

SUPREME COURT OF QUEENSLAND

CITATION: *R v Johnson* [2007] QCA 249

PARTIES: **R**
v
JOHNSON, Eva Rose
(applicant)

FILE NO/S: CA No 94 of 2007
DC No 135 of 2006

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 3 August 2007

DELIVERED AT: Brisbane

HEARING DATE: 23 July 2007

JUDGES: Williams and Jerrard JJA and Mullins J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – where applicant pleaded guilty to arson of dwelling house – where applicant sentenced to four years imprisonment – where applicant eligible for parole after serving 15 months imprisonment – where plea was a late plea – whether too much weight given to pecuniary value of the property damage caused by the fire – whether sentence manifestly excessive

R v Ball [\[2001\] QCA 201](#); CA No 32 of 2001, 28 May 2001, distinguished

R v Barling [\[1999\] QCA 16](#); CA No 304 of 1998, 5 February 1999, considered

R v Collins [\[2003\] QCA 154](#); CA No 23 of 2003, 9 April 2003, distinguished

R v Cramond [\[1999\] QCA 11](#); CA No 411 of 1998, 4 February 1999, considered

R v Henderson [1993] QCA 336, CA No 198 of 1991, 16 August 1993, considered

R v Johnson [\[2005\] QCA 265](#); CA No 127 of 2005, 29 July

2005, distinguished

R v Matheson; ex parte A-G [1997] QCA 410; CA No 340 of 1997, 14 November 1997, considered

R v Sharkey [1994] QCA 121; CA No 28 of 1994, 29 March 1994, considered

R v Weyers [2001] QCA 311; CA No 52 of 2001, 2 August 2001, considered

R v Zuvela [1995] QCA 612; CA No 393 of 1995, 23 November 1995, considered

COUNSEL: A W Moynihan SC for the applicant
D R MacKenzie for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **WILLIAMS JA:** The circumstances giving rise to this application for leave to appeal against sentence are set out in the reasons for judgment of Mullins J which I have had the advantage of reading. I will not repeat what is stated therein.
- [2] Senior counsel for the applicant relied heavily on the observation by Jerrard JA in *R v Johnson* [2005] QCA 265 that "where there is no question of fraud and where the safety of others is not a consideration, the appropriate head sentence for the offence of arson is about three years." That observation should, in my view, be restricted to the precise circumstances of the case his Honour was then considering. It is significant that this Court in *Johnson* upheld a sentence of four years imprisonment with a recommendation for post-prison community based release after 12 months for the offence of arson in the circumstances of that case.
- [3] Mullins J has in her reasons referred to other decisions of this Court which indicate that in appropriate cases a head sentence of more than three years is justified for the offence of arson. I agree with all that is said in those reasons, but would add a reference to some observations made in this Court in *R v Matheson; ex parte A-G* [1997] QCA 410. There the offender was convicted after a trial of numerous offences including one of arson. He was also dealt with for a variety of other serious criminal offences, but was sentenced to five years imprisonment, cumulative upon those other sentences, in respect of the arson count. The Attorney-General appealed and counsel contended that a sentence of eight years would have been appropriate for the arson given the circumstances. The offender had broken into a carpet store, stolen some rugs, and later returned and set fire to the premises destroying them. The damage to the business was in the vicinity of \$1,000,000. In dismissing the Attorney's appeal the Court made the following observations which, in my view, are generally relevant when sentence for the offence of arson is being considered:
- "In considering the arson it should be borne in mind that this was deliberate and premeditated; and the appellant showed a callous disregard for those who might be affected economically, psychology and even physically. A nearby house had to be evacuated and, of course, there was a risk that those who attempted to put out the fire might be endangered. And there were the serious economic consequences ..."

