IN THE DISTRICT COURT
AT ROTORUA

I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CRI-2020-063-001248
[2020] NZDC 19895

THE QUEEN

v

DAVID VICENT HILL

Hearing:	24 September 2020
Appearances:	M Jenkins for the Crown B Foote for the Defendant
Judgment:	24 September 2020

NOTES OF JUDGE M A MacKENZIE ON SENTENCING

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[1] Mr David Hill, you appear for sentence today in respect of three charges; arson, burglary and being unlawfully in a building. The lead offence is the arson.

[2] On 14 April 2020, you went to a property located at 159 Lake Terrace, Taupo. This is a property which is rented out for short-term holiday accommodation. It has a rateable value of $1,935,000. The last date the property was occupied prior to the Level 4 lockdown was 23 March 2020.

[3] You went to the property on 14 April 2020. You did not have any permission to enter the property. You went into the property, searched the house and identified valuable items which belonged to the property owners. You organised others to meet

you at the property. Items were removed from the property. Items removed included a valuable art collection. The total art collection is valued in excess of US$250,000.

[4] At approximately five past two in the morning on 15 April 2020, you returned to 159 Lake Terrace and again went into the property. You returned with the purpose of eliminating evidence of the burglary committed by you and your associates the prior day. You obtained a camping gas cooker and went up the stairs to the second floor. You ignited the gas cooker and intentionally used it to start a fire in two separate locations at the dwelling. After doing this, you fled from the property. The fire spread inside the dwelling, resulting in the total destruction of the property.

[5] A few days later on 22 April 2020, you went to another property in Taupo. This is an unoccupied residential property in a derelict location. You had no permission to be in that property. You set up yourself as makeshift accommodation in that property.

[6] Police executed a search warrant on the same date, 22 April 2020. They recovered a number of items stolen from the Lake Terrace property. The property included a set of eight paintings stacked in an unused bedroom wardrobe, another three paintings which were hanging on the walls and two mirrors also from the Lake Terrace property. The recovered artwork is believed to be valued in excess of US$100,000.

[7] You admitted taking the artwork from Lake Terrace and then returning at night and setting fire to that property.

[8] The exact amount of the loss is unknown. The summary of facts referred to reparation in excess of NZ$2,000,000 being sought. There is no reparation sought today.

[9] The principles and purposes of sentencing are accountability, deterrence, denunciation, the need to promote in you a sense of responsibility, to provide for the interests of the victim, to provide for your rehabilitation, reintegration, to impose a sentence which reflects the gravity of the offending, is generally consistent and is the least restrictive outcome appropriate in the circumstances.

[10] The sentencing process involves two steps. Firstly, I will set a starting point relevant to the nature of the offending itself. I will then adjust it for personal factors, whether they are aggravating or mitigating, and the guilty plea credit.

[11] The Crown submits, turning to the sentence starting point, that the offending justifies an overall starting point in the region of six and a half years imprisonment. Mr Foote submits that a starting point in the region of six years imprisonment is appropriate.

[12] There is no tariff case for arson because the circumstances vary widely. Two cases *Meha v R*[1] and *Ollerenshaw v R*[2] confirm that the reason there is no tariff case is because the cases differ so widely, nevertheless, the Court of Appeal has identified important factors which include:

(a) the degree of property damage;

(b) the degree of danger to any occupant or professional fire fighter; and

(c) the question of motive.

[13] As was noted in *Ollerenshaw v R*, the offending may be planned or an act of impulsiveness. 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.

[14] The aggravating features are the following:

(a) This was highly premeditated offending. You went to the property at a time you knew it was very likely it would not be occupied. This was because of the Level 4 lockdown. The question of premeditation was something that was a factor in *Meha v R*.

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1 *Meha v R* [2014] NZCA 307.
2 *Ollerenshaw v R* [2010] NZCA 32.

(b) The motive is highly relevant. The motive for the arson was to conceal the burglary that had been committed the day before. Mr Foote cautions the Court against double-counting that, but the cases clearly confirm that motive is an important factor to be taken into account.

