

NCN: [2019] EWCA (Crim) 1585

No: 201902478 A3

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Tuesday, 3 September 2019

**B e f o r e:**  
**LORD JUSTICE SIMON**

**MRS JUSTICE McGOWAN DBE**

**MR JUSTICE FREEDMAN**

**REFERENCE BY THE ATTORNEY GENERAL UNDER**  
**S.36 OF THE CRIMINAL JUSTICE ACT 1988**

**R E G I N A**  
v  
**DARREN JOHN FINNEMORE**

**Mr P Jarvis** appeared on behalf of the **Attorney General**  
**Ms S Cornish** appeared on behalf of the **Offender**

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**J U D G M E N T**

**LORD JUSTICE SIMON:**

1. This is an application by the Solicitor General to refer sentences to this court, under section 36 of the Criminal Justice Act 1988, as being unduly lenient. The sentences were passed by His Honour Judge Mooncey in the Crown Court at Leicester on 6 June 2019.
2. The offender is now aged 49. On 18 April 2019 he was convicted of three offences: counts 4 and 6, arson being reckless as to whether life is endangered, contrary to section 1, 2 and 3 of the Criminal Damage Act 1971. Count 4 charged damage by fire at 1 - 4 Coleman Close, Leicester, and count 6, damage by fire at 11 - 16 Coleman Close. Count 7 was the more serious charge of arson with intent to endanger life, contrary to the same provisions. The lives that it was intended to endanger being those of Mandy Morris and Kenneth Aley and the fire being set at 75 Rowlatts Hill, Leicester.
3. Following the preparation of reports the offender was sentenced to a term of 5 years' imprisonment on count 7 and 3 years' imprisonment on counts 4 and 6, all to be served concurrently. The overall sentence was therefore a term of 5 years.
4. Mandy Morris and her partner, Kenneth Aley, lived in a flat at 75 Rowlatts Hill in Leicester. The offender lived in another flat in that block. In December 2017 she made a serious criminal allegation against the offender. The police arrested him and then released him on bail with a condition not to return to the flats. He went instead to live with his mother whose home was nearby.
5. From the middle of January 2018 the offender telephoned the police on a number of

occasions to report that he was feeling suicidal because of the allegations that had been made against him and because he had not been allowed to return to his flat.

6. On 28 January 2018, at around 3.00 am, CCTV recorded the offender wandering in and out of Coleman Close close to Rowlatts Hill. He was smoking a cigarette. He set light to the wheelie bins for Flats 1 - 4 Coleman Close and 11 - 16 Coleman Close. This was close to the gas mains for the block. He then made his way back towards his mother's house.
7. The occupants of the flats were asleep at the time. Some of them awoken by the sound of popping and crackling coming from outside and one heard an explosion. There was a considerable amount of smoke in the downstairs passageway that was making its way into the flats. Some of the occupants had to be rescued by the emergency services from their flats. One of them was treated in hospital for smoke inhalation. The fire brigade spent almost 6 hours tackling the fires started by the offender. Extensive smoke damage was caused to a number of the properties.
8. Meanwhile, at about 4.15 am and in breach of the conditions of his police bail, the offender made his way to 75 Rowlatts Hill. He set light to a magazine and stuffed it into the letterbox of the flat where Ms Morris and Mr Aley lived. The magazine had been in a plastic wrapper. It did not stay alight for long and no damage was caused to the inside of the flat. Minor damage was caused to the letter box itself.
9. A neighbour alerted the fire brigade and officers arrived a short time later. They knocked on the door of the flat and Mr Aley answered. Initially he appeared not to have known

about the incident but he subsequently said he had smelt something burning and so he went to the door in time to see the offender running off. A number of police officers subsequently identified the offender from the CCTV.

