IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2008-092-5680

THE QUEEN

v

ANTONIO BANDERAS CARLOS
KHALIDA HASAN HUSEN

Hearing: 18 December 2009

Counsel: R Reed for the Crown
P Kaye for Carlos
A Speed for Husen

Judgment: 18 December 2009

SENTENCE OF POTTER J

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Introduction

[1] Following trial by jury, Mr Carlos and Ms Husen, you were found guilty and convicted of one charge of arson under s 267(2)(b) of the Crimes Act 1961 and one charge of attempting by deception and without claim of right to obtain ownership of a pecuniary advantage, namely an insurance claim contrary to s 240(1)(a) and s 72 of the Crimes Act 1961. You are before the Court for sentence on those charges.

[2] The arson charge was prosecuted under s 267(2)(b), and charged that you intentionally damaged by fire or by means of an explosive property, namely the premises of Café Hasan Baba, with intent to obtain a benefit, namely an insurance claim. The maximum penalty is seven years' imprisonment.

[3] The maximum penalty for the charge of attempting by deception to obtain a pecuniary advantage is three and a half years' imprisonment.

[4] I am advised the prisoners still face dishonesty charges which have been tried in the District Court but the jury were unable to reach a decision and a retrial, I understand, has been ordered. Those charges are not relevant to this sentencing.

Factual background

[5] The prisoners owned and operated the restaurant known as Café Hasan Baba in Cook Street, Howick. The lease of the premises was in the name of Kurdistan Limited. That company traded as the Café Hasan Baba. Ms Husen is the sole director and shareholder of Kurdistan Limited.

[6] At approximately 3.11 a.m. on the morning of Sunday 17 February 2008 a member of the public, Mr Bateman, who had just passed the entrance to the Café Hasan Baba in Cook Street, saw a flash which was followed by a large explosion. The explosion caused the windows and the doors of the café to be thrown forward into Cook Street and across the road into the grounds of a cemetery adjoining a church. Wood, glass, tables and chairs were thrown many metres into Cook Street.

The explosion lifted the roof of the kitchen at the rear of the premises, blew apart a concrete block wall which divided the restaurant premises from a stairwell leading to the upstairs floor of the building and blocked that stairwell preventing entrance. The building generally, and the restaurant in particular, were extensively damaged.

[7] During the evening prior to the explosion Mr Carlos, who generally took responsibility for the front of the restaurant while Ms Husen did all the cooking and food preparation, had told customers that they were required to pay in cash because the Eftpos machine was not working. With some protest by some of the customers, payment for meals and services that night was made in cash. The restaurant was in a cash-rich situation with those takings and unbanked takings from previous days.

[8] Two waitresses gave evidence at the trial that they left the restaurant between 9.30 and 10.30 p.m. The latter of those to leave saw Mr Carlos cashing up and placing most of the cash in his pocket. Mr Carlos and Ms Husen stayed at the restaurant that night until about 2 a.m. The records for the burglar alarm showed it last being set at 1.56 a.m. At that stage they secured the premises, set the alarm and together left the premises for their home. They were later alerted by the security firm who monitored the burglar alarm, about the fire at the premises.

[9] Investigations carried out at the scene showed that the explosion was triggered by the ignition of petrol vapour. A significant quantity of petrol had been poured within the restaurant premises in a number of strategic positions on the floor and in two planter containers. The petrol had been left for a period to allow the petrol to evaporate and form a vapour. Following the alarm being set at 1.56 a.m. when the prisoners departed the restaurant, none of the alarm sensors had been activated prior to the explosion slightly more than an hour later, at about 3.11 a.m. Although the alarm sensors did not cover every part of the restaurant, they did cover certain of the areas where petrol had been poured, so if any intruder had entered and poured petrol, the alarm would have been activated. There was no evidence of a break-in at any points in the building.

[10] Investigations into the finances of the prisoners showed that at the time of the explosion they were significantly in debt. Mortgages on two residential properties

exceeded $1.2m. Those properties were in the name of Ms Husen. Notices under the Property Law Act had been served by Westpac Bank, the mortgagee, and the properties were due to be sold at mortgagee sale in March 2008. The business account of Kurdistan Limited with the National Bank exceeded its overdraft limit of $25,000 and Ms Husen's credit card had been cancelled as she had exceeded the credit limit of $10,000.