(c) The third aggravating factor is the extent of the loss. It is accepted that the extent of loss is significant and is over $2,000,000, taking into account the total loss to the property and in terms of the items stolen from inside the house. It is likely also, as per the Crown submissions, that there would be a significant loss of earnings pending the rebuild of the address, as it was run as luxury accommodation.

(d) The degree of danger to the firefighters is also an aggravating feature. While Mr Foote says that they are highly-trained specialists and there was no injuries reported, nevertheless in *Reed v Police*[3] itself, the submission that the potential danger to emergency services such as firefighters should not be treated as an aggravating feature was rejected. Even though they are highly-trained, there is a risk, particularly when a fire becomes well-involved.

[15] I do agree that the unlawful entry is not a separate aggravating feature. It is part and parcel of the premeditation, as I have set out.

[16] There are no mitigating features of the offending itself.

[17] As both counsel identify, the Crown relies heavily on a case *Reed v Police* as being the most useful case by way of comparison. Because there is no tariff case, I must take into account not just the aggravating features of the offending itself, but draw guidance from other similar cases. *Reed* involved a burglary of a church in Christchurch. The appellant stole a number of items, including a computer and a sound mixer. A week later, he went back to the church and took some other equipment. He set fire to a bag in the church, put it on the floor and exited the building. The church suffered extensive fire damage in the vicinity of $2,200,000. The appellant

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3 *Reed v Police* [2016] NZHC 3097.

was charged with arson and burglary. He was on bail for other charges at the time. The aggravating features considered relevant were premeditation, danger to firefighters, the motive in setting the fire to cover up the burglary and the extent of the damage. While the arson was identified as the lead charge, a global starting point of seven and a half years imprisonment was identified, but to be clear, that was for all the offending on a totality basis.

[18] Of relevance is that in *Reed,* the High Court undertook something of a review of arson sentencing cases and considered in particular two Court of Appeal cases, *R v Z*[4] and *R v Lucas-Edmonds*.[5] In both of those cases, the sentence starting point was seven years imprisonment. *R v Z* involved an arson of a church in Tauranga, a place of important cultural and spiritual significance. In the *Lucas-Edmonds* case, it involved a burglary and three charges of arson. The arson incidents all occurred within 45 minutes of each other, involved a very minor incident, then setting fire to a garage where there were occupants, but more relevantly, setting fire to a church in Willis Street, Wellington with damage in the vicinity of $750,000. Again, the sentence starting point considered appropriate on a global basis was seven years imprisonment.

[19] I have considered all the cases that both the Crown and Mr Foote have referred to me. I do intend to start a global starting point reflective of the arson and the burglary. That is because the motive for the arson was to cover your tracks or get rid of the evidence relating to the burglary. But I will say this - the burglary, on a stand-alone basis, is at the serious end of the spectrum as well. It involved premeditation, it was brazen and high-value items were taken. On a stand-alone basis, in my view, the sentence starting point would be at least two years if not three years imprisonment. I say that having regard to two cases at each end of that spectrum, *Waenga v Police*[6] and *Martin v Police*.[7]

[20] In *Waenga,* it involved the defendant and/or associates forcing entry into a business address in the early hours of the morning and took items valued at $20,000. Burglary was taken as the lead offence and a sentence starting point of two years

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4 *R v Z* CA13/00, 27 June 2000.
5 *R v Lucas-Edmonds* [2009] NZCA 193, [2009] 3 NZLR 493.
6 *Waenga v Police* [2016] NZHC 1712.
7 *Martin v Police* [2016] NZHC 2094.

imprisonment was adopted and upheld on appeal, but noted it was at the higher end of the range.

[21] In *Martin v Police,* there were two burglaries. The appellant and/or associates went into a residential address, caused damage and took items. In terms of one of the burglaries, about $100,000 worth of jewellery and cash in various currencies totalling $40,000 was taken. On appeal, the Court upheld the sentencing judge's starting point of three years imprisonment for both burglaries. The first involved premeditation with extensive damage done to the property and the second involved the theft of a considerable amount of property. The relevance of the burglary cases, is that on a global basis, the sentence starting point must be more than six years imprisonment.

