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

IN THE DISTRICT COURT
AT DUNEDIN

CRI-2016-002-000003
[2018] NZDC 8091

THE QUEEN

v

AARON GOURLAY

Hearing: 26 April 2018

Appearances: R D Smith for the Crown
A L Pinnock for the Defendant

Judgment: 26 April 2018

NOTES OF JUDGE K J PHILLIPS ON SENTENCING

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[1] Mr Gourlay, you are for sentence before me today on one charge being Charge 2 in a Charge List which you were found guilty on by your jury after an extensive jury trial relating to this charge and a number of others upon which you were acquitted. The charge you are convicted on is a charge under s 267(1)(a) Crimes Act 1961, and carries a maximum penalty of 14 years' imprisonment. You were acquitted on five other charges. You were found not guilty of them. Your thanks, no doubt, have gone in a fulsome way to your counsel, Ms Pinnock, for the tenacious and professional way she conducted a defence of a case that was extremely difficult.

[2] The facts on which you are to be sentenced on, I distil from having heard the evidence. I note that what Ms Pinnock tells me at the time was correct. At this time in June 2015 in Alexandra, you were a drunk, drinking alcohol to excess every day. As a result of the way in which there had been a restructuring of a recycling set-up in Alexandra, you had lost the employment that you had. I note that you were disgruntled about that and that did not help the drinking issues you had either. You became, as

I saw the evidence, upset with the attitude of [the victim]. In the house where you were living at the time, you, on 28 June 2015, obtained products from your garage and using cans and tape you made an incendiary device. You did so (again as Ms Pinnock accepts and points out in a way) on the kitchen table in front of your partner and her son. You left the property and walked a short distance to where [the victim] lived. You put that device under his motor vehicle. You would have seen when you did that how close his car was parked to the flat or apartment that he, together with others, lived. Your intention was clearly expressed to your partner. You said you were going to "blow up" the car.

[3] It would appear, on the evidence that I have, that that device you had constructed did not work, because you did not hear the bang that you wanted to hear after you got back to your own house. You then took a bottle of fuel and some form of wick (I think) and went back to where you had put the first device. This time you put what was described as a "Molotov Cocktail" under the vehicle, using a particular type of bottle with a wick and fuel in it, and ignited it. That worked. You set the car on fire and totally destroyed it. The victim was in the house, a ranch slider or glass sliding door away really, a very small stoop, and the vehicle. As a result of what he had heard and what he did, luckily no person was hurt or damaged as a result of your criminal actions. The car was totally destroyed and damage was occasioned to the apartment or flat.

[4] I have had given to me Victim Impact Statements. The owner of the flat had to replace the ranch slider, a light fitting (covered by insurance) and the eaves of the house were damaged as well. I note that Mr Greenyer had 42 years as a firefighter. His view was the fire had potential to spread, as per his Victim Impact Statement. We had other expert evidence at trial to that end.

[5] I note the impact that this had on [the victim]. [The victim] is a person who is suffering from a life-ending disease. He found it impossible really to replace his motor vehicle. He needed it to be able to get around, as you saw when he gave evidence before you. I note what you say in your letter and I will give that to Mr Power. He might wish to give it to [the victim]. That is a matter for the Crown. You say that

were not thinking too good, and you describe yourself correctly; you are a "bloody idiot". I take note that you are apologising, albeit, absolutely belated.

[6] You have been on remand awaiting your trial for nearly two years, as I understand the position (see addendum). You are without a home, you are without an income, and albeit that there is reparation outstanding, I cannot make a reparation order here. [The victim] because of his illness would not be alive, I do not think, to recover any reparation because of the time it would take you to make any payment towards him.

[7] Mr Power for the Crown reminds me that arson does not have a tariff case or decision that I can "hang my hat on various pegs" given to me by the Court of Appeal or the Supreme Court, but - and it is a big but - arson is always serious offending. It is always dealt with with the premise that sentences must reflect denunciation, deterrence and community protection. As I pointed out, this occurred on 28 June 2015. It is now 26 April 2018. The community has been protected by you having been remanded in custody. I have read the decisions that Mr Power discusses in his submissions. I note the *R v Protos*[1] decision with the starting point of four years relates to a "reckless act", *R v Cox*[2] relates to an "opportunist act", a starting point of some three years. *R v Rameka*[3], in my view is more serious with a starting point of five years.

[8] Mr Power's position is that your prior history relating to violent convictions over 24 years, 90 prior convictions, including ones for wilful damage calls, in his view, for an uplift. He notes that there was premeditation (persistence, I think he calls it); the risk where the fire was set close to where the victim lived; the use of two devices. His submission to me is that the starting point should be three and a half to four years, with an uplift of six months (now today, three months) with an end of somewhere over four years with reparation to the victims.

