

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

This judgment cannot be republished without permission of the Court. Publication of this judgment on the Youth Court website is NOT permission to publish or report. See: Districtcourts.govt.nz

NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE ORANGA TAMARIKI ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING. SEE

<http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html>

**IN THE YOUTH COURT
AT WAITAKERE**

**I TE KŌTI TAIOHI
KI WAITĀKERE**

**CRI-2019-290-000222
[2020] NZYC 378**

THE QUEEN

v

**[BN]
Young Person**

Hearing: 20 July 2020

Appearances: S Teppett for the Crown
S Fernando for the Young Person

Judgment: 20 July 2020

ORAL JUDGMENT OF JUDGE K J PHILLIPS

[1] [BN] is charged that he together with [CF], recklessly and without claim of right damaged by fire immovable property at [address deleted] having no interest in that property.

[2] A number of the charge elements have been accepted. As I understood the defence as it was first put to the Court, it was that [BN] did not act recklessly; and that the other elements were accepted. It appears now that what we are really talking about is whether the Crown can establish (to the required standard) in relation to [BN] that he, with the necessary intent, was a party to the offending (albeit that the charge is not laid in the terms that he was a party, rather that he jointly with [CF] committed the arson). I have had legal argument following the evidence on the basis of “party involvement”.

[3] The first point that should be noted is that the first element of an arson, that is ‘immovable property was damaged by fire’, is not capable of argument because [CF] has admitted in the Youth Court his involvement in a crime of arson of the property on the day, that is [a day in late] December 2019, at [the address]. No issue can be raised on behalf of [BN] that it was not proven to be an arson. Quite clearly the Court can say that the guilt of the person charged jointly establishes the fact of the arson.

[4] There has not been any question raised that [BN] had any claim of right for committing the arson or that he had any interest in the building or the fixtures. He was not the owner or tenant or lessee.

[5] So it really comes down to this; the damaging of the property by fire has to be proven by the Crown beyond reasonable doubt to have been done intentionally or recklessly. Here the allegation is that it was done recklessly. That is, that it is alleged that he did an act which he knew would probably cause the arson and he was reckless as to whether that happened or not, i.e. he did an act in relation to the setting of the fire; that act was done by him in the knowledge it would probably cause arson; and he was reckless as to whether it did or did not cause arson to occur.

[6] The sole evidence that we have in relation to [BN]'s involvement in the matter is the interview he had with [Constable A] which took place [in late] December (the same day as the arson) at the Henderson Police Station in Waitemata.

[7] I have gone through the interview transcript; I have watched closely the interview and the manner of the conducting of the interview. To say the officer was fair in the way he conducted it would not be praising the officer sufficiently. It was a well conducted interview. To say [BN] was anything other than helpful and compliant would also be wrong, because he was. It was an interview given by a young man, [BN] (born on [date deleted] 2005) he being 15 at the time of the interview. So as a young man he was given all appropriate rights, as are required to be given to people of his age and was fully aware of his position when he spoke with the officer. At the same time he was being interviewed, the co-offender [CF] was being interviewed at the Henderson Police Station.

[8] [BN] said that initially he had been with [CF] and that [CF] started to play with fire at the house:¹

Then he brought the fire back down here into the hut. He was playing with gas. Something caught on fire at the bottom of the house in the shack because he put a fire and he had fire inside and he was at the entrance.

He says that:²

We walked out and then I walked back into the shack, saw that it was burning and I left.

[9] Under further questioning he said that he never really went into the main house, that he only went in there when he saw smoke coming out the back because 'he' (referring to [CF]) had lit something and that [CF] was going through everything and that he, [BN], only went into the main house when he saw the smoke.³

[10] He went on to talk about [CF] having a lighter, 'spraying stuff'.⁴ "He torched and there was no one in the house. We had to put that out." When asked whether [CF]

¹ Page 6 of the transcript.

² Page 6 line 18 of the transcript.

³ Page 8 of the transcript.

⁴ Page 9 of the transcript.

was playing with fire inside the house he said he was, and that [CF] had torched a towel and that is what caught on fire.

[11] [BN] said regarding the fire at the main house, “We put that out then he went back outside with a bottle and he lit the little fire basically off the front. He’s gone in there. He came out saying, ‘It’s burning, it’s burning.’ I just sat back in the shed. The towel on fire was on the ground.”⁵

[12] He said, “He had found the lighter and a gas cylinder at the entrance of the toilet place.⁶ It caught on fire there. He saw the towel, he sprayed it and that’s what he used.”⁷

Q: Did you see him light it?

A: No, no, I know.”

Q: How did you know he did that?

Q: Cos he told me.

He further stated:⁸

Q: And then you guys put that out?

A: Yeah, and then we went back into the shack into the main room. He sat outside still playing with fire then something caught on fire at the bottom.

Q: Okay, and how did that fire start?

A: Him playing with fire.

...

A: Then he went back to the (inaudible 15:56:06) then something on the bottom caught on fire and I think that’s how the fire started, yeah.” ...