[11] The prisoners had significant insurance cover on the Café Hasan Baba in the name of Kurdistan Limited: $165,000 on property, $470,000 for loss of profits, a total of $625,000. After the explosion they attempted to claim on the insurance. The loss adjuster who inspected the premises estimated the claim could total $435,000, estimating loss of profits of $270,000 and $165,000 for loss of property. The insurance company refused to pay the claim until completion of the Police investigation.

Pre-sentence reports

[12] Full pre-sentence reports have been prepared for the prisoners. There is significant similarity. Mr Carlos is aged 31 and Ms Husen 29 years. They were born in the Kurdish area of northern Iraq and established a relationship by internet. At that time Mr Carlos was in Pakistan where he took shelter at the age of eight years. He came to New Zealand in 1998. Ms Husen followed and they married here in 2001. They have a daughter aged just three years, born on 16 December 2006. They refer to having established a successful cafeteria business in Howick before it was burned. They say they want to re-establish that business as soon as possible but have been prevented from doing so because of the criminal proceedings and also the denial of their insurance claim. They continue to deny any involvement in the offending.

[13] Mr Carlos has been undertaking on-line educational programmes and studies while he has been on bail. They have been living in rented accommodation with Mr Carlos's parents. The family are reported as remaining strongly supportive of them.

[14] Both prisoners are assessed as being of low risk of re-offending and are not perceived to have any rehabilitative needs. They say that because of their religion they do not drink, nor use drugs and do not gamble. They are at present in receipt of unemployment benefits. They have no previous convictions except in the case of Mr Carlos a drink driving charge in 2008 which seems inconsistent with his attitude to alcohol. That conviction is not relevant for this sentencing.

[15] Reports were completed as to the suitability of the rental address for the sentence of home detention or community detention. No impediment was identified. However, a sentence of home detention may only be considered if the sentence of imprisonment otherwise to be imposed is two years or less.

Purposes and principles of sentencing

[16] The purposes and principles of sentencing are set out in ss 7 and 8 of the Sentencing Act 2002. The purposes of sentencing in this case are to hold the offenders accountable for the harm done to the victims and the community, to promote in them a sense of responsibility and acknowledgement of that harm, to provide for the interests of the victims to the extent that the imposition of a sentence can do that, to denounce the conduct and to deter others from committing the same or a similar offence. Deterrence both individual and general is an important factor in sentencing for arson. The Court must also take into account the offenders rehabilitation and reintegration and impose the sentence which is the least restrictive outcome appropriate in the circumstances. The Court must take into account the gravity of the offending including the degree of culpability of the offender, both of which are significant in this case.

Aggravating factors

[17] The Crown advances as aggravating factors of the offending the following matters:

a) The level of premeditation involved. The Crown submits premeditation on the part of the prisoners was at the highest end of the scale. It points to the careful and deliberate plan implemented by the prisoners to make it appear as though the restaurant had been burgled and the explosion caused by the burglars. Further, the Crown submits that by attempting to make it appear there had been a significant amount of cash on the premises that had been stolen in the burglary, as well as an expensive Persian rug, valued at $10,000 in the insurance claim, they attempted to maximise their proposed insurance claim following the fire.

The Crown also points to the deliberate ploy to obtain cash payments from customers on the night preceding the explosion. The evidence at trial was that the Eftpos machine was not out of order. All that had occurred was an entry at about 6.30 p.m. for an amount of $1.22 which had been denied because the wrong account key had been entered. This entry had been done using Mr Carlos's own swipe card. Evidence further confirmed that no assistance had been sought by the restaurant that night in relation to the Eftpos machine which was claimed to be out of order, and the telephone lines to the help desk were working.

The Crown also points to damage to the till, mainly superficial scratches, and to the till drawer being left open and empty, to give the impression that it had been broken into by burglars. However, the evidence of one of the waitresses, Ms Gaby, was that she saw Mr Carlos putting the cash from the till in his pocket as he cashed up just before she was leaving.

