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106.

COURT OF APPEAL

3rd July, 1989

Before: Sir Patrick Neill, Q.C., (President)
D.C. Calcutt, Esq., Q.C., and
A.C. Hamilton, Esq., Q.C.

The Attorney General
- v -
Robert Reginald Coutanche

Appeal against sentence passed by the
Royal Court (Superior No.) on
20th March, 1989.

Advocate S.C. Nicolle, the Crown Advocate
Advocate C.J. Scholefield for the Appellant.

JUDGMENT

THE PRESIDENT: The accused in this case was charged with three offences of maliciously setting fire to material. Two of those offences were early in the morning of 6th November, 1988, and the third offence was on 25th November, 1988. On the first two charges the accused was sentenced to four years and there was a lesser sentence of eighteen months on the third charge. All sentences were made to run concurrently.

It is worth spending a moment on the facts of the first two incidents. In the first case the occupant of the ground floor flat of Durban House, Brighton Road, early in the morning noticed smoke and flames coming from an exterior staircase. In fact it was a wooden staircase. He tried to telephone the Fire Brigade, his telephone was out of order and he had to go to a neighbour's telephone.

The facts were that at the top of the wooden staircase there was a flat in which two ladies resided, aged respectively 59 and 64. They noticed the flames and they noticed the staircase was alight. They were also aware at that time that the Fire Brigade was there. Nevertheless they were put into a state of panic and were extremely frightened. They were rescued but had to be taken to the General Hospital and treated for shock. I think on that statement of the facts it is self-evident that there was a risk to human life. If an observant neighbour had not noticed the flames and taken prompt action, who can tell how the affair might have ended - quite possibly in death.

The second case on that same early morning period involved the occupants of a flat. They woke up to find their room full of smoke. They were coughing and were frightened and they, too, noticed firemen fighting the fires. In both cases the fires appear to have been started by rubbish being set alight in close proximity to dwelling houses. The second case, too, could as one knows from general experience have ended in asphyxiation, but again, fortunately there was no loss of life.

On the Court's general approach to the crime of arson, as it is called in England, or the statutory offence with which we are concerned here of maliciously setting fire to material, the general approach is (and here I quote Shaw L.J. in the case of R. -v- Slater (1979) 1 Cr. App. R. (S) 349): "Arson is always a very serious offence because once something has been set fire to there may be no means of limiting or controlling the consequences of the fire".

In another case, R. -v- Small (1980) 2 Cr. App. R. (S) 25, Bridge L.J. (as he then was) said this: "The offence of arson is always regarded by the Court as one of great gravity, particularly if it is an offence involving an

element either of intent or recklessness in relation to the possible endangering of human life". Nobody suggests intent here but recklessness is certainly something that may be in question, although of course Bridge L.J. was speaking in the context of a criminal offence that made recklessness a necessary ingredient.

We have had cited to us the book by Thomas on sentencing and from that it appears that the normal tariff in a case of arson is something in the range of three to five years. For very serious cases the sentence may be longer. We have had cited to us cases involving both seven and ten years' imprisonment and there may be special circumstances requiring a shorter sentence. But that is the general tariff.

Counsel for the accused relied rather strongly on the first paragraph of a passage which starts at the foot of page 170 of Thomas and goes on to page 171 and I will just read that:

> "Offences of arson are frequently connected with mental disturbance. The Court has recommended that a person convicted of arson should not normally be sentenced without psychiatric investigation ..." (I pause here to say that there was such investigation here) "... and where there is a sufficient basis of evidence the appropriate sentence may be a hospital order or sentence of life imprisonment subject to the principles discussed in chapter 7. Such sentences are generally preferable to long fixed term sentences if the offender is likely to represent a continuing danger in the future. Probation Orders with or without a requirement of submission to psychiatric treatment have been used in appropriate cases".

I think it is important to draw attention to the fact that the key sentence at the top of page 171 says: "The appropriate sentence <u>may</u> be" a hospital order or life imprisonment and then later comes the reference to a Probation Order.

