence of drugs and indeed, he went so far as to contest his ability to have formed the requisite criminal intent. That issue is not before me although I should say that the magistrate's judgment is particularly careful in this regard and, in my view, provides adequate and reasoned justification for rejecting this particular line of defence.

[8] That being so, Mr Birch submits that his moral inhibitions were clearly sufficiently loosened by the intake of drugs and that accordingly his moral culpability should be regarded as having been reduced accordingly. Mr Theron of course raised the difficult as to whether in fact a court should take account of drugs and intoxication as mitigating factors, or to put it within the framework of section 51(3), whether they constituted substantial and compelling circumstances sufficient to justify the imposition of a lesser sentence.

[9] As he correctly submitted, the Minnesota Guidelines which the minimum sentence legislation to which I have already made reference was clearly influenced, expressly excludes a consideration of these factors. Were they to be the only facts to be taken into account I would be extremely hesitant to conclude that they amounted to any substantial or compelling circumstances. If it were to be so, courts would be giving licence to people to commit crimes

on the basis of intoxication and drugs and then to attempt to take the horror off the nature of their crimes by recourse to such arguments.

[10] But there are other aspects of which the Court must take account. Mr Birch has clearly had a tragic childhood, in the pre-sentence report which has been made available to the Court, there is clear evidence that Mr Birch lost his mother when he was four years old and suffered at the hands of a father who himself was heavily involved in drugs. He is a person who has never had the benefit of a stable and decent childhood and, as he movingly said to the Court in his argument in mitigation, he is a man who has developed antisocial tendencies to such an extent that he finds it extremely difficult to reciprocate care and concern for other human beings.

[11] It is also so that Mr Birch submitted documents which I am prepared to take into account regarding his conduct in the more than two years in which he has been incarcerated pursuant to having been arrested and in which it appears that he has made a sincere attempt to find religion to examine the innermost recesses of his soul and to try as best as he can to come to terms with the sheer horror of the life which he had led and which led to these tragic events.

[12] Mr Birch of course submitted that given the evidence that he is on the road to some form of rehabilitation the Court should take serious cognisance thereof in order to reduce the sentence way below that prescribed by the Act.

[13] The legislation appears to me to work with two fundamental penological concepts, namely culpability and harm. In other words, a court must take account in substantial and compelling circumstances of the culpability of the accused in a moral sense, to which I have already made reference. But it also needs to take account of the harm which has followed from the acts on which the accused has been convicted. Even were I to be generous to Mr Birch and to submit that the culpability which he exhibited should be considered to have been reduced morally as a result of the intake of drugs and that his subsequent remorse and attempt to come to social terms with that which he committed would reduce his culpability, the harm which was created by raping a 12 year old child on two occasions, albeit within a similar time sequence, is of such a dastardly nature that a court must be extremely careful before finding substantial and compelling circumstances.

[14] Mr Theron submitted that when one looked at the overall nature of the culpability and the harm and the interests of society an appropriate sentence would be that of 20 years, in that the substantial and compelling circumstances were at least such that a minimum sentence of life would be inappropriate in such a case.

[15] This is a very difficult case and I find myself in a difficult jurisprudential situation as to know precisely whether in fact substantial and compelling circumstances do exist in this case. We have to do here with an antisocial human being who has brutalised a young girl of 12 years old in circumstances where he himself admits no one quite knows what the psychological effects of this ghastly set of circumstances will be on her for the rest of her life Perhaps it is because of the nature of the life which he led, the

sincere attempt to redress the evil which he committed, the clear evidence from independent sources, including those within the Department of Correctional Services, support his own contentions with regard to his changed approach that in circumstances where there is some doubt in the mind of the Court, that doubt should to this very limited extent, dictate that a careful and anxious conclusion should find that substantial and compelling circumstances do so exist.

[16] An appropriate sentence would therefore be approximately 22 and a half years. It is a shade short of the 25 years prescribed in terms of section 51, it is sufficient to leave the door open to consideration by the authorities at a later stage. I would, and I do impose a sentence of 22 and a half years upon Mr Birch insofar as each of these convictions are concerned but I am prepared to take account of the fact that he has spent two and a half years in prison already.

[17] The public is unaware of the fact that courts should take account of the time that a person has been incarcerated as an awaiting trial prisoner. Those of us who, as judges of this court have a duty to visit prisons, know well what the conditions of awaiting trial prisoners actually are and in many circumstances they are actually worse than those of sentenced prisoners. It is a legitimate and justifiable exercise to take account of the time spent by an awaiting trial prisoner in prison in the final assessment of the sentence. Therefore, insofar as the public is concerned this Court has sentenced Mr Birch to 22 and a half years for each conviction on rape but this amounts to an effective 20 years because I have taken account of the two and a half years which he has spent in prison already.

### The robbery with aggravating circumstances

[18] The fact that I have already spent a considerable amount analysing the existence of substantial and compelling circumstances there is no need to repeat that which I have already said. All of these crimes flowed from one set of circumstances beginning with the two rapes and culminating with the three counts of attempted murder. It would be appropriate therefore to sentence Mr Birch to a term of imprisonment of 15 years for the crimes of robbery with aggravating circumstances and accordingly I sentence him to seven years on each count of attempted arson and the three counts of attempted murder.

[19] These were the final acts Mr Birch in his spree of madness which began with the rape of Nicola Clayton and ended with throwing a petrol bomb through a house occupied by three people. In my view, these are serious offences, on their own they would necessitate a serious sentence of imprisonment, even though I should emphasise that notwithstanding Mr Birch's long list of convictions, none of them are for acts of violence and all of them are for the use of drugs. In the circumstances, taking all of these convictions into account would be a term of imprisonment of six years.

[20] To summarise thus, the Court has sentenced Mr Birch on each count of rape to a term of imprisonment of 20 years; to a term of imprisonment of seven and a half years for the two counts of robbery with aggravating circumstances and a term of imprisonment for six years for the attempted arson taken together with three counts of attempted murder, all of these sentences to run concurrently.

[21] There is of course the final count of assault with aggravating circumstances, again which played out in the same events, and which a term of imprisonment of four years will be imposed.

All of these sentences will run concurrently which effectively means that Mr Birch has been sentenced to an effective term of imprisonment of 20 years, although were, as he indeed he should, to spend the entire duration in prison he would have been in prison for 22 and a half years effectively given the amount of time that he has already spent in prison.

I want to make one final point before concluding and that is I am aware that Mr Birch represented himself in the difficult issue of dealing with sentence. That is not, however, a matter which was done lightly. When this matter initially came before this Court for sentence Mr Birch was represented by Mr du Toit in whom it appeared Mr Birch had lost confidence and accordingly time was given to Mr Birch to procure another legal representative, although he was warned at the time that it would be preferable to employ Mr du Toit who appeared to be extremely concerned with the welfare of Mr Birch in the event that no other legal representative was available. When the Court recommenced to hear this matter on Monday, Mr Birch persisted with his view that he did not wish Mr du Toit to represent him and after careful questioning by the Court he accepted that he finally had to go ahead representing himself. I do not consider that any injustice was done in this case in that during the hearing before the trial Court, Mr Birch was represented by experienced counsel Mr Eia and in the proceedings before

me he presented his case extremely eloquently with a great degree of insight and revealed a considerable measure of legal preparation in the presentation of argument before me. He objected to a number of aspects in the probation officer's report and which I have not taken account of any aspect of that report to which Mr Birch objected.

[21] Accordingly, I am satisfied that issues were ventilated before this Court in a free, fair, reasonable and just manner.

**DAVIS, J**