IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA 2/19

BETWEEN	**DAVID TONORIO**
	Appellant
AND	**THE CROWN**
	Respondent

Coram: Williams P, White JA, Asher JA
Hearing: 4 June 2020
Appearances: Mr N George for the Appellant
Ms K Bell and Ms J S Epati for the Respondent
Judgment: 23 [...] June 2020

JUDGMENT OF THE COURT OF APPEAL

A. The appeal against conviction is dismissed.

B. The appeal against sentence is dismissed.

INTRODUCTION

[1] On 14 June, 22 June and 8 July 2018 there were three serious fires in Rarotonga. The appellant was charged with three counts of arson. He pleaded not guilty. He was also charged with two unrelated burglaries to which he pleaded guilty.

[2] The arson charges were heard in a six day trial which commenced on 29 July 2019. The jury returned verdicts of guilty.

[3] On 9 August 2019 the Trial Judge, Doherty J, sentenced Mr Tonorio on the arson and burglary charges to eight years and six months imprisonment.

[4] Mr Tonorio appealed against both conviction and sentence. The notice of appeal contained a number of grounds and there were additional grounds raised in submissions, without procedural objection from the Crown.

[5] There was a submission that the Crown evidence, in particular evidence of four confession witnesses, fatally lacked corroboration, and lacked credibility. It was submitted that there was strong alibi evidence which was not given sufficient weight. It was said that the Crown case was unduly complex, and the Trial Judge's summing up defective. There was also an allegation of prosecutorial misconduct. Effectively it was argued that there had been a miscarriage of justice because there was not sufficient evidence before the jury upon which Mr Tonorio could be safely convicted.

[6] In relation to sentence it was argued that there was a failure to adequately take into account Mr Tonorio's age, and that the sentence was manifestly excessive.

[7] This appeal has been heard during the Covid crisis when the Judges were unable to travel to the Cook Islands. With the co-operation and support of counsel, it was heard by video link, with counsel in the Court at Rarotonga, and the Judges in Auckland. We express our gratitude to counsel and the Court staff for their co-operation and support.

BACKGROUND

[8] The first fire took place on 14 June 2018 when the Friendly Mart at Arorangi burnt down. The next fire was on 22 June 2018, when the Tex Mart at Arorangi was burnt to the ground. Then approximately two weeks later on 8 July 2018 the Raro Mart in Avarua burnt down.

[9] There were no eyewitnesses to any of the fires, no video footage, and no DNA or other scientific evidence linking any particular person to the fires.

[10] The Crown case that Mr Tonorio was the arsonist was based on four confessions that he had allegedly made to friends, all of whom were called as witnesses. Mr Tonorio was aged 17 at the time of the fires, and the core persons who were called by the Crown to give evidence of the alleged convictions were all of about that age or younger, and were his friends or acquaintances.

[11] If the confessions were accepted, it followed that the fires were deliberately lit. The focus of the case was on who had lit the fires, rather than how they were lit and whether the lighting was deliberate. There was expert evidence put to the jury that the Friendly Mart and Tex Mart fires were deliberately lit, using accelerants. In relation to the Raro Mart, the Crown did not put forward evidence conclusively establishing a cause of the fire, but there were suspicious circumstances indicating that the fire could have been deliberately lit. We are satisfied that during the trial the defence took no particular issue about how the fires started. The real issue was whether Mr Tonorio had lit them.

[12] We now set out, based on the Crown summary, the evidence of the four key confession witnesses on which the Crown case depended:

TIMOA KOKORIA

[13] Mr Kokoria was 16 years old at the time of giving evidence and 15 at the time of the fires. He was a friend of the appellant. He said that Mr Tonorio had confessed to lighting all three fires. When he gave his evidence at the trial, the transcript shows that he was reluctant to get his friend Mr Tonorio into trouble. At the end of the evidence in chief he was declared hostile. However an overview of his evidence, including what he said under cross examination, shows that he confirmed that the confession of lighting the fires, was made to him.

