[2019] EWCA Crim 1182

2019/01345/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

5th July 2019

Before:

Lord Justice Irwin
Mr Justice Popplewell
and
HIS HONOUR JUDGE Field QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

Regina

and

Jared Bartley Jones Mustoe

Mr W B Wilson appeared on behalf of the Appellant

Friday 5th July 2019

Lord Justice Irwin
On 4th January 2019, in the Crown Court at Mold, before His Honour Judge Parry, the appellant pleaded guilty to an offence of arson being reckless as to whether life is endangered, contrary to section 1(2) and (3) of the Criminal Damage Act 1971. Subsequently, on 18th March 2019, he was sentenced by His Honour Judge Hale to four years and eight months' imprisonment.

The appellant appeals against that sentence by leave of the single judge.

The facts may be summarised as follows. The appellant had been drinking with others in a local public house near his home in Shotton. One of those in the pub was a Mr Davies, who was a neighbour. At the end of the evening the appellant went with three other men to the home of Mr Davies, a few doors away from his own. There they drank throughout the night, from Friday into Saturday 1st December 2018. Mrs Davies and four children were upstairs in bed. The eldest of the children of the family was a young woman, Jasmine Davies, aged 18. According to her father's statement, she was up and down during the night. Towards the morning, the appellant made remarks about Jasmine which the family thought were inappropriate. There was a disagreement and the appellant was asked to leave the house. He had a different account of how that disagreement arose, but it is not necessary for the purpose of sentence to resolve any of that.

The appellant, who had been drinking all night, left with a grievance. He went towards his own house. It appears, despite some conflicting estimates of time, that this was around 8am on the Saturday morning. Some ten minutes later, the Davies family heard a bang and saw a “gulf of flames” at the front of their house.

As he admitted later that day, the appellant was angry and resentful. Having gone back to his house nearby, he emptied some petrol into a glass jar or bottle, which he lit and threw at the property. He said that it was only an

inch or so of accelerant. He wanted to frighten the Davies family, but not to cause them any harm.

The Fire Brigade were called. According to their report, the call was made at 8.37am. The Fire Brigade attended at 8.42am. The fire had already been extinguished by Mr Davies and by Jasmine's partner. They were able to do so by patting the flames with hands and feet. The fire had damaged the outside of the ground floor bay living room window. Mr Davies had found flames on the windowsill. The boyfriend (a Mr Jones) found a glass container in the front garden with the remnants of flame coming from it. He kicked that to one side and the flames went out.

The appellant admitted what he had done as soon as soon as he was arrested.

The incident badly frightened Mrs Davies, who already suffered from anxiety. She made a victim's personal statement five days later setting out her concerns.

The appellant was born in 1991. He was 27 years of age at the time of the incident. He had no previous convictions. He was an isolated man with, on his own account and that of his brother, few friends. He had a long-standing anxiety condition. He had been in a long-term relationship with a young woman. He had lived with his mother, but when she became ill in late 2016 and into 2017 the relationship broke up and then his mother died. The appellant became more anxious and depressed and began to drink heavily. That was the background to this offending. The appellant was unemployed and lived on his own.

A psychiatric report was commissioned before sentence. Several pertinent points are highlighted in the report of Dr Basa. He says:

> "7.1.1 [The appellant] has reported experiencing chronic symptoms of anxiety and depression since his early teenage years. This is also corroborated by collateral history reported by his older brother. Available information from his general practitioner's records and his notes recording his contact with mental health services also confirm the same.
>
> …
>
> 7.1.3 His symptoms have clearly impacted on his level of functioning and his ability to progress in life as an adult. He has not been able to further his education or obtain a job. He spent his time at home, avoiding social interactions and playing computer games.
>
> …
>
> 7.1.5 The death of his mother appears to have caused a significant deterioration in [the appellant's] mental health. He started drinking excessive amounts of alcohol to cope with his symptoms. While alcohol could provide temporary alleviation of symptoms, especially symptoms of anxiety, in the long term it can only lead to further deterioration.
>
> 7.1.6 In my opinion, [the appellant] fulfils the diagnostic criteria for Dysthymia … and generalised anxiety disorder …"

