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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **19/02/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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v

RAYMOND JACKSON

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Ian Turkington (instructed by RP Crawford Solicitors) for the Applicant
Jonathan Connolly (instructed by PPS) for the Respondent

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Before: Treacy LJ, McCloskey LJ and Maguire LJ

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TREACY LJ (*delivering the judgment of the Court*)

Introduction

[1] The applicant renews his application for an extension of time and for leave to appeal his sentence following the order of the single judge, Mr Justice Colton, refusing these applications.

[2] At arraignment on 25 June 2020 the applicant pleaded guilty to one count of arson being reckless as to whether life would be endangered. On 2 September the trial judge, His Honour Judge Miller, imposed a four year determinate custodial sentence comprised of 2 years custody and 2 years licence.

[3] In advance of the sentencing hearing the judge had detailed written submissions from the prosecution and defence, a report from Dr Bownes, Consultant Psychiatrist, and a comprehensive pre-sentence report. There is also included in our appeal bundle a report from Mr Joe Dwyer, Educational Psychologist, which was not placed before the judge by his previous legal representatives. There is an agreed factual background which also provides detail regarding the applicant's previous convictions for arson which we have reproduced at paras [4]-[25] below.

Factual Background

Indictment

[4] The Defendant is charged with arson on 25 September 2019 - intending to damage the property (a NIHE flat), or being reckless as to whether the property would be damaged, and being reckless as to whether the lives of the other residents of the block of flats would thereby be endangered, contrary to Article 3(2) and 3(3) of the Criminal Damage (Northern Ireland) Order 1977.

Background

[5] On Wednesday 25 September 2019 at 1610 hours, the Northern Ireland Fire and Rescue Service ("NIFRS") received an emergency call by the Defendant to say that his flat was on fire - that he made a 'big fire'; and that he did it to kill himself. Police were duly tasked by the NIFRS to attend three minutes later at 1613 hours. The Fire Service remained on the phone with the Defendant until firemen entered the flat and rescued Mr Jackson who was apparently unconscious. The Defendant was the sole occupant of the flat at the time.

[6] The applicant's flat is a downstairs flat which is located within a larger block. There is one adjacent flat, two flats on the first floor and a further three across a communal entrance area. Some of the flats were known to be occupied at the time of the fire.

[7] NIFRS determined that the fire was a deliberate ignition with no evident accelerant. It had been set in the living room by setting light to cassette tapes in their PVC covers which were on the floor. The fire was just in front of a leather recliner. This appears to be the chair the Defendant was found unconscious on. The damage was estimated at approximately £2-3,000 by the NIHE.

[8] The Defendant was unconscious but came to in the lobby. He was then conveyed to hospital by ambulance. The transcript of the 999 call appears to suggest that the Defendant was talking to the fireman however. The Defendant was arrested at the Ulster Hospital, Dundonald on 26 September 2019 at 1415 hours.

[9] At interview on 26 September, the Defendant- denied that he was suicidal at that time, but that he was in Maghaberry before because he did want to kill himself; that he did not remember making a call or being pulled out by the Fire Service. He said he must have blacked out. The Defendant said that he set a fire before because his girlfriend had died and he was upset [and that he tried to burn down four flats with himself inside one].

[10] The Defendant did give his name and address when he called the Fire Service however. His phone was otherwise linked to him. The prosecution was alerted to the plea of guilty prior to arraignment.

Record

[11] Mr Jackson is 59 years-of-age. He has a relevant record from 2005 and 2007.

Conviction February 2006 for arson endangering life (incident January 2005)

[12] Neighbours in the flats where the Defendant resided smelled smoke, and on investigating, discovered a towel on fire. The towel was draped over an electric fire. When confronted as regards his actions, Mr Jackson said he was going to set the flats alight. He repeated this 'continually' to C/Davidson, who had arrived on the scene. Mr Jackson was observed by all to be intoxicated. At interview, he stated that - he was an alcoholic; had taken tablets due to his depression; and had not been aware of his actions. Mr Jackson pleaded guilty to one count of arson endangering life and was sentenced to a probation order for three years.