Q: Okay, and where were you when he was doing that?

Q: I was inside but it wasn’t as a big deal as I thought it was. It was a little bit of smoke. When we left it everything caught on fire?

⁵ Page 10 of the transcript.

⁶ Page 11 of the transcript.

⁷ Page 11, line 11 of the transcript.

⁸ Page 11 of the transcript.

...⁹

Q: Then who took the stuff to the shed?

Q: We both did.

Q: You both did?

A: Stuff from inside.

...

A: All I took from the house was it was blankets. That was it, I didn't take anything else. He took everything.

Q: Yeah.

A: I didn't want to go in the house but whatever he threw at the window like pillows and sheets and stuff like that's what I took, that's the only things I took.

Q: So the pillows, sheets from inside the house that [CF] was throwing out of the window you picked up and took to the shed?

Q: Yeah.

...¹⁰

Q: Yep, you guys put the towel.

A: Oh.

Q: Put the fire out?

A: Yes.

Q: And then he's told you that he lit – he torched the towel?

A: Yep.

Q: Using a lighter and a spray?

A: Yep, it's still in the house.

⁹ Page 13.

¹⁰ Page 16.

[13] Then as referred to in Mr Teppett's closing submissions:¹¹

Q: How long have you known [CF]?

A: A couple of months.

Q: I'd say a couple. Yeah, okay. Was when you left the shack.

A: Yes.

Q: Was there any smoke or any fire?

A: Just like a little bit. It was just a little bit of smoke.

Q: Where was it from?

A: From underneath.

Q: Underneath the house?

A: We couldn't get to it so we didn't know how to put it – oh I thought it was just a little one so we left it 'cos it was just a little bit of smoke.

Q: How long were you at the shack for?

A: About 30 minutes or maybe an hour. Yeah, an hour, maybe an hour, but it was only little smoke that we saw, only little bits.

Q: Okay, did you light any fire at any time?

A: No, I didn't touch, he was like being greedy with the lighter as well so I never really touched the lighter.

Q: You didn't really touch it or you did touch it?

A: I didn't touch it purposefully (inaudible 15:59:43) those fires.

Q: Where's the lighter?

A: Who knows.

[14] Mr Teppett says when one has regards to the use of the terms "I never really" or the term "purposefully" it can be inferred from that he was not telling the truth when he said that he had never lit any of the fires or touched the items in question principally the lighter. I think that is drawing a 'very long bow' by the Crown to make that argument in relation to this case.

¹¹ Page 18 line 9.

[15] What we do have is an interview where [BN], young as he is, was adamant that he did not get himself involved in the lighting of the fires. His action in leaving something smoking may be able to be a part of an argument that he was not entirely without blame, but cannot in my view, then be transposed to say that he was acting together with [CF] and thus establish the necessary intention that he knew that leaving the fire smoking would probably cause the building to burn down or that he was reckless in leaving it as he did.

[16] Mr Teppett puts to me the case of *R v Duncan*.¹² It is a direction that was given to a jury in relation to a wounding with intent to cause grievous bodily harm in relation to one of three co-offenders and where the issue of parties was raised. As I have said here, this charge has not been laid as a ‘party’ charge, it has been laid that he, [BN], acted in concert with [CF]. But in order to give it appropriate consideration, my view, in relation to Mr Teppett’s submission, is that standing by and watching a crime being committed, in one’s presence, is not enough to make one a party. That is trite law i.e. there needs to be a degree of active involvement. But in cases where someone is voluntarily and deliberately present, as [BN] was, witnessing the commission of a crime and offering no opposition or dissent when he or she might be expected to do so, could in some circumstances justify an inference that being present there was an intent to encourage and assist.

[17] However, it goes a little bit further. Simply where the charged person is just there offering no dissent, the fact finder has to be satisfied beyond reasonable doubt that a person in that position intended to give further encouragement and support to the principal offender and embolden him in doing what they were doing. That is the third paragraph of the Judge’s direction in the trial which was approved by the Court of Appeal.

[18] There is no evidence here (mainly because I think [BN] was never asked the question) that he was giving encouragement, or that he intended to give encouragement to [CF]’s clearly established intention on what [BN] was witnessing

¹² *R v Duncan* [2008] NZCA 365.

to commit arson. There is not any evidence here other than [BN]'s presence at times when [CF] is totally engrossed in clicking the lighter and using the methylated spirits.

[19] I have to say that in relation to [BN] there is not sufficient evidence to make me sure that he was acting jointly with [CF] in this fire lighting. I think that [BN] was being totally honest with the detective and he did not attempt to hedge or fudge the matter. He was giving honest answers to all the questions asked of him whether they tended to cause him problems or not. He was being open and honest.

[20] On the basis of the interview, I am not satisfied that it has been established beyond reasonable doubt that [BN] was acting recklessly, and I am not satisfied if it is going to be argued that he was a party to the action that he had the required or necessary intent in relation to the arson.

[21] I find the charge not proven.

Judge K J Phillips
District Court Judge

Date of authentication: 07/08/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.