The Crown also refers to the significant amount of petrol brought on to the premises, assessed by experts who gave evidence at trial to be at least eleven litres, which was poured throughout the restaurant. On the evidence, that petrol had to be poured in the restaurant sometime before 1.56 a.m, then left for over an hour until it evaporated to form

the extremely explosive petrol vapour which was the cause of the explosion at about 3.11 a.m.

Further, the Crown says that the prisoners invented fictions to try to explain the explosion in the restaurant: that gang members had previously come to the restaurant and bothered them, and it was they who might be responsible for the offending. This fiction was pursued in the text of a note allegedly from "gangs", sent by post to the address following the explosion.

Further, the prisoners claimed that their late stay at the premises to about 2 a.m. on the Sunday morning was to do some painting. This was offered to the Police as an explanation, unconvincing, the Crown submits, for departure from the restaurant at a time which was inconsistent with the latest times recorded for the setting of the burglar alarm over a relevant period prior to the offending.

Although some aspects of the matters claimed by the Crown as evidencing premeditation are disputed in submissions on behalf of the prisoners, I accept they are supported by the evidence at trial and that premeditation is a seriously aggravating factor of this offending.

b) Extent of loss, damage or harm resulting from the offending. The landlords of the premises at Cook Street, Howick suffered both loss and harm. There were two other tenants besides the Café Hasan Baba occupying the premises - a dental practice upstairs and a retail shop adjacent. All three parts of the building needed repair work and were untenanted until late in 2008. While insurance covered most of the repair costs Mr and Mrs Rimmer, the landlords, say they have suffered net financial loss of about $21,000 together with significant stress and anxiety, as well as needing to devote a lot of their own time to oversee the repair work.

The Howick Dental Centre was unable to carry on its practice for two weeks after the explosion as the premises upstairs were unusable. They were forced to relocate. They have now resumed the premises they occupied prior to the fire, but even after receipt of insurance proceeds, they estimate they will have suffered a loss of earnings of approximately $100,000 which is not covered by insurance. They are unable to estimate whether there will be ongoing loss of business as the result of the disruption to their practice. They too have suffered significant upset and anxiety.

Mr Wayne Bateman, a visitor from the United Kingdom at the time of the explosion, was only five metres clear of the front of the restaurant when the explosion occurred. He narrowly escaped serious injury from the force of the explosion when the glass front of the building was blown out and glass, wood, tables and chairs were forced by the blast out of the front of the shop and across the road. Mr Bateman's victim impact statement details the shock he experienced which he says endures, even after two years.

The undoubted loss, damage and harm caused by this offending is an aggravating factor. The crime of arson carries inevitably a high risk of loss, damage and harm and indeed, risk to life. It is the result of good fortune that Mr Bateman was not seriously injured or even killed by the explosion. Had he proceeded along Cook Street a few seconds later he may well have been injured or killed.

c) Convictions for which the prisoners are being sentenced at the same time. There is the second charge of attempting to obtain pecuniary advantage by deception. The Crown submits that the prisoners' deliberate attempts to financially benefit from their offending is a significant aggravating factor.

I accept the second charge of which the prisoners have been convicted is an aggravating factor. While intent to obtain a benefit is an element

of the charge of arson under s 267(2)(b), the separate charge is based on the deliberate attempts by the prisoners to obtain payment of the insurance monies under their policy and in doing so to deny their part in intentionally damaging the property in respect of which the claim was made.

Mitigating factors

[18] The Crown submits there are no mitigating factors of the offending or in relation to the offenders.

[19] For the prisoners, it is submitted they come before the Court as persons of previous good character who are assessed as being of low risk of re-offending. Counsel, Mr Kaye and Mr Speed, point to their background, to their arrival in New Zealand and that they have worked hard in establishing their own restaurant business and by their own efforts to support their life in New Zealand as well as providing a home for Mr Carlos's parents.

[20] Counsel also emphasise the situation of the prisoners' three year old daughter and the hardship that a sentence of imprisonment will involve for her. That is undeniably so, but families, and regretfully often young innocent children, invariably suffer, sometimes greatly, as the result of the criminal acts of their parents and the sentences which follow that offending.

