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Neutral Citation No. [2023] EWCA Crim 1305

IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2023/01657/A2



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Tuesday 31<sup>st</sup> October 2023

**B e f o r e :**

**LORD JUSTICE DINGEMANS**

**MR JUSTICE JAY**

**MR JUSTICE GOSS**

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**R E X**

**- v -**

**ISHMAIL ZAFAR**

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Computer Aided Transcription of Epiq Europe Ltd,  
Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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**Mr J Scobie KC** on behalf of the Applicant

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

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## **LORD JUSTICE DINGEMANS:**

### **Introduction**

1. This is the hearing of a renewed application for leave to appeal against sentence following refusal by the single judge.
2. The applicant is now aged 30 years. Before the conviction which is the subject of this proposed appeal, he had three previous convictions for assault occasioning actual bodily harm, possession of a Class B drug with intent to supply, and being drunk and disorderly. He had not served an immediate custodial sentence before, but he had been the subject of a suspended sentence of imprisonment for possessing a Class B drug with intent to supply.
3. On 6<sup>th</sup> June 2022, in the Crown Court at Luton, he pleaded guilty to an offence of criminal damage (count 1). On 26<sup>th</sup> October 2022, he pleaded guilty to two counts of arson being reckless as to whether life was endangered (counts 2 and 3).
4. On 21<sup>st</sup> April 2023, the applicant was sentenced to 86 months' (seven years and two months) imprisonment on each count of arson being reckless as to whether life was endangered, to run concurrently with each other, and to a concurrent term of 12 months' imprisonment for the criminal damage.

### **The Factual Circumstances**

5. In the early hours of the morning on 19<sup>th</sup> April 2022 the occupants of a property known as Mangrove Green woke up to find that the windows in the bottom floor of their house had been smashed and that their car, parked on the drive of their home, had been set alight. Accelerant was later found to have been used on the first car which had been set alight. The fire quickly spread to another car parked next to it. The house, which was a detached wooden barn conversion in a rural setting, was in close proximity to the fires. We have seen the

photographs. The occupants were at home asleep in their beds. They were Katherine McPherson and her two adult children. The two vehicles were a Mini Classic, which was completely burnt out, and a Ford Fiesta, which suffered significant damage to the passenger side. The value of the cars, which were written off, was £20,000 and £12,000, and the cost of the damaged windows was £2,800, plus VAT.

6. The neighbour had heard the noise from the fire, knocked on the door of Mangrove Green to warn the occupants, and had then called the police. The police and the Fire Brigade attended and an examination was made. Blood was recovered from one of the smashed windows and the applicant was identified through DNA testing.

7. It was the prosecution case that the fire was started intentionally and, although the police believed that the wrong house had been targeted, the applicant was a party to the starting of that fire. The fire investigator concluded that the fire had been started deliberately, with the use of an accelerant, and that it had the potential to spread to the adjacent property, putting occupiers at risk.

### **The Sentence**

8. The guilty pleas to counts 2 and 3 (the arson as to whether life was endangered) were tendered on 26th October 2022, which was the first day of the applicant's trial. The guilty pleas were on an agreed basis, that the applicant did not know that there was any plan to set fire to anything when he was conveyed to the property. He thought that windows were to be smashed at the property, and he did smash them. He accepted that when he was there, the car was set alight by another and accepted joint responsibility for that. No further details were given in the basis of plea.

9. After the guilty pleas were taken, the sentence was adjourned for the preparation of a pre-

sentence report to assess issues of dangerousness. The PSR identified that the applicant had become involved because of debts owed to others. A psychiatric report was obtained, but no evidence of a mental disorder was found. Also obtained for the sentencing exercise were various references which we have seen, noting the applicant's qualities of hard work, loyalty and his charitable works. There was a positive report from prison.

10. In a Victim Personal Statement, Katherine McPherson referred to her terror which was continuing six months after the event. She was waking up in cold sweats in the middle of the night, not knowing why the applicant had done what he did. Her adult son had been too traumatised to go into the house again. He talked about the effect of the attack on his mother and sister. The adult daughter had had a two hour long severe panic attack the day after the offence.

11. When sentencing, the judge set out the facts. He said that he would sentence in accordance with the basis of plea. He said that he had regard to the psychiatric report and mitigation. He said that it was culpability B offending, because the applicant was reckless as to whether life was endangered; and he found that there was category 1 harm because there was serious psychological harm caused. Based on the Victim Personal Statements, the judge was sure that there was serious psychological harm. That gave a starting point of six years' custody, with a range of four to ten years. Aggravating factors were the use of accelerant, the recent conviction for assault occasioning actual bodily harm, being on bail at the time, and the fact that the applicant was involved with others who were acting out of revenge.