[14] Specifically Mr Kokoria gave evidence that the appellant made the following admissions to him:

(a) He burned down the Tex Mart because of the CCTV cameras.

(b) He burned down the Raro Mart.

(c) He burned down the Friendly Mart and that he got into the Friendly Mart via a hole in the top of the roof.

[15] In relation to his credibility, he gave the following evidence:

(a) That he was a friend of David's and did not want to see him get into trouble.

(b) That all the police said to him was that he had better tell the truth, and that the information about the fires just *"slipped out of my mouth"* when he was being questioned by the police about some burglaries.

[16] In relation to the defence allegation of him being an agent of the police, Mr Kokoria gave the following evidence:

(a) The police did not ask him to ask Mr Tonorio about the fires.

(b) The information about the fires just *"slipped out of my mouth"* when he was being questioned about some burglaries.

PHILLIP HOSKING

[17] Mr Hosking was 19 at the time of the trial and 18 at the time of the fires. He was another friend of Mr Tonorio. He gave evidence in court that Mr Tonorio made the following admissions to him:

(a) He broke into the Raro Mart looking for money and then burned it down.

(b) He got into the Raro Mart by climbing a tree on the side of the building, and then got in through a top window.

(c) He was responsible also for the Friendly Mart fire and was not responsible for the Tex Mart fire.

[18] In relation to his credibility, the following exchange happened in cross examination:[1]

Q. Can I just put this to you. Did you not make this up to get the police off your back?

A. No.

[1] Notes of evidence, page 106, lines 25-30

Q. Did you feel better after you told police about it?

A. No.

Q. How did you feel?

A. Betrayal toward my friend.

[19] In relation to the issue about him being an agent of the police, Mr Hosking was asked whether he was troubled by what other people were saying. He denied being asked by police to make enquiries of Mr Tonorio about the fires.

JONATHAN SIMPSON

[20] Mr Simpson only knew the appellant through Phillip Hosking. He gave evidence in court that he asked Mr Tonorio whether he was the one that burned down Friendly Mart. When Mr Simpson was asked about the response to his question, he deposed that Mr Tonorio said "oh ah yeah". The other two fires had not occurred at that time.

[21] Mr Simpson denied asking the question of Mr Tonorio because of a police request and essentially asked out of suspicion. He made it clear that after Mr Tonorio admitted the Friendly Mart fire to him that the appellant was not to come around anymore as he did not want to be involved.

PUAPII NICHOLAS

[22] Mr Nicholas was a friend of the appellant. He was called by the Crown to give evidence, based on a statement he had made to police that Mr Tonorio had confided in him. Mr Tonorio had said to him that he was responsible for one of the fires.

[23] At trial, Mr Nicholas recanted his statement saying that he had lied to the police about Mr Tonorio to get back a phone that was taken off him by police some time before that.

[24] After a voir dire hearing Mr Nicholas was declared hostile. He maintained his retraction under cross examination by the Crown. The Crown ultimately closed by dealing with the evidence of this witness in the following way:

> The fourth person Puapii told us that he lied to the police. Even though he acknowledged at the end of his evidence that the police told him that if he wanted his phone back, he needed to

> supply evidence that he owned it. Which you may think is not surprising given all the phones he admitted to stealing.
>
> He also told us that he lied to his aunt for unknown but different reasons. And whilst the Crown says he has probably lied to this Court, at the end of the day he admitted to consistently lying. And so his evidence is completely unreliable and should be put to one side. His evidence does not take us anywhere ...

[25] The Judge also specifically commented about the evidence of Mr Nicholas and concluded by saying:

> Can I suggest to you that you treat his evidence very carefully, in making your decision and you might want to, it is a matter for you, set it completely aside as being unreliable. Again that is a matter for you but treat it with particular care.

DEFENCE CRITICISMS OF THE CONFESSION EVIDENCE

Lack of corroboration

[26] It was Mr George's submission that the confession evidence should have been corroborated. He submitted that it was an omission by the Judge not to mention or explain the need for corroboration to the jury.

