

NCN: [2019] EWCA Crim 1633

No: 201902837 A3

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Tuesday, 3 September 2019

**B e f o r e:**  
**LORD JUSTICE SIMON**

**MRS JUSTICE McGOWAN DBE**

**MR JUSTICE FREEDMAN**

**REFERENCE BY THE ATTORNEY GENERAL UNDER**  
**S.36 OF THE CRIMINAL JUSTICE ACT 1988**

**R E G I N A**  
v  
**KAYLEIGH WOOD**

**Mr S Lloyd** appeared on behalf of the **Attorney General**

**Mr S Parry** appeared on behalf of the **Offender**

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**J U D G M E N T**

**LORD JUSTICE SIMON:**

1. The Solicitor General seeks leave to refer a sentence passed on Kayleigh Wood (aged 25), under section 36 of the Criminal Justice Act 1988, as being unduly lenient.
2. The sentencing judge was His Honour Judge Berkson and the sentence was imposed at the Crown Court sitting at Chester on 4 July 2019, following the offender's plea to count 2 on an indictment, an offence of encouraging or assisting the commission of an offence, believing that it would be committed contrary to section 45 of the Serious Crime Act 2007.
3. A co-defendant, Jack Robinson, had also pleaded guilty (in his case to count 1), the offence which the offender had encouraged or assisted. This count charged arson with intent to endanger life, contrary to section 1(2) and (3) of the Criminal Damage Act 1971, having deliberately set a fire at a block of flats at Pennine Court, Macclesfield.
4. The offender was initially charged on both counts but at a plea and trial preparation hearing on 15 March she pleaded not guilty to count 1 and guilty to count 2, and that plea was accepted by the prosecution and no evidence was offered on count 1. On 4 July Robinson was sentenced to a 12 year extended sentence of imprisonment, consisting of a custodial term of 8 years and a 4 year extended licensed period. The offender was sentenced to a term of 2 years' imprisonment suspended for 18 months. She was also ordered to carry out 200 hours of unpaid work and to pay a victim surcharge.
5. Since the crimes of the two defendants are closely linked it is necessary to refer to Robinson's offence, although his sentence is not the subject of a reference - a point made

by Mr Parry who appears on behalf of the offender.

6. Jack Robinson had previously been in a relationship with Katie Burness, who lived in a high rise tower block (Pennine Court, Carisbrook Avenue, Macclesfield). This consisted of 15 floors and 92 flats (all of which were occupied) and which housed around 246 people, including vulnerable people, some of whom had mobility issues. There were two secure communal doors for access.
7. On the day before the offence Robinson had been sending Ms Burness text messages from about 8.45 pm on 11 February into the early hours of the 12 February 2019. He sent a series of messages threatening to set fire to the flats. He accused her of "shagging someone else" and stated that she never loved him. He said he was going to kill her and burn her alive. During that time Robinson also made it clear in text messages to the offender (with whom he was in a relationship) that he was going to set someone's home on fire. She replied: "No you're not, I'm on my way". Robinson responded "I am. Leave it Kayleigh". The messages indicated that he was initially trying to put her off. He messaged: "Don't come, I'm going to kill this kid. Watch." He later said: "If you love me you'll take me to do this."
8. At 3.26 am on 12 February the offender's car was seen at a Shell petrol station. The offender was driving and Robinson was in the passenger seat. Robinson purchased £7 of petrol and a canister containing the same. He paid using the offender's card. At about 3.45 am Robinson poured petrol over and around the front entrance communal doors to the flats. He set it alight and then fled. In doing so he intended to endanger the lives of the

occupants.

9. Having driven him to the scene the offender waited for Robinson and then drove him away. Immediately following the setting of the fire, Robinson sent a text message to Katie Burness telling her to look outside the flat. At 4.20 am he sent another text message telling her that she got what was coming to her. Fortunately the fire did not take hold. It went out once the fuel was spent.
10. A fire officer of the Peaks and Plains Housing Department explained that the tower block had a fire alarm system, it was cladded in non-combustible material with fire rated paint on the walls. She confirmed that damage was caused to the front entrance door and that the surrounding areas were charred. Had the fire spread beyond the entrance the outcome could have been catastrophic.
11. In her police interview the offender made admissions as to her involvement but claimed that she was acting under threat of physical violence from Robinson. She said she had driven to meet him with a view to calming him down. They drove to the forecourt of the petrol station where he bought the fuel although she said that she tried to stop him. She drove him to the scene knowing that he was going to set a fire outside the flat. She drove him away from the scene to the home of one of his friends. It was put to her that there were messages on her phone the next day revealing that she was offering to hide him from the police at her home, and she then commented that she felt controlled by him but she also wanted to be with him. The offender had no previous convictions.