12. Mitigation included an element of being asked to do this with someone else, albeit well short of intimidation or coercion; genuine remorse; the fact that he had worked throughout his whole life; and the fact that he was in prison at a difficult time because of lockdowns.

13. The judge was narrowly persuaded that the applicant was not dangerous, and he imposed a determinate sentence. The judge went from the starting point of six years, having balanced the aggravating and mitigating features, to eight years' custody, before then giving a discount of ten months for the guilty plea. That is how he calculated the sentence of 86 months.

14. The written proposed grounds of appeal are: first, that the judge selected too high a starting point on counts 2 and 3; second, that the judge wrongly increased the starting points in respect of statutory and other aggravating factors, which was not justified; third, that the judge failed to mitigate the applicant's sentence; fourth, that the judge failed to give appropriate weight to the principle of totality; fifth, that the judge failed to make any allowance for the impact of the Covid pandemic on the prison estate; and sixth, that in the circumstances the sentence was manifestly excessive. We are very grateful to Mr Scobie KC for his helpful submissions this morning on behalf of the applicant.

15. As to the category, it is common ground that the offending is culpability category B. It was said in writing that the judge should not have placed the offence into category 1, although the point was not pursued orally by Mr Scobie this morning before us. In our judgment, the judge was entitled to find, in the light of the Victim Personal Statements, that very serious psychological harm was caused. That deals with the first point.

16. The real question advanced in oral submissions before us was whether the judge had gone from six to eight years on a justifiable basis when balancing the aggravating and mitigating factors. It is necessary, therefore, to consider the aggravating factors. They included: the use of the accelerant; the applicant's recent conviction for assault occasioning actual bodily harm, of which Mr Scobie gave us more details this morning. It seems that there was a roadside altercation and a passer-by, who was an off-duty police officer, intervened and he was then assaulted. In our judgment, the judge was entitled to, and indeed

had to, refer to that. The judge was also obliged to refer to the fact that the applicant was on bail for that offence at the time; that is a statutory aggravating feature. The judge was further entitled to have regard to the revenge nature of the attack, which was not inconsistent with the basis of plea, because the applicant had agreed to smash the window's of someone else's property, which was always likely to be a revenge attack. The judge took careful account of the basis of plea. In those circumstances the judge had rightly identified the aggravating factors.

17. We turn to the mitigating factors. They were identified as: the lack of premeditation of the arson, which was apparent from the basis of plea; the applicant's genuine remorse; his hard work (described as a "strong work ethic" in the Advice on Appeal), which was evidenced by compelling references; the fact that this was the applicant's first time serving a custodial sentence in prison; and the fact that he was doing well in prison. In those circumstances the overarching submission made by Mr Scobie is that that judge was entitled to go up from six years when balancing the aggravating and mitigating features, but to go up to eight years, before giving a discount for the guilty plea, was manifestly excessive.

18. In our judgment, the judge was entitled to reflect the aggravating and mitigating features as he did. This was very much a matter for the sentencing judge, who was acting within the bounds set out by the sentencing guidelines. We consider that the sentence is severe, but we are wholly unable to characterise it as manifestly excessive.

19. We would, therefore, and notwithstanding the helpful submissions made this morning, be minded to refuse the renewed application for leave to appeal against sentence.

20. There is, however, an issue on count 1 (criminal damage to the windows), which was identified by the Registrar, to whom we are grateful, and which has been pursued orally by

Mr Scobie this morning.

21. The maximum sentence on count 1, given the value of the damage to the windows, was three months' imprisonment. The offence of criminal damage had properly been committed to the Crown Court because the other offences were indictable only, but the Crown Court was bound by the penalty as if it was summary only, given the value of the windows. The judge in fact imposed a concurrent term of 12 months' imprisonment on count 1. This exceeded the maximum available.

22. Given the circumstances of a night time attack on an occupied property and the fact that the sentence was to be made concurrent, the judge, in our judgment, would have been entitled to take the top of the sentencing range of three months' custody (12 weeks), before discount for the guilty plea. The applicant was entitled to credit of 25 per cent for the plea. This gives a sentence of nine weeks' imprisonment.

23. Accordingly, we grant leave to appeal and we allow the appeal to the following extent. We quash the sentence of 12 months' imprisonment on count 1 and substitute for it a sentence of nine week's imprisonment. The sentence remains concurrent with the seven years and two months' imprisonment on each of counts 2 and 3, which are concurrent with each other. Therefore, although the appeal has been allowed, the overall sentence remains the same.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: [rcj@epiqglobal.co.uk](mailto:rcj@epiqglobal.co.uk)

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