

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2017-009-007757
[2017] NZDC 25796**

THE QUEEN

v

JASON STEWART GEMMELL

Hearing: 15 November 2017

Appearances: C White for the Crown
Defendant appears in Person

Judgment: 15 November 2017

NOTES OF JUDGE A D GARLAND ON SENTENCING

[1] Jason Gemmell, you appear before the Court today for sentencing on a charge of arson and on a charge of unlawful possession of a knife in a public place.

[2] The facts relating to your offending are these. At about 10.00 pm on Saturday, 26 August last, you were in an intoxicated state on [street name deleted] in Christchurch. You entered a property at [address deleted] which consists of two flats in one house. You grabbed a piece of wood and smashed the window to flat two and you entered that property. Whilst inside, you lit three fires, one in the front bedroom, one in the hallway and a third in the rear bedroom. You subsequently left via the front door. As soon as you left the property there was an orange glow of fire that could be seen coming from the house. Your actions from the time that you entered the property until the time you left were observed by a member of the public who called the police.

A short time later the police located you. At the time you were located, you were found in possession of the large knife. You were arrested. In explanation, you admitted going into the house and lighting a piece of paper but only because it was dark and you could not see anything.

[3] The Crown have provided the Court with a written estimate for the costs of repair to the premises which comes to \$76,942.67. I understand that the insurance company has accepted that estimate and that the repairs will now be undertaken.

[4] The pre-sentence report indicates you are 46 years of age. You are said to be at medium-risk of reoffending and causing harm to others. A sentence of imprisonment is recommended with release conditions so that you can participate in a departmental programme that will assist you to identify the factors that contribute to your offending and to develop strategies to avoid decisions that result in offending.

[5] In sentencing you Mr Gemmell, I bear in mind the purposes and principles of sentencing set out in ss 7 and 8 Sentencing Act 2002. The Crown has filed written submissions which I have read and which Mr White has spoken to in Court today. In essence, the Crown submits based on the authorities provided, that a starting point of between three and a half and four years' imprisonment is appropriate before taking into account mitigating features personal to you.

[6] You have spoken on your own behalf today because you do not have a lawyer. I have enquired as to whether or not you wish to have counsel and whether you have sought legal aid. You have told me today that you have been offered legal aid but you do not want legal aid and you do not want a lawyer. You told me that you did do this. You told me that you were very sorry for doing this. You said you only went to pick your stuff up from this property, namely some music that you had given to the occupier to dispose of on your behalf. However, there was no power on and so you lit the fires in order to see inside the property. You said you had no intention of harming anyone with the knife that you had in your possession. You have told me that you think that three and a half years' imprisonment is a bit much. You ask for a reduction in sentence because of your guilty plea.

[7] The maximum penalty for the crime of arson is 14 years' imprisonment. There is no guideline judgment in relation to arson. In the case of *Ollerenshaw v R*¹ the Court of Appeal said:

There can be no tariff for arson. Cases differ so widely. Sometimes the offence is planned, sometimes it is an act of impulse, sometimes property is placed at risk, sometimes lives. Motive can range equally widely and be more or less sinister. What counts is the particular combination of circumstances that led to and constitute the offence.

[8] In *R v Z*² the Court of Appeal said:

As has often been stated, there is no tariff for arson. Each case will depend on its own facts which will involve a consideration of the property damaged, danger to life both of occupants and firefighters and often the mental state of the offender will be of significance. Sentences vary from substantial prison terms to non-custodial sentences with an emphasis on rehabilitation.

[9] I have considered the cases which have been referred to the Court by the Crown for guidance, namely *R v Ricky Ricky*³, *R v Grindrod*⁴, and *Howarth v R*⁵ all of which are decisions of the Court of Appeal.

[10] *R v Ricky Ricky* and *R v Grindrod* are the most helpful. The similarities are that the offenders broke into unoccupied premises. There was a degree of premeditation and planning. There was extensive damage caused. There was a risk of harm inherent to the firemen who were faced with fighting the fire and there was the risk of the fire extending to an adjoining premises.

[11] In the present case, the aggravating and mitigating features of your offending are as follows. First of all, there was a degree of premeditation because you broke into the property and you lit three fires in three separate rooms. Secondly, this offending involved an unlawful entry into a dwelling house in order to set the dwelling house alight. I understand the flat that you broke into was tenanted but the tenant was not there at the time the fires were lit. I understand that the adjoining flat was unoccupied at the time you lit the fires. I am not advised as to whether or not that adjoining flat

¹ *Ollerenshaw v R* [2010] NZCA 32

² *R v Z* CA138/00 27 June 2000

³ *R v Ricky Ricky*

⁴ *R v Grindrod* CA263/99 20 October 1999

⁵ *Howarth v R* [2014] NZCA 237

was tenanted. It seems to me that you took a serious risk given that you only entered one of the flats where you lit the fires and that you would not necessarily have known whether or not there were persons in the adjoining flat and, therefore, whether or not you were placing the lives of other persons at risk.

[12] The damage that you did to this property was extensive. The value of the loss to the owner of the property and now the insurance company is said to be just under \$77,000. There is a further aggravating feature that you were in possession of a large knife at the time that you entered this property unlawfully and committed the arson. The Crown, in its written submissions, acknowledge there was no actual risk to life because neither of the two flats were actually occupied at the time you set fire to the premises, but the Crown acknowledges there was, as in all of these cases, an inherent risk to the safety of firefighters who had to put the fire out.

[13] I accept the Crown submission that there are no mitigating features of this offending. In particular, you are quite unable to pay that large sum of reparation in order to reduce the gravity of your offending.

[14] In my view, the starting point for your offending is four years' imprisonment.

[15] I turn to consider the aggravating, mitigating factors personal to you. First of all, I have considered your past history of offending. It is a lengthy history of offending but there are a limited number of convictions for offences which are relevant to your current offending. On that basis, I impose no uplift from the starting point. In mitigation, you entered early guilty pleas which entitles you to a full reduction of 25 percent. Accordingly, I reduce the sentence by one year. That gives the following result. On the charge of arson, you are convicted and sentenced to imprisonment for three years. On the charge of unlawful possession of the knife, you are convicted and sentenced to one month imprisonment. That term is to be served concurrently. That means the total sentence is one of three years' imprisonment.

[16] I make an order for the forfeiture of the knife.

A D Garland
District Court Judge