12. A pre-sentence report was prepared. It noted that the offender had been in a number of abusive relationships and it was her intimate relationship with Robinson that linked her to the offending behaviour. The exact cause of her fixation and attachment when entering into new relationships was unclear. Being a victim of domestic abuse would have been a traumatic experience and while Robinson was not physically violent towards her, he made repeated threats to punch her during the commission of the offence. In her circumstances it was understandable that the offender may have believed he would carry out these threats especially when considering his erratic and aggressive behaviour.
13. The author of the report noted that her infatuation with Robinson appeared to have underpinned her willingness to comply with his demand. She did not seek to justify her actions because of the level of coercion Robinson placed on her. She was assessed as a low risk of re-offending and a low risk of causing serious harm in the future.
14. The report noted that she was a single parent to an 8-year-old daughter and her primary concern was for her daughter and the impact on them being separated. Although she confirmed that her mother would be able to care for her daughter, the report observed that custody would have a detrimental effect on the offender and her daughter. Her risk of re-offending and the risk of serious harm could be managed effectively in the community.
15. Katie Burness had declined the opportunity to provide a victim personal statement.
16. A business impact statement was provided on behalf of Peaks and Plains Housing Department. Immediately following the fire the incident was discussed on social media by

residents and local neighbours, emotions were running high and the office received calls from concerned residents of the tower block. At that stage the suspect was unknown and staff had to reassure residents, most of whom were elderly and vulnerable including people with mobility issues. As a result a security firm were hired at extra cost during the night-time periods (costing over £1,000 over a period of three nights). Police uniformed patrols were asked to assist in reassuring the community. None of the residents witnessed the fire while it was alight but the impact afterwards was described as "huge". If the fire had caught and the building ignited there would have been loss of life and damage to property. A new main door had been installed at a cost of over £1,000.

17. At the sentencing hearing the prosecution referred the judge to the case of *R v Myrie* and the suggested starting point of 8 - 10 years for an offence of arson with intent to endanger life. The prosecution identified that the arson offence was motivated by animosity on the part of Robinson towards Ms Burness and was an act of vengeance. The offence was planned; and he had also involved the offender. The use of fuel as an accelerant was itself an aggravating feature in relation to the arson. The building targeted was substantial and had the potential for a large number of vulnerable victims. Furthermore, the prosecution observed that Robinson's antecedent history aggravated the offence: he had 11 previous convictions for 22 offences, including robbery in 2008, 2012 and 2016, and he was on licence in relation to the 2016 robbery at the time of the offence. It was also noted that alcohol played its part so far as he was concerned.
18. In terms of mitigation, the prosecution observed that the fire did not take hold and damage was limited.

19. In relation to the offender the prosecution highlighted that a person convicted of an offence contrary to section 45 of the Serious Crime Act 2007 was liable to any penalty for which he or she would be liable on conviction of the anticipated or reference offence. The judge remarked that he was required to "scale down" the sentence depending upon the encouragement and assistance given whilst having "some reference" to the main offence.
20. During the hearing Robinson said to the judge "she was forced to do it"; and the offender relied on his wider coercive behaviour in mitigation. The prosecution observed that the offender had chosen to participate and had chosen to travel to meet Robinson, although he had made it clear to her what he was planning to do. The prosecution accepted that "to a certain degree she was in his thrall" and that "perhaps there were elements that were threatening in relation to Robinson's behaviour".
21. Counsel for the offender (then as now) Mr Parry relied on the pre-sentence report and the references from family members. He submitted that her role was limited to assisting Robinson to get to the petrol station to obtain the petrol, to driving him to the scene of the incident and then driving away afterwards. She had initially gone to try and calm Robinson down. At the petrol station Robinson had told her to get out, fill the canister and pay for it. She refused. She was crying and hysterical and continued to plead with him not to do it. Threats were made. There was no actual violence but she was frightened and through that fear she drove him onto the address feeling that she had no choice.
22. The offender had, since the incident, sought out Ms Burness to apologise to her for the part she had played in the offending and that apology had been accepted. Counsel observed

that the offender had for a number of years suffered with anxiety and depression, and had been receiving counselling. She had been in previous abusive relationships. She came from a close and supportive family. The impact on her daughter of imprisonment would be enormous. The crime was entirely out of character. She set out to try to do the right thing but under pressure became involved to a limited degree and had expressed genuine remorse.