[27] The common law as to corroboration applies. There is no evidential requirement in the Cook Islands that all confessions require corroboration, and there is no such requirement at common law. There can be a requirement of corroboration of accomplices and interested witnesses, but none of these would have applied to these confessions, as is made clear in *Halsbury's Laws of England*.[2] There is no obligation to make a direction about corroboration of confessions in criminal trials at common law.

[28] Today there are statutes that set out rules of evidence in England. Most corroboration requirements have now been removed from English law. There are at present no rules as to confessions, although under s78 of the Police & Criminal Evidence Act 1984 a range of procedural failures can be regarded as circumstances likely to make a confession unreliable. There is a discretion to exclude any evidence including a confession if reliance upon it that would lead to unfairness to the suspect.

---

[2] *Halsbury's Laws of England Fourth Edition*, Volume 11(2), paragraphs 1142-1143

[29] The general rule in s76(1) is that in any proceedings a confession made by an accused person may be given in evidence against him. There are safeguards which specifically apply or relate to unfairness in the way that a confession has been obtained.

[30] The New Zealand Evidence Act 2006 , which does not apply in the Cook Islands, does not require corroboration of confession evidence. Indeed s 121(2) provides that there is no requirement for either a general warning to the jury about the dangers of relying on uncorroborated evidence, or a direction relating to the absence of corroboration. However such a warning is not prohibited, and there can be such warnings, for instance under s125(1) in relation to child complainants. There is a need for corroboration under s121(2) in relation to perjury, false statements and declarations and treason. There is however a discretion under s122 to make directions about evidence which may be unreliable.

[31] We should also add that the fact that there are three confessions (putting to one side the evidence of Mr Nicholas) which overlap, can itself be seen as a form of corroboration. Mr Kokoria gave evidence in relation to all three fires. Mr Hosking only referred to confessions as to the Raro Mart and Friendly Mart, and not the Tex Mart fire. Mr Simpson referred only to the Friendly Mart fire. But this means that there were supported confessions in relation to two of the fires, and each confession confirms that Mr Tonorio was involved in arsons at the time, in itself adding credibility to the other confessions.

Rigged confessions

[32] There is nothing to support the submission made to us, that the three witnesses who gave evidence of the confessions were obtaining them at the instigation of the police. Insofar as this allegation was put to those witnesses, they denied it. Indeed the whole tenor of their evidence when it is read supports an inference that they were reluctant to give evidence against their friend. They did not want to get him into trouble.

[33] There was nothing to show that they were in the position of accomplices. While there are vague references to some of them being "persons of interest" there was no tangible evidence to show that they were regarded as accomplices of Mr Tonorio, or thought of themselves as facing an allegation that they were accomplices.

[34] We have carefully read the evidence of the three confession witnesses we have referred to, and we can see nothing in their evidence that gives rise to any particular concern about their reliability. We can see why it may have been the case that the jury regarded them as credible and reliable witnesses. We acknowledge that the evidence of Mr Hosking and Mr Simpson in particular, had a short ambit. It really was in essence just an affirmation by Mr Tonorio of his involvement in lighting the fires. That is all that one might expect from a youth who is chatting to a friend about such an event.

[35] It is also relevant that on two occasions in the summing up, the Trial Judge drew attention to the need for the jury to assess reliability.

[36] In summary we are unable to accept that there was sufficient material before the Judge to require any specific unreliability warning.

Conclusion on the corroboration and reliability points

[37] Thus we conclude that the evidence of Messrs Kokoria, Simpson and Nicholas was properly put to the jury without any corroboration requirement or specific reliability warning. We accept that this evidence was critical to the Crown case, but this does not seem to us to be a matter of concern, providing it was fairly put before the jury.

The evidence of Puapii Nicholas

[38] Plainly Mr Nicholas discredited himself in the witness box. He recanted his confession. The Crown chose not to rely on his evidence at all in its closing.