10. At 8.35 am the police went to the offender's mother's address. The offender was in the living room when they arrived. He was arrested and mumbled words to the effect that someone was "taking the piss". He knew who it was and he was going to knock them out.
11. In his police interview the offender answered "no comment" to all questions. He had prepared a statement in which he denied any involvement in the crimes. He was later charged, pleaded not guilty, stood trial and was found guilty.
12. The prosecution case at trial was that the offender had set the fires at Coleman Close in order to occupy the attention of the fire services so he could move on to his real target which was Ms Morris and Mr Aley's flat at Rowlatts Hill.
13. The offender had 41 previous convictions from 19 court appearances. They include convictions for theft, criminal damage and possessing offensive weapons. Of particular significance were convictions in 1995 and 2000, for committing arson recklessly.
14. In relation to the convictions in 2000 there were a number of offences for which he received an overall sentence of 7 years' imprisonment. The offending involved the offender setting fire to wheelie bins outside a number of properties.

15. A psychiatric report on the offender was prepared by Dr Thirumalai. The offender told him that having left school at 16 he worked in warehouses but he had been unemployed for over a decade. He has three children from a previous relationship but no contact with any of them. He denied drinking alcohol and taking any illicit substances prior to committing the offences. Dr Thirumalai did not have access to the offender's medical records but he self-reported that he had suffered mental health difficulties around 20 years ago. He also reported a history of self-harming. He said he had been in prison for most of his adult life. He struggled to cope with the stress of living in the community and finds prison life easier. With regard to the present offences, the offender denied committing them so it was not possible for Dr Thirumalai to explore with him his insight into the offending.
  
16. The doctor concluded that the offender was fit to be sentenced. There had been no previous diagnosis of mental disorder but the offender did have a number of characteristics consistent with having an emotional unstable personality disorder which could make him more prone to impulsive acts.
  
17. There were a number of victim personal statements from the occupiers of the flats in Coleman Close: Keith Corkhill described waking to the sound of someone banging on his door. He had tried to run downstairs to escape but the smoke was too thick. He then tried to jump out of the bathroom window but the flames from outside prevented him. He was panicked and afraid. He managed to open the living room window just enough so he could put his head outside and breathe. The fire brigade arrived a matter of minutes later. He believed that if his neighbour had not woken him up he probably would have died from the smoke inhalation. Even now he suffers from flashbacks in relation to this experience.

18. Terence Owen's statement described how, after the fire, he was unable to return to his flat. He was taken to hospital and in the immediate aftermath had to look for somewhere else to live with his wife.
19. A number of other occupants found themselves in the same situation. Phyllis Snelders had to move in her with son and his wife which put a strain on them all. Mohammed Malik, his wife and child were trapped in their flat during the fire. Since then they have had to live with his wife's family some distance from where they work and where their children go to school. His 3-year-old daughter has been left traumatised by the fire.
20. The maximum sentence for each offence charged as counts 4, 6 and 7 is life imprisonment. In March 2018 the Sentencing Council published a Consultation and Draft Guidelines for offences of arson and criminal damage. That consultation closed on 26 June 2018. Definitive Guidelines were published on 3 July 2019 and applied to all cases sentenced on or after 1 October 2019.
21. The judge was taken by the prosecutor to the Draft Guidelines. In respect of count 7 the prosecutor submitted that the facts of the case fell into category 2A, with a starting point of 6 years' imprisonment and a range of 4 to 8 years. For counts 4 and 6 the equivalent starting point was somewhere between 4 and 6 years' imprisonment.
22. Mr Jarvis, in opening the application, made two apologies on behalf of the prosecutor (which was not him). First, a sentencing note should have been prepared for the assistance of the judge and second, the judge should not have been referred to the Draft

Guidelines.

23. In his sentencing remarks the judge noted that although count 7 was the more serious offence, the effects of the offences charged under counts 4 and 6 were the more serious, in that people had to be evacuated from their flats and there was smoke damage. The judge said that he had looked at the draft guidelines and some of the existing authorities, and noted as correlation between what he regarded as two sources of sentencing authority. He said the potential victims of count 7 would be protected by a restraining order that precluded him going from within 100 yards of the address for 10 years, and he then passed the sentence to which we have referred.
  
24. Mr Jarvis, who appears for the Solicitor General, submitted that the sentences were unduly lenient. He pointed out that the Draft Guidelines did not come into force until 1 October 2019 and were therefore irrelevant (see the terms of the guidelines themselves and the case of *R v Connelly* [2018] 1 Cr App R(S) 19). The judge should have been guided by the authorities of this court.
  