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[1] *R v Protos*, CA259/04, 19 October 2004
[2] *R v Cox* [2013] NZCA 194
[3] *R v Rameka*, CA426/04, 16 June 2005

[9] Ms Pinnock has made detailed submissions in writing which I have read and considered prior to coming into Court today. I do not intend to traverse them all. I note that you deny saying anything to your partner before leaving them that night. I accept the evidence of the partner as to what she said she heard. I have no doubt in my mind at all that you regret what you did to [the victim], upon reflection and reconsideration of your position. But nothing on that night was going to stop you doing what you intended to do, to blow up the car. You have no resources to pay reparation.

[10] Ms Pinnock is again right, when she puts that the significant history in the past of your criminal offending is directly related to your struggle with substance and alcohol abuse. I have received Certificates and I accept from what I have been told that you have not just been "sitting on your hands" in your cell at the Otago Correctional Facility. You have availed yourself of courses and treatments. You consider yourself at this moment to be "dry" of alcohol. Ms Pinnock referred me to a number of cases including the District Court decision of Judge Zohrab in *Police v McMaster*[4]. I note that the cars there were taken and damaged by fire for the purposes of making sure there was no any evidence against the person who stole the car. The charges were not laid in the way the charge against you was laid i.e. that you ought to have known that danger to life was likely to ensue (at a higher level). A number of the authorities she discusses relate to car fires where the charges being faced were laid at a different level to your charges.

[11] She submits that the danger to the occupants arises from your recklessness and is not a separate aggravating factor but an overall factor included in the charge as the charge involves intentional setting fire to the car where you ought to have known danger to life was likely to ensue. She submits to me a starting point of between three and three and a half years. She disputes the addition of any uplift.

[12] The Pre-Sentence Report that I have has to be reasonably basic because of where you have been. It is noted that the current events you face indicate an increase in the seriousness of your violence; that you have had good compliance in the past with community-based sentence; but you have a high likelihood of reoffending. It

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[4] *Police v McMaster* [2017] NZDC 6155

notes what you have done whilst you have been in prison, and notes also, which I think is commendable, your motivation to find work and to address your alcohol issues.

[13] I have to consider all that, Mr Gourlay, and arrive at what is an appropriate point for your sentence considering denunciation and deterrence and your criminal conduct.

[14] I start by looking at your culpability or in other words your responsibility and your offending. You gathered together what you needed to do what you intended to do, to blow up the car. You built the incendiary device or devices with that intention of setting fire or blowing up [the victim's] car for some wrong that you felt he had done to you. Mr Power would describe that as revenge being the ultimate reason. You purposely go there taking the items with you. You put the items on two occasions under the vehicle. You would have seen how close that car was to where the defendant lived. You would have realised with this car parked out in front that he, perhaps with others, was inside that apartment. You put the device in a position near the fuel tank of the car. You light it. It does not work. By this stage you were back at your home. One would have thought that that would have been enough, but you were not to be put off by that. You went back and, on the Crown inference which I draw from the fact you took this particular bottle (why I use the word there is and what you caught you out that it was a bottle of some age with the particular writing on it that the person who had owned the property could identify having left there) that bottle was found in pieces where this fire started, the fire which destroyed the car and damaged the house. By anybody's reckoning, your culpability is high.

[15] I thank Counsel again, both of them, for the authorities that they have given to me. I have read them and considered the words used in each of those authorities. But and the reason why there is no tariff decision in arson, none of them, in my view, fit neatly into these facts and your criminal actions.

[16] I accept what Ms Pinnock says, to a large extent, about the cases dealing with fires of cars, but they fall (and as I read them) on a lower charge basis than your offending. You put these devices together to obtain and maximise the destruction by fire that you wanted to obtain.

[17] Overall, I consider that the starting point for your offending when I have read the cases and considered what I have been told is three years and six months.

[18] There is no doubt in my mind that you have a serious history of criminal offending involving violence. There is one, I think, involving property damage. But Ms Pinnock is right, you have no prior convictions for arson. In order to uplift for your prior convictions so that it just does not become a case of where you are "dealt to" because you have prior convictions, I must try to rationalise the past convictions and the sentences imposed as not having stopped you from offending in this way. There is very little similarity, in my view, between the convictions you have had and the conviction that you now have. In the end, I do not intend to uplift the starting point for your prior convictions. I do not consider, after having given it careful thought, those convictions have a relevance to or call for an uplift here in the particular circumstances of this offending. The only connecting thread that I could see was your alcoholism. Here in this particular set of circumstances I do not see that in any way can be brought to account. I do not intend to uplift the starting point.

[19] There are no personal mitigating factors to take off the final starting point which thus becomes the end point.

[20] You are sent to prison, Mr Gourlay, on Charge 2 for a period of three years and six months. I do not make any order for reparation; there is no likelihood of such an order being satisfied.

ADDENDUM

[21] Paragraph 8. Counsel have correctly pointed out that Mr Gourlay was remanded in custody as from 2 January 2016.

K J Phillips
District Court Judge