[21] Mr Speed for Ms Husen submits that she had a lesser role in this offending which should be regarded as a mitigating factor of her offending. I do not accept that submission. Both prisoners were charged as principal parties. The clear evidence was that both operated the restaurant business, Ms Husen being responsible for the cooking in the kitchen, Mr Carlos managing the front of the restaurant and generally attending to matters incidental to the restaurant business. Ms Husen is the sole director and shareholder of Kurdistan Limited which held the lease of the restaurant premises and in the name of which company the insurance policy was held. She signed the insurance claim form following the explosion, although she did not take part in negotiations with the insurance assessor. She was the sole owner of

the residential properties which were mortgaged to Westpac Bank. While the evidence does not identify exactly what part each of the prisoners played in the offending, there is no evidence that the role of Ms Husen was less than Mr Carlos. They were in it together.

Authorities

[22] Numerous authorities have been referred to me by counsel, and others have emerged from my own researches. There is no fixed tariff for arson. This is because the facts and seriousness of such cases can vary significantly. In *R v Gilchrist* CA429/90 15 April 1991 the Court of Appeal noted that sentences for arson in the Court of Appeal had ranged from probation to eight years' imprisonment. The Court said at page 3:

> ... sentences in this area vary greatly because of the differences in the circumstances of the particular cases, and in the motives behind the offending. Arson is always serious. It is easy to commit but difficult to sheet home and has the potential to place lives in danger. It may be planned or committed on the spur of the moment. In some cases there may be a psychiatric background. The offender may have a sinister motive. Where the arson is a means of destroying incriminating or commercially valuable evidence the deterrent aspect of punishment will be an important consideration.

[23] The judgment in *Gilchrist* was issued in 1991. The range in sentencing for arson has not changed. Counsel for the prisoners referred to a number of sentencing decisions in the District Court where short sentences of imprisonment or home detention have been imposed. The Crown referred to cases where a starting point of five years for sentencing has been taken. In short, other cases are of little assistance because the nature of the offending and the circumstances of the offenders vary so greatly. But to the extent previous sentencing decisions provide some guidance, I must take what guidance I can from Court of Appeal authorities.

[24] On one aspect the authorities are consistent. As stated in *Gilchrist*, arson is always serious. In *R v Grindrod & Christie* CA263/99, CA268/99 20 October 1999 the Court of Appeal observed at [12], there was no doubt that a severe sentence was justified, emphasising the need for deterrence. In that case there was the arson of an

unoccupied residential property which the prisoners set alight using petrol they found in a nearby shed. They destroyed the home of the chief of the local volunteer fire brigade. Sentences of four years' imprisonment were imposed. The Court commented that the offending:

> ... causes not only damage, distress and inconvenience to the property owners but the risk of harm to fire-fighters and the community at large and fear to other members of the community.

[25] The facts in *Gilchrist*, a case to which I have previously referred, have some relevance because of the deliberate planning involved in that case and because the premises the subject of the arson were business premises. They were the premises of a debt collection firm which the prisoner set on fire in order to destroy records held. He engaged a professional burglar to break into the premises to ensure that any alarms would not be functioning. Certain items were taken from the premises prior to the fire. The fire that followed resulted in the building having to be demolished. Mr Gilchrist denied any involvement in the fire but was found guilty by the jury of arson. A sentence of four years' imprisonment on the arson charges was upheld in the Court of Appeal, as was a concurrent sentence of eighteen months' imprisonment on a burglary charge.

[26] The Crown referred to Court of Appeal decisions in *R v Munro* CA132/02 24 July 2002, *Gilchrist*, *R v Rameka* CAQ426/04 16 June 2005 and *R v Grindrod & Christie* in which sentences upwards of three and a half years have been imposed from starting points of five years, where starting points have been identified. The end sentences have taken account of mitigating factors where appropriate.