25. In *Attorney-General's Reference No 68 of 2008 (R v Myrie)* [2009] 2 Cr App R(S) 48, this court reviewed the sentence of an offender who received a two-and-a-half year sentence of imprisonment for arson being reckless as to whether life would be endangered. The court considered a number of earlier authorities and held that the starting point for arson with intent to endanger life is in the range of 8 to 10 years following a trial and in cases of reckless arson:

... we would regard the range as rather below that, but it is apparent to us that

the dividing line between the worst cases of reckless arson and the least serious cases of arson with intent to endanger life is a fine one.

(see paragraph 25).

26. This bracket has been applied to a number of reckless arson cases since then including *Attorney-General's Reference No 39 of 2016 (R v Hitchens)* [2016] 2 Cr App R(S) 34; *Attorney General Reference (R v Cox)* [2018] 1 Cr App R(S) 3 and *R v McKay* [2018] 1 Cr App R(S) 26. He submitted that the offending had a large number of features which made the offending serious and which called for a sentence considerably in excess of 5 years' imprisonment.
27. For the offender, Ms Cornish reminded the court that the judge had heard the evidence in the trial and having done so had concluded the offender had acted impulsively. His mental health issues provided substantial mitigation, as did a long history of alcohol misuse and a finding from the psychiatrist that he had an emotionally unstable personality disorder which made him prone to impulsive actions. So far as count 7 was concerned, although it was an intentional act, there was minimal risk as the fire was out before the fire service arrived. No real damage was caused and no one was injured. So far as the other counts were concerned, the setting of the fire was reckless. Although wheelie bins were set alight the flats were not themselves set on fire: the reason for the evacuation was the risk due to smoke rather than due to fire, and there was no sophistication or premeditation. She submitted that the sentences were lenient but not unduly so, such as to require the intervention of this court. We should add that we have received a handwritten note from the offender making a personal plea in relation to the application while continuing to deny committing the offences.



28. In our view, the sentences for these three offences had to take into account a number of features which demonstrated the seriousness of the offending.
29. First, the offender was convicted after a trial of three offences, one charge of arson with intent and two charges of reckless arson. Fires were set at two different sites, and the reckless offences were part of a scheme of distracting the fire service before the intentional fire setting at Rowlatts Hill, intending to endanger the lives of Mandy Morris and Kenneth Aley. These offences were premeditated and not impulsive acts.
30. Second, the fire at the Rowlatts Hill flat was in revenge for an allegation made against him. It involved a breach of a condition of his bail that precluded him being near the flat. As Mr Jarvis acknowledged, no significant damage was caused and no one was injured as a result but, in our view, he correctly submitted that the intent involved a serious offence.
31. Third, that was not the position in relation to the reckless arson offences. These offences were carried out in the early hours, when the offender would have known that people were asleep. Many of them only became aware of the fires after it was too late for them to escape. The dangers of fires in blocks of flat, at night, hardly needs to be restated. These fires caused extensive property damage, one person was hospitalised and the crimes, as we have recorded, had the continuing effect on the lives of the victims described in their statements.
32. Fourth, there was little mitigation available to the offender. Although he had mental health issues, with attempts at suicide, he had no diagnosed mental disorder that reduced the

culpability to any significant extent. His record was poor and, most significantly, he had previously received a substantial sentence of imprisonment for arson being reckless as to whether life would be endangered in 2000. That had been preceded by an earlier offence, as we have set out.

33. Taking all these matters into account and applying the guidelines in the cases to which we have referred, we have concluded that the overall sentence of 5 years' imprisonment for these offences was unduly lenient. Adopting the approach of the judge which was to weight the sentence on count 7 to reflect the seriousness of the overall offending, we have concluded that the appropriate sentence was a term of not less than 10 years. Accordingly the sentence of 5 years was unduly lenient.
34. We will give effect to this conclusion by granting leave, quashing the sentence on count 7 and substituting a sentence of 10 years' imprisonment.