Conviction September 2008 for arson (incident October 2007)

[13] On 12 October 2007 at 0134 hours and at the request of Fire Control, Police attended a flat at Rathgill Park, Bangor where the Fire Service were dealing with a fire which had allegedly been set by the person who made the initial call to their control room. He stated that he was going to burn the place down and kill himself.

[14] The fire had been set by lighting a drawer of papers in the lounge of the flat. Damage itself was restricted mainly to that lounge although acrid smoke affected the other 3 remaining flats in the block, all of which were occupied by Housing Executive tenants. The fire is believed to have been started as he made the '999' call to Fire Control. The building consists of four flats, two upstairs and two downstairs with a communal hallway. The Defendant was in a downstairs flat.

[15] A witness, Mr Curragh, was in the flat across the hallway along with his son and his friend. Mr Curragh was awoken by his son who explained there was smoke coming from the Defendant's flat. He thought he was messing around as Raymond Jackson threatened to burn the flat down 'all the time.' On seeing the smoke he realised it was serious and got everyone out. Mr Curragh and his son suffered from smoke inhalation but did not require any medical treatment. There was a tenant in a flat upstairs who was awoken by the Fire Brigade knocking on his door. He had no injuries.

[16] The occupant of the flat was the Defendant who was subsequently arrested for arson endangering life.

[17] It was established that Mr Jackson suffered from mental health problems and having been assessed by the Crisis Team he was deemed fit for interview.

[18] He was interviewed twice in the presence of his solicitor and an appropriate adult during which he admitted that he threw a lit cigarette butt into a plastic bin. He was not sure but thought that he may have also lit a letter with a cigarette lighter and put it in the bin. He stated that he could feel the flames but did not see them. He accepted from the damage he could see to a wooden drawer that there had obviously been substantial flames. He believed that he had blacked out for maybe 10 minutes and that whilst his actions were not deliberate they were reckless. He did not know that there were other people in the other flats but accepted that he put them at risk.

[19] From the transcript of the 999 call made by Jackson it appears that he was only lighting the fire whilst he was speaking to the operator. He was conscious the whole time and the phone was taken off him by the Fire Officer attending the scene. Raymond Jackson would have been aware that the other tenants were in because he had called with Jay Curragh, who was his friend, at approximately 2000 hours that night. Mr Curragh states that he was mumbling and quite drunk, he told him to go back to his flat.

[20] Mr Jackson is a self-confessed alcoholic, his friend Mr Curragh tells police that he had been off alcohol for approximately two years and had only recently started drinking again. Mr Curragh would state that there are forever ambulances, fire brigade and police outside their home; Jackson threatens suicide with knives all the time. Mr Jackson was classed as a nuisance at the time having serious underlying mental health issues.

[21] From Mr Jackson's conversation with the 999 operator his intent was to kill himself. He had no regard or thought for other persons at this time. Mr Jackson in interview did accept that his actions were reckless however.

[22] It appears that the Defendant was prosecuted for arson endangering life. The record is marked as 'arson.' The sentence imposed was a custody probation order of three years' imprisonment and two years' probation. [NB the agreed Statement also included the paragraphs set out at [23]-[25] below].

Punishment

[23] The maximum sentence under Article 3 is life.

Aggravating circumstances

[24] Aggravating circumstances may include amongst other things - previous convictions; offence committed whilst under the influence of alcohol; offence committed in a domestic context; significant impact on emergency services or resources; the intention or recklessness to cause very serious damage to property; recklessness as to whether serious injury caused to persons.

Case law

[25] There are two cases (at least) which have bearing with respect to the current Covid-19 pandemic. Locally, we have R v Beggs [2020] NICC 9, a decision of the Recorder at paragraph 14 in particular [credit]. The Court of Appeal decision in R v Manning [2020] EWCA Crim 592 is also instructive at paragraph 41 and more particularly in this instance perhaps at paragraph 42 [sentence impact, necessary length etc].