[39] The Judge did not put Mr Nicholas' evidence quite that way. He said, as we have set out, that Mr Nicholas' evidence should be treated very carefully and that the jury might set it aside as being completely unreliable. We are not sure why the Judge did not simply set out the Crown approach, which was to not rely on Mr Nicholas' evidence. There was no obligation on the Judge to put forward his evidence at all, given the Crown position.

[40] Nevertheless we do not consider this to be a serious error by the Judge. He made it quite plain to the jury that there were matters of grave concern about the evidence. We consider that his warning that we have set out, coupled with the Crown's disavowal of Mr Nicholas' evidence, would have meant that the jury would not have placed any significant reliance on his evidence. It was plainly unreliable.

The alibi evidence

[41] Mr Tonorio in addition to denying that any admissions were made, put forward an alibi defence. He relied on the evidence of his two brothers and mother who were called to give evidence and who said that he was with them on the nights of the fires.

[42] The Crown cross-examined them, and pointed to small imperfections and inconsistencies in the alibi evidence. It was pointed out that the family members had met, and could have come up with a scheme to create the alibi (although this was never admitted by the alibi witnesses).

[43] The burden and standard of proof remain the same when there is an alibi defence. It was open to the jury to believe some or all of these alibi witnesses, or to consider it a reasonable possibility that one two or three of them were telling the truth. It was equally open to the jury to reject the alibi evidence as concocted by a family members anxious to help their son or brother. Plainly they reached the latter conclusion. It was open to the jury to do so. This is what the jury process is all about.

[44] There was some suggestion in the submissions for the appellant that the jury might have thought there was a burden of proof on the accused to prove his alibi. There is nothing to signal that this was so. The Judge said in his summing up that the defence does not have to prove alibi and did not have to prove anything. He also made the necessary direction that if the jury rejected the alibi evidence that did not mean that Mr Tonorio was guilty. The jury still had to go back to the Crown case to see if it was proven.

[45] There was nothing overwhelming or conclusive about this alibi evidence. This part of the appeal really came down to an invitation to us to substitute our judgment for that of the jury. It is not our role to do that. We would however also observe that it is not in our view altogether surprising that the alibi evidence was rejected, given that it came only from family members who plainly had a motive to help Mr Tonorio.

[46] Mr George emphasised the fact that Mr Tonorio's family saw a fire engine drive past their home to attend the fire, while Mr Tonorio was in the house. He said this supported the alibi defence. But it only supported the alibi defence if the jury thought it was possible that the family members were

telling the truth. If the jury rejected their evidence, the fire engine evidence added no strength to the defence.

[47] The Judge did not go through the evidence of each family member in detail on the question of alibi. But Mr George had a full opportunity to do that in his closing, and the Judge plainly and clearly referred the jury to the alibi evidence, and the need for them to reject it before they could be able to find Mr Tonorio guilty.

[48] In conclusion on the alibi evidence, we are of the view that there was nothing to indicate the Judge's summing up was inadequate, or that the jury's implicit rejection of the alibi evidence was unfair or irrational. We will deal with the criticisms of the prosecution reference to alibi later in this judgment.

THE SUMMING UP

[49] There are various criticisms of the summing up, some of which we have already touched on.

[50] The first criticism we deal with is that when the Judge was responding to Mr George's suggestions that the Police had failed to follow up on certain suspects, the Judge said to the jury:

> You do not judge the case on what the police did not do. You judge the case on what they did.

[51] Within the context of this summing up we do not consider that this sentence was objectionable. The theme of the defence references to Police failure was that there were other potential suspects who could have been better investigated. As a general proposition, such a submission cannot legitimately assist a jury, as other possible suspects are not on trial, and the burden and onus of proof means that if there are holes in the investigation, then this will lead to the charges not being proven to the requisite standard. Without such a statement by the Judge about not speculating about what the Police could have done differently, there is a danger that a scattering of defence allegations about other possible suspects in the closing address could distract the jury from its actual task of assessing the guilt of the defendant. Instead they end up assessing whether the Police investigation was competent. That is to be avoided.