I do not think it is correct to say that Thomas is laying down that there is some inflexible rule that in cases of proven psychiatric difficulty one of the three routes indicated must always be followed. Indeed, had he been

saying that, that would have been contrary to some of the authorities which we have seen. I will refer to three. R. -v- Gouws (1981) 3 Cr. App. R. (S) 325 was a case of arson where the accused had suffered from severe psychopathic disorder rendering him incapable of coping in an open society. He was not acceptable for a special hospital and was refused admission to a mental hospital, but he was there sentenced to six years' imprisonment. In the case of R. -v- Compton (1983) 5 Cr. App. R. (S) 411 there was evidence that the appellant had suffered from a combination of mental disorders. He had been subject to persistent depressions and had an unstable personality which was liable to lead to disruptive behaviour and suicidal tendencies. In that case he received a sentence of seven years.

Finally, very briefly reported in footnote (4) to the paragraph of Thomas which I have read out, is the case of R. -v- Bowman where ten years for setting fire to a house was held on appeal not to be too severe although life might have been appropriate in view of the psychiatric evidence.

Insofar as there is any suggestion that Thomas was saying that there were only three possibilities, that is not the case and we are satisfied that even in cases where there are psychiatric problems a prison sentence may be imposed.

Turning to the three possibilities I take first the question of the hospital order which Thomas mentions. We are told by counsel here that that is not available. There is no provision in the law of Jersey, so we are informed, that would enable a Court to impose directly a hospital order. To that extent it would appear that the law of Jersey is not the same as the law now prevailing in the United Kingdom in this matter. I think that is a matter which this Court would desire to draw to the attention of the appropriate authorities for further consideration. I hasten to add that we have not had time to carry out any research into the relevant statutory provisions, but we have put questions which give us reason to believe that the position is as I have stated and there is a difference in a significant respect between the law on the mainland and the law in Jersey. Therefore a hospital order, one of Thomas' three options, is not available. It is accepted that life imprisonment is not a possibility because this is a statutory offence with a maximum sentence of imprisonment of ten years. And finally as regards

probation, it is accepted that a Probation Order would not be suitable.

It was argued that we should consider adjourning the hearing of this appeal in order that the appropriate machinery could be set in motion for the making of a new guardianship order under the mental health legislation. In regard to that suggestion I have to say that there is nothing in the report of the Consultant Psychiatrist, Dr. Fogarty, which would make it highly desirable for us to follow that course and indeed if anything the report is to the contrary effect because, as has been pointed out, the psychiatrist draws attention to the fact that in the past the accused has not been visited with any criminal sanctions for his conduct and perhaps it will suffice to read this sentence from his report: "I would with respect suggest that some sanction by the Court is desirable since his misdemeanours in the past have never led to any legal sanctions imposed by a Court and I believe that only in this way can he begin to learn that his actions have consequences". That is a very long way from being something in a psychiatrist's report that would compel us now to adjourn so that a guardianship order should be made.

In the view of this Court what it comes down to is: what is the appropriate sentence for crimes of the gravity which I have described? The conclusion which we have reached, after giving careful consideration to everything which has been most cogently and persuasively urged on behalf of the accused, is that the sentence of four years is not excessive, is not wrong in principle and should be upheld.

Authorities

R. -v- Slater (1979) 1 Cr. App. R. (S) 349.

R. -v- Gouws (1981) 3 Cr. App. R. (S) 325.

R. -v- Compton (1983) 5 Cr. App. R. (S) 411.

R. -v- Small (1980) 2 Cr. App. R. (S) 25.

R. -v- Zywina (1984) 6 Cr. App. R. (S) 434.

A.G. -v- Drew and M (a minor) (1985-86) JLR N.6.

Thomas: Principles of Sentencing (2nd Edn.) pp. 170-2: Criminal Damage: Arson.

A.G. -v- Le Monnier (1987-88) JLR N.6.

R. -v- Bowman: Thomas "Principles of Sentencing": p.171: footnote (4).