Discussion

[26] We have considered the insights into the applicant's difficult background and history as evidenced in the reports before us. We note that the applicant has a long history of poor mental health aggravated by misuse of alcohol and his limited willingness to work consistently with mental health professionals. The report from Dr Bownes is dated 21 October 2019 and the pre-sentence report is dated 25 June 2020 and is therefore of somewhat more recent vintage. The pre-sentence report sets out in helpful detail the applicant's social and personal circumstances and from that report we note the following. First, the applicant informed the probation officer that within custody he was coping well. Secondly, he was not involved with any mental health or counselling services prior to his remand into custody in September 2019, or indeed, subsequent to his remand in custody. Thirdly, that at the time of the pre-sentence report he was working as an orderly in Maghaberry Prison, had had those duties for some 9 months, appeared to enjoy that role as this meant that he was able to be out of his cell more frequently. We observe that there is no updating materials beyond that which is contained within the pre-sentence report as to the applicant's prison regimes or conditions. We were however informed by Mr Turkington that the applicant is now in HMP Magilligan prison having been transferred from HMP Maghaberry.

[27] The issue of the applicant's motivation in setting fires, which now includes three separate convictions for arson in 2006, 2008 and now September 2019, is addressed in Dr Bownes' report and summarised in the pre-sentence report as follows:

> "The defendant insisted that he would not have had any intent to cause harm to others. Whilst he does have two previous convictions involving arson, the last conviction was in 2008 and the report of Dr Bownes would appear to suggest that the defendant would not be someone who sets fires because of excitement seeking or a desire for revenge against others, rather as a mal-adapted mechanism for discharging negative feelings. His actions would appear to be directed more in relation to harm himself as opposed to harm others. Nevertheless, his actions in setting fires clearly does place others at some

> risk particularly if he is intoxicated and a fire should get out of control."

[28] The sentencing judge in this case was well aware of the applicant's apparent motivation and the risk that he posed to others by fire setting. It is noteworthy that for the 2006 arson conviction he received a sentence of 3 years' probation. Whilst he was on probation for that offence he committed a further arson in 2007 for which he was sentenced to 3 years' imprisonment and 2 years' probation. We understand that he pleaded guilty. That sentence was not appealed and it appears to us that the sentence is not significantly different from the sentence which was imposed by the sentencing judge in the case that is before us today.

[29] It is accepted by Mr Turkington on behalf of the applicant that the following aggravating factors are present in this case:

(i) The two previous convictions for arson.

(ii) The offence was committed whilst under the influence of alcohol.

(iii) The offence was committed in a domestic context.

(iv) The significant impact on emergency services and resources.

(v) The risk to other tenants in adjacent flats.

[30] As against the foregoing we note that it was the applicant who summonsed help, there was no accelerant involved, the damage caused was modest, the offence was not motivated out of hostility but rather appears to have been a failed suicide attempt or a cry for help, or both. All of these matters were before the sentencing judge. The offence did not involve a specific intent to endanger life and was grounded on recklessly endangering life. Arson is both a serious and specified offence within Schedules 1 and 2 of the Criminal Justice (Northern Ireland) Order 2008. The trial judge agreed with the conclusion of the Risk and Management Meeting set out in the pre-sentence report that the applicant was not a dangerous offender within the meaning of the 2008 Order.

[31] The sentencing judge considered the case law in this area and noted the summary of Hart J in R v McBride [2007] NICC 19 where, having referenced the relevant English decisions, he observed:

> "These cases suggest that sentences of 3-4 years imprisonment have been imposed in cases where one life was endangered, however there are a number of other cases referred to in Butterworth's Sentencing Practice that suggest the range of sentence is normally between 3-6

> years with the sentences following within the range of 5-6 years."

[32] The sentence of 5 years' imprisonment imposed in McBride, following a plea at arraignment for arson (being reckless as to whether lives would be endangered), was appealed. Campbell LJ in the Court of Appeal in R v McBride [2008] NICA 57 at paragraph [20] referenced the sentencing remarks of Hart J set out above. In addition to the cases referred to by Hart J the Court of Appeal considered a number of other English authorities at paragraph [25] noting that "these examples illustrate that there are so many variants in the way this crime can be committed that only limited assistance is derived from them making the task of the sentence all the more difficult". At paragraph [28] the Court stated:

> "Bearing in mind that this is not to be regarded as a racial attack we consider that his early admission of guilt, the absence of any criminal behaviour in the past or of any reason to believe that he will present a risk of harm to others in the future is insufficiently reflected in the sentence of 5 years imprisonment and we will therefore grant leave to appeal and substitute a sentence of 4 years imprisonment."