[52] The defence can of course seek to raise doubts about other suspects. If for instance another suspect had been found with accelerants near the fire, but

not further investigated, then the defence could say to the jury, well there is a reasonable doubt that this person caused the fire. However, there was no such evidence.

[53] We would not necessarily encourage the invariable use of such a sentence in a summing up, as it is conceivable that there could be instances where the police could be relevantly criticised for failing to follow up on a matter where plainly they should have. However, as a general proposition for the reasons stated, the Judge's remark was not unfair. It is for the Crown to prove its case beyond reasonable doubt. The jury is to consider only that evidence that is put before it. It is not to speculate. The rigour of the onus and standard will keep the jury focussed on the alleged actions of the defendant, in the right way.

[54] If there are serious alternative suspects being put forward by the defence, and there is nothing in the Crown evidence about them, the defence needs to produce evidence about their actions to show they are serious suspects. The defence has the benefit of disclosure, and f there are other serious leads indicating different suspects, that can be put to the jury. Indeed, the defence did this to an extent in this trial. Clearly what was said did not shake the jury's assessment that Mr Tonorio was guilty beyond reasonable doubt.

[55] We turn to a second criticism. At one stage Mr George appeared to criticise the Judge for stating to the jury that the defence was not challenging how the fire at the Raro Mart was started. We do not think this is a fair criticism. As we have said, it was the case that the defence did not question how the fires were started.

[56] As we have also said, plainly if the confessions were accepted by the jury, the fires had been started deliberately. There was no need for other evidence as to how the fire started. As the Judge said to the jury, if they accepted that Mr Tonorio made the admissions his friends said he made, then they were entitled to conclude that the fires were deliberately lit.

[57] As a third matter, it was argued by Mr George that the Judge failed to highlight the scepticism of Mr Kokoria when he claimed to have doubts about Mr Tonorio's admissions because he thought Mr Tonorio might be *"showing off"*. This remark by Mr Kokoria could have worked in two ways. It might have weakened the Crown case, but equally Mr Kokoria in making a generous and helpful remark about the Tonorio, could be seen by

the jury as adding to his credibility. It shows Mr Kokorio as a friend trying to limit the damage to Mr Tonorio.

[58] As a fourth criticism, Mr George referred to the following statement by the Judge in summing up:

> Now the defendant, he says he was home with his family at the time of each of these fires, the time they were lit. And you have heard that is what we call alibi evidence. I could not have committed the crime as I was not there, actually it can be proved that I was over here. And his alibi is supported by his mum and his two brothers, and in a nutshell they said that he could not have set any of these fires because he was at home with them. And they do not have to prove it, they do not have to prove anything. It is the Crown that has to prove that he is guilty. And again, if you reject their evidence, reject the alibi evidence, do not jump to conclusions, you have still got to go back and say well let's put that aside. What's the Crown evidence and can we rely on that to be sure.

[59] We see no difficulties with this paragraph. It does not reverse the onus of proof. Indeed it emphasises the onus that is on the Crown to prove matters beyond a reasonable doubt. Further it warns the jury that even if they reject the alibi evidence they must not jump to a conclusion of guilt. In the next paragraph it was stated:

> So, if you just go back to your piece of paper in that last question – Are you sure that it was David Tonorio who set the fire that damaged the particular place? If you get to that question and if you answer it yes and find him guilty on each particular charge, then to do that you will have had to have done these things. You would have to reject his evidence that he did not do it. You would have to reject his evidence that he did not tell anyone that he did. And you would have to reject the evidence of his family.

[60] Again we find this paragraph unexceptional. In saying to the jury that to find Mr Tonorio guilty it would have to reject the evidence of his family, the Judge was no more than saying to the jury, that it would have to reject the alibi evidence to find him guilty. We have no doubt that the jury understood that they would have had to have had no reasonable doubt about the proof of the alibi evidence before it could be rejected. If there was a doubt, the verdict had to be not guilty. But even if it was rejected, the jury

had to go back to what had been proven. Throughout his summing up the Judge correctly describes and emphasises the burden and standard of proof.

