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IN THE COURT OF APPEAL OF NEW ZEALAND CA 271/88

THE QUEEN

v.

ANDREW NIKORA

Coram: Cooke P
Somers J
Barker J

Hearing: 2 November 1988

Counsel: P Moran for Crown
L H Atkins for Appellant

Judgment: 10 November 1988

JUDGMENT OF THE COURT DELIVERED BY BARKER J

Andrew Nikora seeks leave to appeal against a sentence of 5 years' imprisonment imposed on him in the High Court at Palmerston North on 2 September 1988. He had earlier pleaded guilty in the District Court to two charges of wilfully setting fire to the police station and residence at Shannon. For the offence on 24 July 1988 he was sentenced to 3 years' imprisonment; for the offence on 26 July 1988 he was sentenced to 5 years' imprisonment, the sentences to be concurrent.

For some time prior to these offences, the police had experienced trouble in the township of Shannon arising out of gang activities. There had been threats to the local

police constable and his family which eventually caused them to vacate the combined police station and residence. It was known in the community that the building was empty at the time of the offences. The Judge acknowledged that there was no evidence that Nikora had been involved in the earlier threats to the police constable. Nikora had been associated with the local gang - the Nomads - but was not a 'patched' member.

In the early hours of Sunday, 24 July 1988, Nikora prepared two milk bottles as molotov cocktails. He threw the molotov cocktails at the back porch of the police residence. Some windows were broken; there was substantial smoke and fire damage to the rear door and porch enclosure. The fire went out by itself and was not detected until around 11 am the next day. In the early hours of 26 July 1988, Nikora made up two more molotov cocktails and, accompanied by an associate, he returned to the police station, threw the molotov cocktails at the windows; an explosion and fire followed. The fire brigade arrived promptly; damage totalling $3,700 was incurred.

On the following day, after an initial denial, Nikora admitted his offending. He told a police officer that he did the arsons to earn a 'patch'. He later resiled and offered the alternative explanation that he had been annoyed about the arrest of several Nomad gang members for another incident; he considered himself provoked by the local

constable. This explanation seems scarcely less reprehensible than the first because of the element of revenge.

On sentencing, the Judge characterised Nikora as frightened, presumably because of his anxiety to deflect any blame for the arsons from the gang. The Judge held, and it was not disputed by counsel before us, that Nikora acted through a mixture of desire to earn a patch and because he was told what to do, even if he did not admit that in any public way.

As the Judge remarked, Nikora'a backgound is a sad one. He is aged 19; he ran away from school at 14; his family has its troubles; despite limited unskilled employment, he grew up substantially unemployed. He had a relatively minor criminal history from an early age, but the maximum sentence previously imposed was 14 days' imprisonment.

The Judge took into account, in mitigation, Nikora's youth, his plea of guilty and the fact that there was no actual or intended danger to life, although there is always some risk to life once a fire has been started. He acknowledged that a petrol accelerant was used but, judging from results, he was prepared to accept nothing more. The Judge also noted that this was not an arson done for reward or to conceal evidence.

Having taken all those matters into account, the Judge then stated that arson, always a serious offence, has an added element of seriousness when the object is a police station and police house. He considered Nikora's motive, even allowing for the above factors, was one of promoting revenge and intimidation; he regarded extremely seriously Nikora's return offence after the failure of his first attempt. The Judge considered that a strong deterrent sentence was required.

Counsel for Nikora submitted that the Judge failed insufficiently to take into account the following matters : (a) that the house was known to be empty and therefore there was little risk of danger to life; (b) the promptness of the guilty plea which was entered before the necessity for taking depositions; (c) the mixed motives of the applicant, including fear, and (d) the applicant's youth and disadvantaged background.

Arson is always a serious crime. The perpetrators are often difficult to detect. The offence is becoming more widespread and publicly-owned buildings are more frequently becoming targets. Arson always carries the potential for endangering the lives of firefighters even if an unoccupied building is torched.

We agree with the Judge that two markedly aggravating factors are found in this case. First, the return offence two days after Nikora's first unsuccessful attempt;

secondly, the direct attack on law and order implicit in the arson of a country police station in the context of gang harassment of the local constable and his family.

We agree with the Judge that a substantial period of imprisonment was called for, particularly because of these aggravating factors. However, we consider that the Judge did fail sufficiently to take into account the mitigating factors discussed earlier, particularly Nikora's youth and disadvantaged background and his very prompt plea of guilty which itself warrants a significant reduction.

We consider that an appropriate effective sentence is one of 4 years' imprisonment. We therefore vary the term imposed in respect of the second offence, i.e. that committed on 26 July 1988, to 4 years' imprisonment. This sentence is to be concurrent with the sentence of 3 years' imprisonment, imposed in respect of the first arson.

We stress that this particular case has special features, especially the absence of danger to persons and the fairly small amount of damage, which have led us to reduce the sentence somewhat. This should not be regarded as a precedent for more serious cases, especially when petrol bombs or the like are used as weapons against the police or as deliberate gestures against law and order. People contemplating such offences should be warned that

sentences more severe than the present one of four years' imprisonment may well await them.

Leave to appeal is granted and the appeal is alllowed.

R.D. Barker J.

Solicitors: Crown Solicitor, Wanganui, for Crown
L H Atkins for Appellant