[33] The range of sentence appropriate to offences of arson is wide, reflecting no doubt the wide variety of different factual circumstances in which the offence may be committed. The range is also reflected in the sentences which were imposed on the applicant for his prior offending for arson. In the present case defence counsel in his written submissions to the sentencing judge realistically accepted that a prison sentence was inevitable. Mr Turkington, who now appears for this applicant, does not demur from that approach.

[34] In the present case the sentencing judge held that if the applicant had been convicted following a contested trial he might have expected a sentence of up to 6 years. This forms the first and central ground of appeal, namely the contention that this starting point was manifestly excessive. Having regard to the highly material criminal record which included two previous convictions for arson and the wide sentencing range we reject as unarguable the contention that the starting point was manifestly excessive.

[35] We do not accept the argument advanced before us, but not before the court below, that the applicant's motive, that is to say suicide and/or a cry for help, takes this case outside the custodial range to such an extent as to render the starting point manifestly excessive. For the reasons articulated in R v McCaughey & Smyth [2014] NICA 61 the Sentencing Council Guidelines have limited applicability in this jurisdiction as outlined at paras [22]-[24] thereof.

[36] The sentencing judge gave full allowance for the applicant's guilty plea at the first opportunity reducing the term of 6 years to one of 4 years divided equally between custody and licence. Whilst this was a stiff sentence and other judges could reasonably have dealt with it differently that is not the test.

[37] In his second ground of appeal it is contended that the judge erred in principle in failing to make any allowance for the public health crisis. The issue of discount because of the COVID-19 pandemic has been the subject of detailed consideration by this court in its recent judgment in R v Stewart [2020] NICA 62. Morgan LCJ at paragraphs [12]-[13] analysed the approach of the English Court of Appeal in R v Manning [2020] EWCA Crim 592 and at paragraphs [14]-[15] set out the contrasting Scottish approach in the judgment given by the Lord Justice Clerk, Lady Dorrian, in HM Advocate v Lindsay [2020] HCJAC 26. Morgan LCJ also referred to R v Beggs [2020] NICC 9 where the Recorder gave a reduction for the plea over that normally allowed to take into account the assistance provided by the defendant in making a positive request to have his case listed for the purposes of a guilty plea and early sentence during the medical emergency. The court noted that the Recorder concluded that this evidenced additional remorse on the defendant's part and willingness to cooperate with the authorities. The Court of Appeal in Stewart accepted that the pandemic has affected the prison regime and that in particular prisoners have been deprived of face-to-face meetings with family. The LCJ then noted the present position in Northern Ireland prisons as set out by Colton J in R v Morgan [2020] NICC 14. In a crucial paragraph the Court of Appeal rejected the argument that there should be any automatic increase in the discount allowed for a plea by reason of prison conditions:

> "[18] Given the steps taken by the Prison Service to deal with the issues arising from the pandemic we consider that there is much to be said for the approach espoused by Lady Dorrian. We do not, therefore, accept that there should be any automatic increase in the discount allowed for a plea of guilty by reason of prison conditions. We recognise, however, the force of the approach taken by McFarland J as he now is in respect of those who plead guilty and face up to their responsibilities during the pandemic."

[38] Both the defence and the prosecution had raised the issue of an allowance by reason of prison conditions in their written submissions before the sentencing judge. Although he did not expressly refer to prison conditions in his sentencing remarks he was plainly aware of the arguments raised in respect of this issue. Judgment in Stewart had not been given at the time of sentencing in this case. The applicant's contention that the judge erred in principle in failing to make any allowance for the public health crisis presupposes that there should be an automatic increase for the public health crisis. This contention was however rejected by the Court of Appeal in the passage set out above.

[39] Taking all relevant matters into account including the restrictions arising from the Covid-19 pandemic, the sentence in the present case, whilst stiff, was within the range open to the sentencing judge and cannot, in our view, be condemned as manifestly excessive. We did not call upon the prosecution. Leave to appeal is refused.