Neutral Citation Number: [2014] EWCA Crim 1051

No: 201306222/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 18th February 2014

B e f o r e:
LORD JUSTICE TREACY
MR JUSTICE KING
HIS HONOUR JUDGE KRAMER QC
(Sitting as a Judge of the CACD)
R E G I N A

v

DEREK SAMUEL GALE

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165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Miss M Luttman appeared on behalf of the **Appellant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE KING: This appellant is some 29 years of age. On 7th November 2013, in the Crown Court at Maidstone, before His Honour Judge MacDonald QC the appellant was convicted after trial on one count of arson being reckless as to whether life is endangered. Following that conviction he was sentenced to 7 years' imprisonment. He now appeals against sentence with the leave of the single judge.

2. The background facts were these. The appellant had been in a relationship with one Donna Gray for some 8 years and they lived together in a terraced house in Ramsgate with their three children aged 5, 4 and 1. By the time of the offence, on 30th March 2013, their relationship was disintegrating. Both parties had problems with alcohol.

3. During the day the appellant had looked after their youngest son who was unwell, while his partner had taken the two eldest children out. Both parties had been drinking on the day - the appellant to excess. When his partner returned they argued. She issued the appellant with an ultimatum - one of them had to leave. The appellant said he would. However he did not leave. He continued drinking and fell in and out of sleep on the sofa in the front room. The appellant later awoke and they argued again. He refused to leave. He took a lighter and set fire to the corner of the fabric curtains in the front room and then sat down back on the sofa. He said words to the effect: "You're not going to get out of here alive". His partner took the two eldest children out of the house and into the street. From there she saw flames at the front room bay window. She went back into the smoke filled house with a neighbour and the neighbour rescued the baby who was asleep in his cot in an upstairs bedroom.

4. Inside the house the appellant was still in the front room. He had pulled down the curtain rail. The house had filled quickly with smoke and the curtains and aerial box were on fire. The appellant managed to pull the burning curtain rail and curtains out of the house, where it was doused by neighbours with water. Neighbours were able to put out the fire inside the house which had spread towards the ceiling with buckets of water through the front window.

5. The appellant remained at the scene for a short time before leaving to go to his parent's house. He made no real attempt at all to assist his partner or the children. Once at his parents he confessed to his father that he had set the fire. He said it had been for the insurance money. It was established in fact during the trial the property was not insured and no such claim had been made.

6. The appellant was arrested. When interviewed he confessed to having set the fire.

7. The appellant has only limited previous convictions, for the most part of no relevance, theft, taking of a motorcar and associated motor offences but he has one conviction for criminal damage in 2005 for which he was fined. We are told by Miss Luttman on his

behalf this involved smashing a Baby Belling oven belonging to a friend following an argument.

8. The judge did not require a pre-sentence report. No complaint is made as to this. There was before him a psychiatric report prepared by a consultant forensic psychiatrist, Dr Tariq. This was dated 17th November 2013. This concluded that the appellant was fit to plead and stand trial and was not suffering from any mental illness, although the report identified a long history of alcohol abuse. The appellant himself described behavioural difficulties at school, with problems with reading and writing. Miss Luttman tells us that during the course of the trial the appellant's low intelligence and learning difficulties were outlined to the court.

9. In his sentencing remarks the judge identified the aggravating features as being that this was an occupied dwelling-house, containing another adult and three children, one a baby asleep upstairs. The fire had quickly taken hold generating much smoke, which may have spread to the polystyrene ceiling tiles. The smoke had made the recovery of the baby from the upstairs bedroom hazardous. The mother herself was drunk and a neighbour had to assist. This was all a reference to the fact that the neighbour, who with the appellant's partner had gone back into the burning house, to go upstairs to rescue the baby had difficulty in locating the cot because of the smoke. The neighbour had to use a mobile telephone as a torch to try to find him. Further, the house was a terraced house, so neighbouring houses and their occupants were potentially endangered. The appellant had been drunk and had left the scene without assisting the family.

10. As to mitigation, the judge did acknowledge that there was little planning and there was an effort to tackle the fire by removing curtains. There had been little financial damage and no one had in fact been injured. He regarded the personal mitigation as extremely limited. He said he was satisfied that the appellant knew perfectly well what he was doing and that it was wrong. He was not mentally disordered. He had a difficult childhood but that really was it.

11. Miss Luttman does not seek to challenge the aggravating features identified by the judge. She however sought to emphasise the mitigating factors more fully. The fire was short lived and was put out by neighbours with buckets of water; the setting of the fire was unsophisticated and not preplanned. There was only one point of ignition and there were no accelerant was used and it was done in the full view of the partner enabling her to get out quickly with the two eldest children. She emphasises that no one was hurt or injured except the appellant who suffered minor burns. The financial damage was small and there was an attempt, albeit she accepted a delayed one, by the appellant to put out the fire. She accepts that the appellant's personal mitigation was limited but she does emphasise to us that the appellant, as a consequence of the offence has now lost his children, who have been taken into care with a view to adoption. The appellant although not mentally disordered, she says did suffer and does suffer from intellectual and learning difficulties. The antecedent history, previous convictions of the appellant, she says, were limited.