[27] I also note the case of *R v Neal* [2008] NZCA 327 which involved the arson of residential premises known by the offender to be occupied, where the offending involved a grave danger to life, although it was the offender herself who raised the alarm and called 111. The Court of Appeal considered a starting point for the offending was six years' imprisonment. Taking into account aggravating and mitigating factors relating to the offender, the end sentence on appeal was five years' imprisonment. A minimum period of imprisonment of three years was imposed.

[28] As with many of the other cases, residential premises were the target in the *Neal* offending and there was a known risk to human life.

[29] Cases such as *Munro*, *Rameka* and *Grindrod & Christie* can be contrasted with this offending because of the level of premeditation involved in this case. In those cases there was little premeditation, although clearly in order to commit the crime of arson some preparation is required such as in *Grindrod & Christie*, the obtaining from a nearby shed of a quantity of petrol by breaking into that shed, and in *Rameka* attacking the house property with molotov cocktails brought for the purpose.

[30] The Crown submits that the offending in the present case is more serious than in these cases because of the intentional, highly premeditated offending and the attempt to deliberately benefit financially from the offending. The Crown submits that a starting point in the vicinity of five to five and a half years' imprisonment is appropriate.

[31] Counsel for the prisoners, referring to decisions such as *R v Kelleher* DC WN CRI 2007-032-004218, 9 July 2009, *R v Silke* CA398/97 26 February 1998 and *R v Protos* CA259/04 19 October 2004, submit that a starting point in the region of two years or so may be sufficient. However, I note that the starting point in *Kelleher* was two and a half to three years and in *Protos* four years.

[32] I cannot accept the defence submissions as to the starting point. This was very serious, highly premeditated criminal offending. It caused extensive damage as well as placing at risk of injury or even life, members of the public, such as Mr Bateman, who were or might well have been in the vicinity of the premises when the dramatic explosion occurred shortly after 3 a.m. on the Sunday morning. The impact of that explosion was felt in neighbouring properties and caused glass, wood and various items to be forced randomly into the street and across the road. Members of the fire brigade who were urgently summonsed were also placed at risk. While it might be said in the prisoners' favour that they could have expected the premises to be vacant at that time, and indeed would have expected the restaurant premises to be vacant at that time, they could not have known that lives of members of the public

would not be placed at risk by the deliberate and dangerous manner in which they undertook the destruction of the restaurant property.

Sentencing

[33] This, as I have said, was very serious offending which I consider must be met by a sentence of imprisonment.

[34] I am mindful that the lead charge of arson was brought under s 267(2)(b) of the Crimes Act which carries a maximum penalty of seven years' imprisonment. If the offence of arson is charged under s 267(1) the maximum penalty is fourteen years' imprisonment. The distinction between the offences created by the two subsections is difficult to follow. It is usually unclear from the various judgments to which I have referred under which provision the charges of arson have been laid; whether under s 267(1) or (2), or under other provisions. But it is likely that the fourteen years maximum penalty applied in some cases. However, in this case the Crown elected to proceed under s 267(2).

[35] Bearing that in mind, and considering the totality of this offending with the aggravating factors I have identified, I take a starting point of four years three months' imprisonment. That starting point reflects and takes into account, the further charge of attempting to obtain a pecuniary advantage by deception, which may be categorised as an element of the lead charge of arson, an aggravating factor and a separate charge of which the prisoners were convicted.

[36] There are no mitigating features of the offending.

[37] As far as mitigating factors relating to the prisoners are concerned, they continue to maintain their innocence. There is no remorse. But I take into account their background, their previous good character and their personal effort and initiative in trying to establish themselves as self-supporting and worthy citizens in a new country. These attributes are supported by the many letters handed to me this morning, which I have read. It is to be regretted that finding themselves severely over-committed and without any apparent legitimate means of rescuing themselves

and their family from a rapidly deteriorating financial situation, they resorted to serious criminal offending. The outcome of this offending, though serious enough, could have been so much worse had there been loss of human life. I allow three months for these mitigating factors.

Sentence

[38] Please stand. Mr Carlos and Ms Husen: the sentence imposed on each of you for the charge of arson is four years' imprisonment. On the charge of attempting to obtain a pecuniary advantage by deception the sentence is fifteen months' imprisonment to be served concurrently with the lead sentence.

[39] Please stand down.