- [4] The Court in that case also referred to a number of decisions where sentences in excess of five years imprisonment had been imposed for the offence of arson in circumstances admittedly involving more aggravating features than are present in the case now under consideration. Given the circumstances in which this offence was committed, and taking into account the factors personal to the applicant, I am not persuaded that the sentence imposed was manifestly excessive.
- [5] I agree the application for leave to appeal against sentence should be dismissed.
- [6] **JERRARD JA:** In this matter I have read the reasons for judgment of Mullins J, and agree with those and with the order proposed by Her Honour. I add that in *R v Collins* [2003] QCA 154 (a matter involving the arson of a motor vehicle) I quoted from the judgment of Mackenzie J in *R v Cramond* [1999] QCA 11, CA No 411 of 1998, where His Honour wrote:
- “Support can be found in the authorities for the view that where there is no suggestion of fraud and where the safety of others is not a consideration, a head sentence of up to three years may appropriately be imposed as for example in Henderson, CA No 198 of 1993 and in Sharkey, CA No 28 of 1994.”
- [7] The sentence of four years was reduced in *Cramond* to one of three years, similar to that imposed in *R v Weyers* [2001] QCA 311, CA No 52 of 2001, a matter of the arson of a bus, and to the three years imposed in *Barling* [1999] QCA 16, CA No 304 of 1998, the arson of a caravan causing \$10,000 worth of damage. I added later in *R v Collins* that:
- “The effect of the judgments in *Henderson*, *Sharkey*, *Cramond*, *Weyers*, and *Barling* is to establish a degree of consistency in head sentences for arson that does not involve potential fraud or possible injury to others.”
- [8] Mullins J has demonstrated in her reasons in this matter, in her analysis of other decisions of this Court in matters of arson, that that statement by myself in *Collins*, and repeated by me in *R v Johnson* [2005] QCA 265 (“...where there is no question of fraud and where the safety of others is not a consideration, the appropriate head sentence for the offence of arson is about three years”) should, for accuracy, be limited to those matters where the extent of the damage caused by the fire is not a significant factor. In *Henderson* it was \$20,000, in *Barling* \$10,000, in *Cramond* a motor vehicle valued at \$16,000, and in *Weyers* the bus was of modest value. A sentencing judge dealing with a matter in which there has been a significant amount of damage caused to another person’s property, such as in this matter, is clearly entitled to take that into account as a relevant factor when imposing sentence, as the learned sentencing judge did, and likewise a sentencing judge should consider the antecedents of the offender, and any other relevant matters. I agree with the judgment of Mullins J.
- [9] **MULLINS J:** The applicant pleaded guilty to arson on 3 April 2007 and was sentenced to four years’ imprisonment with eligibility for parole fixed at 3 July 2008 (after serving 15 months). The applicant applies for leave to appeal against sentence on the basis that the sentence is manifestly excessive.
- [10] The applicant was 45 years old when she offended on 1 March 2004. Her prior criminal history was minor and not relevant.

- [11] The applicant and the complainant had been in a de facto relationship residing at a house at Kingston which was owned by the complainant until they separated in January 2004. They had an argument at the applicant's unit on 29 February 2004. The complainant stayed with his mother that night. The applicant was observed entering the complainant's house at about 9.30 pm on that evening, but left it after a short time. At 2am on 1 March 2004 the complainant's neighbours heard a noise from the complainant's house. They saw the applicant's vehicle parked in the driveway. They identified the applicant as the person dressed in black whom they saw inside the house with a cigarette in her hand. They saw her leave and drive off in her vehicle without the headlights on. Shortly afterwards the neighbours noticed a glow in the kitchen and family room. Realising the house was on fire, they called emergency services and attempted to extinguish the blaze. They called the applicant and she returned to the house. The house was unoccupied at the time of the fire. It was extensively damaged.
- [12] Forensic investigations revealed that the fire had been deliberately lit and had started in the second bedroom. There was no challenge by the applicant at the sentence hearing to the contention that the fire was deliberately lit.
- [13] When the applicant spoke to the police on 1 March 2004, she told police that she went to the complainant's house at around 9 pm to 9.30 pm to do some spring cleaning and had entered through an unlocked sliding door. She denied lighting the fire.
- [14] When interviewed on 2 March 2004, the applicant told the police that she entered the house through an unlocked window to look for marijuana to help her sleep. She said she was feeling cold, looked for a jumper in the second bedroom and may have had a cigarette in her hand which she accidentally dropped in a pile of clothing.
- [15] The complainant's insurer paid him \$80,000 to repair the house and \$33,000 for the contents. The complainant sold the house and land, without repairing it, for \$110,000. The property was valued at \$175,000 prior to the fire.
- [16] On the night of the fire the applicant had drunk a six pack of beer and taken sleeping tablets in addition to her usual prescription medication. The applicant also smoked marijuana when she was inside the complainant's house. The applicant had a number of pre-existing medical conditions including chronic symptoms of obsessive compulsive disorder and depression and neck and low back pain from a motor vehicle accident. She had married at a young age, but the son of that relationship was killed in a motor vehicle accident at age 15 years. She has three adult children from her second marriage. Apart from raising her children, she had engaged in a variety of employment.
- [17] The applicant was committed for trial, but there were delays in trial dates being obtained. When the matter was finally due for trial in March 2007, the applicant decided to plead guilty after conferring with counsel.
- [18] The learned sentencing Judge described her act of burning down the complainant's house as "vindictive and selfish". It is without question (and appropriate) that the sentencing Judge proceeded on the basis of the prosecution's contention that the fire was deliberately lit by the applicant. The sentencing Judge noted that at the time the applicant was labouring under an emotional and psychological condition that was contributed to by alcohol and marijuana. The sentencing Judge correctly observed

that the plea could not be said to be timely, but did indicate remorse on the applicant's part that had assisted in the administration of justice.

