NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA520/2009
[2010] NZCA 32

	BETWEEN	JOHN SAMUEL OLLERENSHAW Appellant
	AND	THE QUEEN Respondent

Hearing: 16 February 2010

Court: Hammond, Panckhurst and Keane JJ

Counsel: P V Paino for Appellant
K A L Bicknell for Respondent

Judgment: 26 February 2010 at 10 am

JUDGMENT OF THE COURT

A Leave granted to appeal out of time against sentence.

B Appeal against conviction abandoned.

C Appeal against sentence of six years imprisonment for arson dismissed.

D Appeal against three years non-parole term imposed for arson allowed; that direction is set aside.

REASONS OF THE COURT

(Given by Keane J)

[1] On 19 December 2006 John Ollerenshaw broke into the Wellington home of his former partner, 'X', which he had shared with her between May - October 2005. They had parted when she told him to leave. She had almost immediately obtained a temporary protection order that was made final after a contest on 23 February 2006.

[2] Mr Ollerenshaw took from X's bedroom a computer hard drive containing her business records and a box containing her jewellery, some of which was expensive and some inherited and irreplaceable. He set fire to her bedroom. By the time the Fire Service arrived, alerted by a neighbour, the fire was deep seated and intense.

[3] On 9 July 2008 Mr Ollerenshaw was sentenced to community service for an admitted breach of the protection order on 19 December 2006, the date of this more serious offending that he continued to deny. Also for a second breach of the order on 25 September 2007, possession of a pistol.

[4] On 13 - 16 October 2008 Mr Ollerenshaw went to trial in the District Court, Wellington, for the burglary and arson. He was found guilty of both offences. On 11 December 2008 he was sentenced by the trial Judge, Judge Barry, to six years imprisonment for the arson and one year concurrently for the burglary. A non-parole period of three years was imposed.

[5] Mr Ollerenshaw initially appealed both his conviction and sentence. He has abandoned his appeal against conviction. He requires leave to pursue his appeal against sentence. He appealed nine months out of time. We are disposed to grant leave. The delay appears attributable to his former counsel and the Crown does not strongly oppose.

Features aggravating offences

[6] Taking the arson as the lead offence for sentence, the Judge began from the premise that arson attracts no tariff and that the sentence must reflect the case. He identified four factors aggravating both offences, each explicable, he held, by Mr Ollerenshaw's underlying purpose: to cause X significant material loss and lasting emotional harm.

[7] Mr Ollerenshaw, the Judge said, acted deliberately and carefully. On 19 December 2006, the day of the offence, he drove early in the morning from his home in Palmerston North to Wellington. In Wellington he stole licence plates from a car in a carparking building. Using a prefix to prevent himself being identified, he made four telephone calls to X's home landline. That might suggest, the Judge recognised, that he was at least intent on excluding any risk to life. But otherwise he was intent on offending with impunity.

[8] Secondly, the Judge said, Mr Ollerenshaw broke into X's home intent on causing her harm in the widest sense. He stole her hard drive because it contained records necessary for her business. He took what was most personal to her, her jewellery, some valuable and some inherited and irreplaceable. In this and in setting fire to her home he was intent not just on causing her material loss. His intent was to violate her privacy and leave her with a lasting sense of insecurity.

[9] Thirdly, the Judge said, Mr Ollerenshaw succeeded. The damage he caused to her house cost $146,000 to repair. That was an insured loss. But X suffered an uninsured contents loss of $80,000. She was left, six days before Christmas, with the clothes in which she was standing. She spent five months in make-shift accommodation. She has suffered since a lasting sense of violation, a loss of trust, and anxiety.

[10] Fourthly, the Judge said, Mr Ollerenshaw, a sickness beneficiary, lacked both the will and the means to make any reparation. More, he displayed no remorse and continued to delude himself that X was in some way accountable for his predicament.

[11] The Judge did not increase Mr Ollerenshaw's sentence above six years to take account of his previous convictions. The two breaches of the protection order apart, they were historic. He was equally clear that there was nothing that mitigated and imposed the term under appeal.

Six year term

[12] On the evidence the Judge was right to treat the offence of arson as the lead offence for sentence and to sentence Mr Ollerenshaw on the premise that his purpose in breaking into his former partner's home was as much to commit that offence as to steal the computer hard drive and jewellery.