[22] The Crown have set out some comparisons between your situation and the cases referred to. For example, in *Reed* there was a similar level of property damage and same motive, being to conceal evidence of a burglary and a similar risk to firefighters, acknowledging that it did not materialise. In *R v Turner,*[8] there was significantly less property damage than in the present case and the defendant was not the instigator or ringleader. In *Shingleton v Police,*[9] there was less property damage. In *R v [H],*[10] there was no apparent motive for the arson as opposed to the situation here. *Turner*, *Shingleton* and *[H]* all involved lesser starting points than contended for by either the Crown or your lawyer.

[23] Taking into account the aggravating features I have referred to, particularly the level of damage and the premeditation, and adopting a global starting point which also encompasses the burglary, the sentence starting point I adopt is six and a half years imprisonment.

[24] Even if I had adopted a sentence starting point on a stand-alone basis for the arson and increased it for the burglary, the sentencing starting point on a totality basis would have been, in my view, at least six and a half years imprisonment.

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8 *R v Turner* [2016] NZHC 754.
9 *Shingleton v Police* HC Christchurch CRI-2010-409-72, 1 July 2010.
10 *R v [H]* DC Rotorua CRI-2018-069-1223, 6 March 2020.

[25] I turn to the second step of the sentencing exercise which is to consider personal factors and the guilty plea credit.

[26] I do not increase the sentence to take into account your previous convictions. You do have a history of both serious and less serious previous convictions, but it is accepted that they are not relevant to the sentencing exercise today. Most are reasonably historic and are different in character. I do increase the sentence though by three months because this was offending whilst you were subject to a sentence. You were sentenced to one year supervision and 200 hours community work on 30 November 2019 for a charge of threatening to kill. There is no dispute that a modest increase is appropriate and there is authority for that proposition in *Turner*. Accordingly, I increase the sentence by three months to six years and nine months imprisonment.

[27] The next issue is what the credit should be for personal factors and the guilty plea credit. In terms of personal factors, Mr Foote accepts that there is no causative link or nexus between your upbringing and the offending. I have the benefit of a pre-sentence report, and a s 38 report prepared by a clinical psychologist. I also have a s 27 cultural report. As both counsel have noted, you have given various explanations for why this offending occurred. Some explanations verge on the more bizarre side of things. What the s 38 report notes is that it appears probable that the index offending was driven by high emotionality, poor decision-making and intoxication. It appears, according to the report writer, that you further justified your decisions with cultural and spiritual interpretations of the nine events. This is referred to at paragraph 78 of the s 38 report.

[28] I asked Mr Foote specifically what he thought was available to you in terms of discounts for personal factors. It is Mr Foote's submission that there should be a credit available to you for your head injuries which have impacted on how you see the world. Mr Foote submits that there is sufficient information, particularly in the s 38 report, to support that.

[29] The Crown submits that in terms of personal factors, there is no nexus between the offending and your upbringing which is acknowledged to have been a harsh or

difficult upbringing. I agree that there is no nexus between your upbringing and the offending. The motive simply was to get rid of the evidence of the burglary.

[30] The s 38 report confirms that there are no mental health issues to be taken into account. That is, mental health issues can be taken into account primarily in two ways:

(a) The first way is where a mental health difficulty is causative of offending.

(b) The second way is that sometimes mental health difficulties can make a sentence disproportionately severe. That has been recognised by the Court of Appeal in cases such as *Zhang v R*,[11] *E v R*[12] and *Shailer v R*.[13]

[31] There are two factors that I do think are relevant here and that is the head injuries in terms of the emerging and provisional diagnosis of post-traumatic stress disorder which is set out in the s 38 report. That relates to potentially sexual abuse and the physical assaults. I do consider that that is something that can be taken into account. There are a number of cases which say post-traumatic stress disorder can be taken into account on a stand-alone basis. That feeds into the issue of your upbringing. I would not place very much reliance on the s 27 report if that was the only report I had available to me. I do have the s 38 report though, which in part is based on self-report, but it also does involve, as I have said, a provisional diagnosis of PTSD which has involved some clinical testing.