12. The sole ground of appeal sought to be taken is that with these competing and aggravating factors a sentence of 7 years after trial fell outside the appropriate bracket for this type of offence.

13. There are no Sentencing Guidelines for this type of offending. There is however the now well-known guideline remarks in the judgment of this court in Attorney-General Reference No 68 of 2008 [2008] EWCA Crim 3188 where, following a review of authorities on sentence in arson cases, this court said at paragraph 25 that the starting point for arson with intent to endanger life is in the range of 8 to 10 years following a trial. In cases involving reckless arson the range is "rather below that"; although it was said that the dividing line between the worse case of reckless arson and the least serious case of arson with intent was a fine one. It is clear from the judge's sentencing remarks that the judge had this guidance very much in mind.

14. Miss Luttman submits that the 7-year sentence imposed in this case must mean that the judge identified the appellant's case as falling at or towards the top of the sentencing bracket and therefore towards one of the most serious type of offences falling within the range. She submits this is too high a categorisation. She has sought to develop this submission by referring us to previous decisions of this court in cases of this sort. In particular she has taken us to Attorney-General Reference No 98 of 2001 (Manzoor Hussain) [2001] EWCA Crim 3068, in which a community order upon conviction two offences of reckless arson after trial, was set aside as an unduly lenient. The court there said at paragraph 37 that in that case, a sentence of at least 6 years would have been appropriate on the initial sentencing exercise. That case, like the present, was a case involving setting fire to the family home, a mid-terraced house, following relationship disharmony and arguments. Like the present, the case involved setting the fire while family members were still inside, in that case the wife and daughter. However, on a careful detailed analysis of the facts of Hussain Miss Luttman submits that this appellant's offending was less serious. She emphasises in Hussain, that two separate fires were set. The fires were set in such a way as to prevent the two victims getting out of the property. The wife and daughter had to jump from an upstairs window. Injury was caused to the wife and child during the escape and no attempt was made by the offender to extinguish the fire and he had to be dragged from the building by a neighbour.

15. Miss Luttman, in her written submissions, then undertook a similar exercise in relation to the facts of the offence in Attorney-General's Reference No 5 of 1993 (Peter Hartland) (1994) 15 Cr App R(S) 201, where the court again on an Attorney-General's Reference, indicated that sentence after plea to reckless arson was in the order of 3 years. It is unnecessary to rehearse the facts of the Hartland other than to record Miss Luttman's acknowledgement that the appellant's case is properly to be regarded as a more serious.

16. Her submissions then comes to this. The appellant's case fell somewhere on the facts between those of Hussain and Hartland and the appropriate sentence, therefore, fell between 3 and 6 years.

17. Notwithstanding the meticulous way in which Miss Luttman has examined the facts of the previous decisions, we cannot accept this submission. The fallacy, in our judgment, lies in elevating the decision of Hussain to a guideline case which fixed the appropriate sentence for a reckless arson on Hussain facts as 6 years. It is not to be so interpreted. It is to be noted that Hussain was an Attorney-General's Reference in which the court was careful to say that the appropriate sentence on an initial sentencing exercise would have been at least 6 years and we emphasise the expression "at least". Moreover the offender in Hussain could lay claim to good character and good references. He had a particularly significant medical condition. This appellant has no similar claim.

18. The fact is that no two cases are the same. This court is not assisted by an over elaborate and detailed analysis of facts underlying previous decisions. It is true that the court in Hussain at paragraph, 35 did identify that in its judgment Hussain was a most serious example of its kind, in that the recklessness related directly to two persons who were effectively imprisoned by the fire behind a closed door in a room which was on a floor from which they could only escape as they did by jumping at risk of personal injury which they suffered.

19. But equally there were in the present case, in our judgment, features which entitled the sentencing judge to regard this as a serious example of its kind. In particular, the recklessness here was directed at a baby asleep upstairs, who was rescued more by good fortune than anything else, having regard to the smoke generated by the fire which the appellant had lit. Moreover, a striking feature of the present case was the total failure of the appellant to seek to assist his endangered family. We note further, if one is looking to facts of particular cases that in Wheeler, a decision referred to in Attorney-General's Reference of 2008 [1998] 1 Cr App R(S) 54, this court indicated that following a plea of guilty to reckless arson, on facts which involved the offender setting fire to a cushion on a settee in a dwelling-house, whilst the occupant was in the flat asleep in bed, the right sentence would have been one of 6 years. We emphasise that that was after a plea.

20. The present sentence was no doubt severe. But we are quite unable to say that it was manifestly excessive or outside the appropriate bracket for this type of offence. The judge was fully entitled, for the reasons he gave, to regard this as a serious case with the aggravating features he identified. For all these reasons this appeal is dismissed.