The doctor went on to observe:

> "7.1.8 There is … no evidence to suggest the presence of pathological fire-setting (pyromania). …"

He observed that the appellant might be thought to represent a risk to himself. He noted that there was no previous history of convictions or violence, given the information available to him from all the sources he had at the time of the preparation of the report. In his view, the appellant was likely to react impulsively and that was more likely to happen when intoxicated with alcohol or any other substance that had a disinhibiting effect. He repeated the emphasis on the appellant's low mood, anxiety, poor self-esteem and difficulty in solving the ordinary problems of life. He then said this:

> "7.2.5 [The appellant's] actions in relation to this incident were impulsive. He did not plan

> for it. He used petrol as an accelerant, which increased the risk of causing serious harm. However, he denied any intention of causing serious harm. He reported regretting his actions immediately afterwards. He has pleaded guilty and taken responsibility for his actions."

In addition to the psychiatric report, a pre-sentence report was prepared. Under the heading "Likelihood of Re-offending" the probation officer said this:

> "Statistically and taking into account the lack of previous convictions and his current age, [the appellant] is assessed as posing a low risk of re-offending. However, in [the appellant's] case it is necessary to focus on dynamic risk indicators which are factors that are subject to change and likely to influence offending such as his reckless use of alcohol, mental health issues, conflict resolution, lifestyle and associates, emotional resilience and low self-esteem. The likelihood of [the appellant] re-offending in a similar or violent manner is a real prospect should he find himself in a like situation, especially if his drunken behaviour is challenged and he perceives he is being wronged."

The probation officer went on to assess the appellant as being a high risk of future harm.

The judge had to bear all of those matters in mind. In approaching sentence, he wisely avoided being taken by the Crown to draft sentencing guidelines. No finalised guidelines had been issued in relation to this kind of offending. He pointed out that anyone who uses petrol and sets fire to it cannot predict what will happen. Having recited a summary of the background, the judge said this in his sentencing remarks:

> "I take the view your culpability is high because you deliberately went home and got an accelerant. Harm, the risk was only, I would say, moderate, so a middle category.
>
> I take the view, because sentences for arson of this type with accelerant are very high in the past, that the appropriate place to begin in your case would be a sentence, after a trial, of seven years. You are entitled to full credit [for the guilty plea] …"

He proceeded to pass the sentence we have recited.

It is of interest that, although the matter was raised and considered in a reasoned fashion, the judge did not consider that there was any need for a restraining order in this case.

The ground of appeal on which leave was granted by the single judge can be simply stated: the starting point was too high for the specific facts in this case. Counsel has helpfully sought to assist the court by citing other cases. They include, for example, R v Thompson [2013] EWCA Crim 740, in which a number of other authorities were reviewed by this court. However, that is not a guideline authority. Nor is Attorney General's Reference No 56 of 2015 [2015] EWCA Crim 1442 a guideline authority. As is often said, by their very nature, cases which come before this court by means of a reference from the Attorney or Solicitor General are often unhelpful since, by definition, the starting point is that there has been a considered view that the sentence was, at least arguably, too lenient.

We consider that this case has to be approached on its facts. Part of the critical aspect of the picture here is that, although this was a case of the use of accelerant, it was not long-planned, it was not carefully conceived, and the quantity of accelerant was very small, as is evidenced from the very limited damage to the premises and the ease with which the fire was put out by those who were present before the Fire Brigade attended.

We agree that the starting point was too high. In our judgment, the appropriate starting point for this offending would have been five and a half years' custody. The personal mitigation, which we have touched upon, properly should reduce that to five years. Thereafter, full credit for the early plea of guilty and early admission means that the appropriate sentence here is 40 months' imprisonment.

Accordingly, we quash the sentence imposed below and substitute a term of 40 months' imprisonment. To that extent the appeal succeeds.