23. In passing sentence the judge noted that the prosecution had recognised by accepting the plea to count 2 that the offender had not been jointly involved in the arson with intent to endanger life. But nevertheless it was a serious case of assisting in a serious crime. Counsel for the offender acknowledged that it passed the custody threshold.
24. The judge gave full credit to pleas of guilty. The offender was aware of what Robinson was threatening to do and was concerned by it. Nevertheless she drove him to a petrol station, then to the scene and then away again after the offence. Robinson had put at risk the lives of every occupant of the flats.
25. The judge took account of the fact that the offender had no previous convictions and the letters written in support. He noted that in contrast Robinson had a number of previous convictions including robbery with weapons. At the time of the index offence he was on licence for a robbery committed in 2016. He noted that Robinson felt guilty about getting the offender involved and had shown remorse. The judge recognised substantial mitigation in the case of the offender. He took account of both culpability and harm in reaching sentences. He found that Robinson's crime was aggravated by the fact that he had, in his



own words, "forced" the offender to become involved.

26. In relation to the offender, the judge observed that he must have regard to the main offence in assessing her culpability and the harm caused. It had been accepted by the prosecution she did not have the same motivation as the co-defendant and that she was somewhat in his thrall at the time.
27. The judge also had regard to the impact of any sentence upon the offender's young child for whom she was the primary carer. The judge then passed the extended sentence of imprisonment on Robinson. In relation to the offender the judge observed that her offending crossed the custody threshold "by some margin", particularly in view of the serious nature of Robinson's crime. Having taken account of the mitigation, the appropriate custodial term after a trial would have been a term of 3 years. That was reduced by one-third to reflect the plea of guilty. Due to her exceptional mitigation and the significant impact on others by an immediate sentence the judge suspended the sentence for a period of 18 months. He attached a community order of 12 months with an order that she carry out 200 hours of unpaid work.
28. For the Solicitor General Mr Lloyd drew attention to the aggravating features of Robinson's crime: it was an act of vengeance; preplanned; fuel was used as an accelerant; the property was targeted and was substantial; the premises were occupied at the time and the crime endangered a large number of victims; he had involved the offender; his conduct was affected by substance misuse; he had a bad antecedent history and he was on licence at the time.

29. These points are significant so far as the sentencing of the offender is concerned. First, to the extent that the sentence for assisting the offence must bear a relationship to the sentence for the offence which was assisted or encouraged many of these aggravating features: previous offences; substance misuse and offending while on licence did not apply to the offender. Second, one of the aggravating factors identified by the Solicitor General (involving the offender) is a matter that favours the offender so far as the seriousness of her criminality is concerned.
30. The Solicitor General also identified those factors which reduced the seriousness of Robinson's offending: whatever his intentions the fire in fact did not take hold and the damage was limited.
31. So far as the offender is concerned, it is submitted on the Solicitor General's behalf that the serious nature and characteristics of the reference offence (arson with intent) made the encouraging or assisting offence more serious. Against this it is acknowledged that there was substantial mitigation. A degree of coercion falling short of duress, previous good character, her remorse, the impact of an immediate sentence of custody on her 8-year-old daughter for whom she was the primary carer.
32. The Solicitor General has referred the court to a number of authorities on sentencing for the offence of arson with intent: *Attorney General's Reference No 68 of 2008 (R v Myrie)* [2009] Cr App R(S) 48; *R v Trickett* [2016] EWCA Crim 1604; *R v Young* [2016] EWCA Crim 678 and *R v McKay* [2018] 1 Cr App R(S) 26. Those cases throw light on the appropriate sentence for the Reference offence but, as we have noted, no complaint is

made about the sentence passed on Robinson - a term of 8 years with a starting point of 12 years.

33. More directly in point Mr Lloyd submitted that the offence of encouraging or assisting, contrary to section 45 of the 2007 Act, carries by reason of section 58(3) the same maximum sentence as the anticipated or reference offence. It was for this reason that this court in a number of cases has said that it is relevant to consider the potential scale of the anticipated or reference offence (see *Watling (Mark)* [2013] 2 Cr App R(S) 37 at paragraph 13; *R v Hall* [2013] EWCA Crim 2499 at paragraph 29 and *R v Woodford (Anthony)* [2014] 1 Cr App R(S) 32, at paragraphs 12 - 13).
  