[13] We do not accept Mr Paino's submission that, on the evidence all that could be inferred was that Mr Ollerenshaw went to X's home to break in and steal, or that the arson was an incidental last minute impulse. The jury, and the Judge on sentence, were entitled to conclude that both offences lay within Mr Ollerenshaw's design.

[14] Even if Mr Ollerenshaw did act on impulse, that does not diminish his culpability. He still clearly acted deliberately. On the evidence at trial he must have used at least a small amount of accelerant. And that it was small does not make him any less culpable. His intent may have been to ensure that the fire did not become obvious until damage within the house was widespread and he was well away. If that was his intent, he succeeded.

[15] The larger question is whether the term imposed stands scrutiny with those imposed in the two cases to which the Judge was referred, and others. In one of those two cases, *R v Gilchrist*,[1] a sentence of four years was upheld on appeal for offending not unlike this, burglary and arson, if of commercial premises. In the other, *R v Z*,[2] this Court upheld a starting point of seven years, but for the destruction of a priceless and irreplaceable 124 year old church. In the earlier case, *R v Honan*,[3] to which both refer, an eight year sentence was upheld for the destruction of a warehouse and retail premises resulting in a $10 million loss.

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1 *R v Gilchrist* CA 429/90, 15 April 1991.
2 *R v Z* CA 138/00, 27 June 2000.
3 *R v Honan* (1988) 3 CRNZ 532 (CA).

[16] When set against those cases, Mr Paino submits, the highest starting point the Judge could have taken, even allowing for the aggravating features he identified, was between four and a half - five years imprisonment. We are unable to agree.

[17] As was said in those cases, and has been said in others, there can be no tariff for arson. Cases differ so widely. Sometimes the offence is planned. Sometimes is is an act of impulse. Sometimes property is placed at risk. Sometimes lives. Motive can range equally widely and be more or less sinister. What counts is the peculiar combination of circumstances that led to and constitute the offence.

[18] A house may not have the cultural or historic value of a church. It may not have the monetary worth of a commercial warehouse. But these cannot be definitive measures. A house may be everything to the person who owns it. It may contain most of what he or she possesses. To acquire it he or she may have taken on a large debt. It is likely to be the source of a whole range of highly personal associations that make a house a home. It is invariably a source of security. And so it was in this case.

[19] The house Mr Ollerenshaw elected to break into, steal from, and set fire to, was not any house. It was the home of his former partner. It was for that reason, and that only, that he set about these offences. His purpose, as the Judge held, a purpose successfully accomplished, was to cause her very significant and lasting injury and he succeeded. That is the definitive measure of the gravity of his offence.

[20] The six year sentence for the offence of arson that the Judge imposed on Mr Ollerenshaw was unquestionably severe. But, when set against the factors the Judge identified and the fact that he imposed a concurrent term for the burglary, we cannot say that it is so severe as to be manifestly excessive.

Minimum non-parole period

[21] When imposing the three years non-parole period also under appeal the Judge held that the statutory one-third minimum did not suffice to hold Mr Ollerenshaw

accountable, to denounce, deter and protect. Mr Ollerenshaw's offending was sinister, the Judge said, and he continued to deny his culpability and to blame X. That suggested that he might constitute still a source of risk to her.

[22] To the extent that the Judge thought the statutory non-parole period insufficient to hold Mr Ollerenshaw accountable, to denounce and deter, we disagree. The sentence the Judge imposed, even assuming the statutory non-parole period, more than sufficed for those purposes.

[23] The Judge looks rather to have imposed the heightened non-parole period to protect X, and we agree that Mr Ollerenshaw's offending was sinister. He and X had parted in October 2005. They had only seen each other after that once, when the final protection order was contested in February 2006. That Mr Ollerenshaw offended as he did in December 2006 in excess of nine months later certainly suggests he had an abiding sense of grievance.

[24] To be set against that, however, is that in the two years between the offending and sentence Mr Ollerenshaw was on bail. There is no suggestion, of which we are aware, that he ever attempted to contact X. He completed his sentence of community work without incident. He must be assumed to be able to complete within his present sentence programs going to any residual risk. The Parole Board, we consider, is best placed to determine his release.

Result

[25] Mr Ollerenshaw's application for leave to appeal against the sentence imposed on him out of time is allowed. His appeal against the sentence of six years imprisonment imposed for arson is dismissed. His appeal against the three year non-parole period imposed is allowed. That term will be quashed and the statutory non-parole period will apply.

Solicitors:
Paino & Robinson, Upper Hutt for Appellant
Crown Law Office, Wellington for Respondent