- [19] The sentencing Judge referred to two decisions of the Court of Appeal as suggesting a head sentence of between three and four years: *R v Johnson* [2005] QCA 265 and *R v Henderson* [1993] QCA 336. The sentencing Judge referred to the "extremely heavy property damage" caused to the complainant's property as taking the case outside the lower category (of three years) and increasing the sentence to four years.
- [20] It is submitted on behalf of the applicant that the sentencing discretion miscarried because the sentencing Judge imposed a head sentence beyond the established range and placed too much weight on the pecuniary value of the damage to property. The applicant relies on *R v Collins* [2003] QCA 154, particularly at pp 6-7 and the statement of Jerrard JA in *Johnson* at p 9.
- [21] It is argued by the respondent that the sentencing Judge was entitled to consider the extensive property damage as a distinguishing feature that was recognised by Pincus JA in *Henderson* at p 5:
- "When I speak of circumstances requiring a heavier penalty I have in mind the possibility of danger to individuals in a dwelling, the possibility that there might be extremely heavy property damage..."
- [22] The respondent relies on a number of authorities that indicate that while the head sentence for arson may usually be around three years, a variety of other factors which are not limited to fraud or safety of others can result in a higher sentence. The respondent submits that the extent or nature of the damage caused by the fire may be such a relevant factor: *R v Zuvella* [1995] QCA 612 and *R v Ball* [2001] QCA 201.
- [23] The offender in *Henderson* who was 35 years old and married had a drinking problem. He was recently separated from his wife, when he returned to the former matrimonial home (that was rented) after consuming a quantity of alcohol, saw his wife's belonging packed up and decided to burn her things. He tipped the lawn mower contents on the fire he had started and that blew up causing damage to the home of just under \$20,000. There was an early guilty plea, but the offender had an extensive previous criminal history. On appeal his sentence was reduced to imprisonment for three years with a recommendation for parole after nine months. The statement made by White J at p 3 of the judgment on which the applicant relies must be considered in the context that there was a moderate amount of damage only caused to the dwelling house and where the offender was described as "reckless as to the result of starting the fire" and with "a more limited motive":
- "The authorities suggest that where there is no question of fraud to gain insurance money and where the safety of others is not a consideration, the appropriate head sentence for the offence of arson is about three years."
- [24] In *R v Ball* [2001] QCA 201 the offender who was 32 years old when sentenced and had a prior criminal history deliberately burnt down his wife's residence that she had inherited from her former husband. The marriage of the offender and his wife had broken down. The offender was the subject of a domestic violence order obtained by his wife. He pleaded guilty to breaking and entering a dwelling house with intent to commit an indictable offence (which related to his entry into the

house to start the fire), arson, resisting a police officer in the execution of his duty and breach of a domestic violence order. All of the offences arose out of the events involved in the arson. The offender had a confrontation with the police at the home immediately before the fire and had to be rescued from the burning house. The effective sentence (which was imposed for the arson) was five years' imprisonment suspended after 16 months had been served for an operational period of five years. The house was valued at about \$200,000 and was completely destroyed by the fire, as were its contents including memorabilia that were of a kind that had a strong sentimental value for the complainant and were irreplaceable. McPherson JA referred to the statement of White J in *Henderson* and observed that it was "not correct to regard this as intended to be a binding determination" and also referred with approval to the statement made by Pincus JA in the same case. The offender in *Ball* was unsuccessful in having his sentence reduced. The additional offences committed at the same time as the arson made *Ball* more serious than the present case.

- [25] The offender in *Johnson* was sentenced to four years' imprisonment with a recommendation for parole after 12 months. The offender was 48 years old at the time of the offence and had barricaded himself in the upstairs part of the house in an attempt to suicide after he set fire to the house. He had been drinking heavily and was depressed because of a recent separation with his wife. The fire had the potential to be a real risk to the safety of the tenant who resided in the same house. The heat and fire damage was confined mainly to the centre of the house and caused extensive charring and burning to furniture, but no significant structural damage. The aggravating feature of the offence and the focus of the decision in the Court of Appeal was the risk to the safety of others and the application for leave to appeal the sentence was refused. The extent of the damage caused in *Johnson* was much less significant than that caused by the applicant in the present case.
- [26] The facts in *Collins* and the personal circumstances of the offender were very different to the present case. The observations of Jerrard JA in *Collins* on which the applicant relies relate to a series of cases, however, where the extent of the damage caused by the fire was not a significant factor: *Henderson* (\$20,000 damage to house); *R v Sharkey* [1994] QCA 121; *R v Barling* [1999] QCA 16 (caravan and contents valued at \$10,000); *R v Cramond* [1999] QCA 11 (motor vehicle valued at \$16,000); *R v Weyers* [2001] QCA 311 (bus occupied as a residence of modest value).
- [27] The sentencing Judge was entitled to have regard to the significant amount of damage caused to the complainant's property as a factor in determining the appropriate sentence. The applicant is a mature offender who did not admit her guilt until her trial was ready to proceed. Taking into account all the relevant factors, the head sentence of imprisonment of four years was not outside the range of sentences that could have been imposed for the applicant's offending. The sentence that was imposed recognised the matters of mitigation in the fixing of the date for eligibility for parole after very slightly less than one third of the head sentence. I would refuse the application.