34. Mr Lloyd submitted that the sentence imposed on the offender was unduly lenient. The index offence of arson with intent was a preplanned act of vengeance by Robinson knowingly assisted by the offender. A fire was started at the entrance to a large residential block which housed a number of vulnerable people. Although it did not catch or spread, the consequences of a fire could have been catastrophic. Significant custodial sentences were required in relation to both Robinson and the offender. As the authorities indicate the judge was required to have regard to any guidance in relation to the reference offence (in this case the index offence of arson with intent). Robinson's starting point was identified as 12 years' imprisonment had there been a trial. However, the judge did not appear to have any regard to the relevant guidance (*Myrie*) in considering the offender's sentence, nor any regard to Robinson's identified starting point of 12 years' imprisonment. He ought to have considered the sentence the offender might have received had she had been convicted of the index offence herself. Given the nature of the building and the other

circumstances to which our attention has been drawn, he should have identified as a starting point a sentence in the region of at least 9 years' imprisonment. The sentence would then have had to be reduced to reflect the offender's mitigation which of course included a degree of coercion, previous good character and the fact that she was the primary carer for her 8-year-old daughter. The sentence would then also fall to be adjusted by virtue of the fact that she was convicted of the offence of encouraging and assisting as opposed to the reference offence of arson with intent. Taking all these matters into account, the judge ought to have arrived at an overall sentence of no less than 6 years' imprisonment and, with full credit for plea, the sentence ought to have been no less than 4 years' imprisonment.

35. For the offender, Mr Parry has submitted today that the judge plainly had in mind the sentence for the reference offence, as is clear from the discussion during the sentencing hearing. He notes that Robinson's sentence of 8 years has not been referenced, and points to the distinction between Robinson's case and that of the offender. The offending by Robinson was very much more serious, and this was properly reflected in the different sentences. He draws attention to the fact that the offender was pressurised by Robinson, that she was of good character, she had been isolated and it was an abusive relationship. There was her remorse, she was in employment and she cared for her young daughter. These matters were strong personal mitigation bore materially on the sentence. In contrast, Robinson was on licence at the time, he was of bad character and he was a dangerous offender. Mr Parry submitted that it was an exceptional case and the sentence, although merciful, was justified by the circumstances. He also informed us that by the end of today the offender would have completed 63.5 hours of work that the sentence required of her.

36. We have considered these submissions. The seriousness of the offence under section 45 of the Serious Crime Act 2007 will depend, as is clear from the cases of *Watling*, *Hall* and *Woodford*, on the seriousness or potential scale of the anticipated or reference offence. This is because as the court explained in *Woodford* at paragraph 12, where the offending is charged under section 45 the essential element of the offence, unlike that under section 44, is that the offender believed that the full offence would be committed and that his or her action would encourage or assist its commission.
37. In the present case we are satisfied that the judge did have regard to the case of *Myrie*. However, the seriousness and potential scale of the reference offence is only part of the enquiry. It is also important to assess the degree of the assistance or encouragement. The difference in degree of such assistance or encouragement may be marked: on the one hand, there may be assistance which is close to participation in or conspiracy to commit the Reference offence. In such cases the sentence for section 45 offending maybe close to the sentence for the reference offence. *Watling* and *Woodford* were examples of such cases, importing or supplying cutting agents for the use in the supply of Class A drugs. As the court expressed the point in *Watling* at paragraph 13, the appellant's "culpability was high and his role was pivotal". However, a defendant's role may not be pivotal and it will be necessary in any event in forming a view about the seriousness of the offending to assess the degree of assistance or encouragement provided. This is what the judge meant when he referred to "scaling down" the sentence depending on the degree of assistance or encouragement provided, while having regard to the reference offence.
38. In the present case there was assistance, much of it unwilling but little, if any,

encouragement. Rather the contrary. Robinson told the judge that he had "forced" the offender to become involved. The judge himself noted that she was somewhat in "thrall" to Robinson at the time and the Solicitor General acknowledges there was "a degree of coercion falling short of duress".

39. Of course she should not have assisted Robinson and in becoming involved in the way she did she committed a serious crime which fully justified a custodial sentence. However, we do not accept the Solicitor General's submission as to the way in which the sentencing should have proceeded. The seriousness of the offending was not simply to be measured by reference to Robinson's much more serious offending.
  
40. In our view, the judge carefully reflected on this sentence and his approach both accorded with principle and resulted in a just and merciful sentence. Although we grant leave, we decline to interfere with this sentence.