[61] We note that the Judge also gave the jury question trails and relied on those question trails, going through them in his summing up. Those question trails contained the correct elements of arson which had to be proven, and the Judge was careful to explain that the jury had to be sure that each particular element was proven.

[62] Having said this we think it would have been better if the Judge had said in relation to the alibi evidence in this sequence:

> The defendant says he was at home with his family at the time of the arsons, and this is supported by the evidence of his mother and his two brothers.
>
> The Crown must make you sure that the defendant deliberately lit the fires. If you accept that he was at home when a particular fire was lit, or if you have a reasonable doubt that his evidence or that of his mother or either brother was correct about him being at home at the time, you must return a verdict of not guilty on that charge.
>
> If you reject the alibi evidence it does not follow that you must convict. You must decide on the evidence that you do accept, whether the Crown has made you sure of its case beyond reasonable doubt.

[63] However, looking at the summing up as a whole, these elements were all covered, and it is our view that the jury was adequately directed.

THE PROSECUTION

[64] As we have stated, the defence added two additional grounds of appeal at the hearing before us. First the *"oppressive forceful and excessive nature of the Crown Prosecutors in pursuing the prosecution of the appellant with disregard for a fair, just and reasonable trial and application of the law."* And *"the failure by the jury to judge the facts of the case properly ..."*.

[65] In particular Mr George was critical of this statement by the Crown in its closing address:

> At the start of this trial, I told you there were two things that the Crown had to prove. First, that these fires were deliberately lit

> and secondly, that the Defendant David Tonorio was responsible for lighting these fires. Before I address these two issues, I want to speak to you about the defence case and why it is that you can reject their evidence and put it to one side.

[66] We see no basis for any criticism of these sentences. The law on the standards of prosecutorial conduct is conveniently set out in the decision of the New Zealand Court of Appeal in *R v Hodges* where Tipping J remarked:[3]

> Counsel is entitled, indeed expected, to be firm, even forceful. Counsel is not entitled to be emotive or inflammatory. The Crown should lay the facts dispassionately before the jury and present the case for the guilt of the accused clearly and analytically. Although different counsel will naturally and appropriately have different styles and different methods of addressing the jury, the Crown's closing address should, at least at some stage, traverse the legal ingredients of the count or counts in the indictment, and call the jury's attention to the evidence which the Crown says satisfies that onus and standard of proof in relation to each ingredient, and in particular those which are the subject of dispute. Crown counsel are important participants in the dispassionate administration of criminal justice. They are entitled to contend forcefully but fairly for a verdict of guilty; but they must not strive for such a verdict at all costs.

[67] The Crown here accurately set out what had to be proven. Of course the Crown will explain why the jury should reject the defence evidence. It is the prosecution's job to point out to a jury any legitimate basis on which it could reject the defence evidence. That is what the prosecutor was proceeding to do. She was not using emotive or inflammatory language. The prosecutor would have been failing in her duty if she had not pointed out the difficulties in the alibi evidence to which we have already referred.

[68] Nevertheless it seemed that there was a criticism of the Crown for strongly attacking the alibi evidence.

[69] It is said that some of the criticisms were unclear. For instance what was wrong in there being family meetings? Mr George submitted that such meetings were legitimate and could be expected.

[70] This may be a fair response, but there was equally nothing wrong in the Crown pointing out that when there were family meetings, there was an opportunity for family members to agree to put forward a particular story that might help Mr Tonorio.

[71] It was said that the Crown unfairly emphasised inconsistencies in the alibi evidence. It is the Crown's job to emphasise inconsistencies in the defence

---

[3] CA435/02 NZCA 290

case. If they are minor, the defence in its reply can say so. The defence makes its closing submission after the Crown, and if the Crown makes foolish or unsupported submissions, the defence can make the Crown look weak and look wrong. That is the way jury addresses work. We see nothing excessive or unfair in the way the prosecutor presented the Crown case.