[32] What the Court of Appeal has said recently in *Carr v R*[14] is that where a cultural report provided under s 27 contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse, including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing, such matters ought to be taken into account at sentencing.

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11 *Zhang v R* [2019] NZCA 507.
12 *E v R* [2011] NZCA 13.
13 *Shailer v R* [2017] NZCA 38.
14 *Carr v R* [2020] NZCA 357 at [60].

[33] The key here is a credible narrative. The Crown make a fair and reasonable submission that you have given so many different explanations, including to the police, that it is difficult to place any reliance on what you have said as being accurate, truthful and credible. But the s 38 report, as I have said, does support a provisional diagnosis of PTSD and indeed alcohol use disorder. The PTSD has as its origins appear to relate to sexual assault, several physical assaults and recommends a further investigation take place.

[34] Those factors relate to your upbringing and clearly that was chaotic. As was noted at paragraph 71 of the s 38 report, there were a number of adversities in your early childhood including neglect, violence, repeated instances of head injury in childhood, sexual abuse which seems to have produced unrecognised trauma symptoms and likely impacted many aspects of your psychological and cognitive development.

[35] So, to the extent that your upbringing, including head injuries, has contributed towards the provisional diagnosis of PTSD, I do consider that a sentencing credit is available to you. Given that there is no causative link, the credit will not be a large one, but nevertheless I do consider that there is a credit available to you for those factors. I will return to that.

[36] The last matter is the credit for a plea of guilty. The Crown have made a firm submission that the guilty plea credit should be no more than 15 per cent. That is based on the fact that although the plea was at an early time, that should not be the dominant feature in assessing the value of the credit, in accordance with *Hessell v R*.[15] This was an overwhelming case and ultimately there was no choice for you but to plead guilty. As such, the Crown submits that the full discount would amount to a windfall. Accordingly, the Crown submits that the guilty plea credit should be in the vicinity of 15 per cent. Mr Foote submits that it should be at least 20 per cent, potentially higher and up 25 per cent.

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15 *Hessell v R* [2010] NZSC 135.

[37] Recently, the Court of Appeal in *Moses v R*[16] have reiterated that fixing the amount of a discount for a guilty plea requires an evaluative judgment. The relevant circumstances of the case must be those that engage any applicable rationales for the discount. As was said in *Moses*, the rationales established by the Supreme Court suggest that, amongst other things, the scale and complexity of the trial, the proximity of the plea to first appearance or trial, the justification for any delay, the inevitability or otherwise of conviction, the benefits of not giving evidence for the victims and witnesses, may affect the amount of the discount which may range from 25 per cent to nothing.

[38] I have taken into account in assessing the credit the fact that it was at a very early opportunity. I accept the Crown's submission that that is not the only factor that I should take into account. It is relevant to take into account that it was an overwhelming place. In short, you had nowhere to go in terms of plea, realistically, and that as such, the full discount would amount to a windfall. However, in recognition that the plea was at a very early opportunity, but recognising the overwhelming nature of the case, the guilty plea credit is 20 per cent.

[39] Returning, therefore, to what the overall credit should be for personal factors and the guilty plea credit, I have decided that for the issues that I have referred to in terms of your personal factors, coupled with the guilty plea credit, that, broadly speaking, the discount is in the range of 25 per cent or just over and I am going to reduce the sentence by 21 months to 60 months, which results in an end sentence of five years imprisonment.

[40] In relation to the arson charge, I will record the sentence in respect of that charge. You are formally sentenced to five years imprisonment.

[41] In relation to the burglary charge, there will be a sentence of a concurrent nature of two years imprisonment.

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[16] *Moses v R* [2020] NZCA 296.

[42] In relation to charge 3, unlawfully in a building, there will be a concurrent sentence of one month imprisonment.

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Judge MA MacKenzie
District Court Judge

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