[72] On an overview the criticism of the prosecution is unwarranted. It was the Crown's job to firmly and clearly point out weaknesses in a defence case, particularly when there is an active defence being put forward with witnesses giving evidence in support, as was the case here. There was nothing to indicate that the Crown was making any submissions to the jury that were not supported by a fact, or could not be seen as an interpretation of the facts that was open. The defence did the same in its closing address to the jury, as was its duty. There was no over-reach by the Crown, and no excessive use of adjectives, or any abusive language.

[73] We do not propose going through all the criticisms that have been made of the prosecutor's closing address. They all amount to an objection to the Crown putting its case robustly, and being critical of the defence case. There is nothing wrong in this.

Failure by the jury

[74] We do not accept the submission that the jury failed to judge the facts of the case properly, and failed to take care and exercise due diligence in carrying out a proper analysis. There is nothing at all to indicate that this trial went wrong. We can see why a jury might accept the confession evidence and reject the defence alibi evidence. It was open to the jury to do so. There was no unclear practice by the Crown, and no significant errors in the summing up. There was enough before the jury, for a reasonable jury to convict in relation to the three arsons.

[75] Accordingly we will dismiss the appeal against conviction.

SENTENCE

[76] Little time was spent by the appellant on the appeal against sentence, and the written submission on this aspect of the appeal was short. The essential point was that the sentence was manifestly excessive because there was an inadequate discount given to recognise the youth of Mr Tonorio. The

Judge fixed a starting point of ten years, and gave an 18 month discount, which was 15%.

[77] Mr Tonorio was exposed to a sentence of up to fourteen years imprisonment on each arson charge, and there were in addition the burglary charges.

[78] These crimes were most serious. In a country such as the Cook Islands where the population is small and the buildings are not large, the burning down of a supermarket is a significant matter. The victim impact reports make hard reading, and show the calamitous effects on the businesses involved, and the great distress of the proprietors.

[79] We note that in an arson case in this jurisdiction, *Police v Angene and Natine*[4], a valuable and historic courthouse was burned down. The sentence of imprisonment for the more senior of two defendants was close to the maximum at 13 years imprisonment, and for the less senior 10 years imprisonment. The starting point that the Judge had in mind in that sentencing may have been higher than the sentences ultimately imposed, because there were guilty pleas.

[80] Given the nature of the building in *Angene*, that was a considerable more serious arson than the burning of a supermarket. A lower starting point could be expected on a single charge of arson. But there was one building in that case, and there are three here.

[81] In all the circumstances we consider that a starting point of higher than that chosen by the Judge, of 11 years imprisonment, would have been entirely appropriate.

[82] Given Mr Tonorio's defence of the charges and the lack of any mitigating factors relating to the offending, the only significant mitigating factor to be taken into account was Mr Tonorio's considerable youth. He was 17 at the time of the offending. However his action was hardly one of impulsive, youthful foolishness. This was repeat offending by someone who must have been aware of the distress his actions were causing the community.

[83] As we have set out, the Judge gave Mr Tonorio a discount of 18 months from the starting point of ten years. Despite the multiple offending, he was

[4] (1982) CKHC (Record, pages 78-80)

very young, and we would have been inclined to a slightly higher discount for youth, of at least 20%.

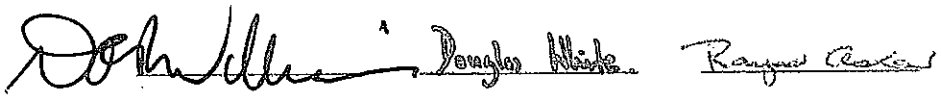
[84] However, this is not a basis for allowing the appeal against sentence. As we have stated we would have been inclined to set a higher starting point by one year more than that of the sentencing Judge. Even if we had given a considerably higher discount, the end sentence would still not have been less than eight and a half years. We do not think that sentence in all the circumstances is manifestly excessive.

[85] We do not uphold the appeal against sentence.

RESULT

[86] The appeal against conviction is dismissed.

[87] The appeal against sentence is dismissed.



David Williams P Douglas White JA Raynor Asher JA