

**IN THE HIGH COURT OF FIJI AT SUVA**

CASE NO: HAC. 181 of 2016

[CRIMINAL JURISDICTION]

**STATE**

**V**

**MOLLY MARY MACNELLY MACDONALD**

**Counsel** : Ms. W. Elo with Ms.P. Lata for State  
Mr. A. Chand with Mr. K. Verebalavu for Accused

**Date of Sentence** : 15 June 2018

**SENTENCE**

1. Molly Mary Macnelly Macdonald, you stand convicted of the following offence on your plea of guilty;

*Statement of offence*

**Arson:** Contrary to section 362(a) of the Crimes Decree, No. 44 of 2009.

*Particulars of offence*

**MOLLY MARY MACNELLY MACDONALD** on 17 March 2016, at Veisari, Lami in the Central Division wilfully and unlawfully set fire to the dwelling house of Harry Whitcombe.

2. You initially pleaded guilty to the above charge on 07<sup>th</sup> July 2016 which was the first instance your plea was taken before this court and you were convicted accordingly on 29<sup>th</sup> July 2016. However, the fact that it was highlighted in your mitigation that you were distressed at the time of the offence taken together with

the contents of your letter attached with the said mitigation to the effect that you cannot remember what happened to you during the time the offence was allegedly committed, created a doubt in my mind as to whether you had the requisite *mens rea* to constitute the offence of arson and therefore whether your plea was equivocal. Accordingly, your conviction was set aside and your plea of guilty was vacated.

3. Subsequently, your case was fixed for trial from 11/06/18 to 15/06/18. On 11/06/18, this court inquired from your counsel whether you are challenging the opinion expressed in the report submitted by the medical superintendent at St. Giles Hospital dated 07/03/17 which was disclosed by the prosecution on 13/03/17. According to the said opinion you did not have a mental condition that is capable of compromising your ability to make rational choices and the ability to differentiate between right and wrong at the time of the offence. After discussing with you, your counsel submitted that you are not challenging that opinion. It was also indicated that you are still willing to plead guilty.
4. Your plea was accordingly taken on 11/06/18 and you pleaded guilty to the above charge. You confirmed that you have entered your plea of guilty to the charge voluntarily. You then admitted the summary of facts filed by the prosecution that included the aforementioned report dated 07/03/17. Since, the doubt I initially had was clarified given the opinion expressed in the said report, I was satisfied that the plea of guilty you entered on 11/06/18 was unequivocal and accordingly, you were convicted of the offence of arson as charged.

5. According to the summary of facts you have admitted, the facts of this case are as follows;

*The Complainant is Harry Whitcombe ("PW1") 45 years, Boat Manager of Lot 1 Veisari, Queens Road, Suva. The Accused is Molly Mary Macnelly McDonald ("Accused") 35 years, D/Duties of 7miles, Veisari, Suva. PW1 is the Accused's nephew.*

*On 17/03/16, PW1 had left for work and his children had left for school except for his 3*

*year old son. His 3 year old son was at home with his babysitter namely Agnes William ("PW2") 55 years, house-girl also of Veisari, Suva.*

*At about 8.30am on the said day, after PW1 and his kids had left for work and school, the Accused walked over to PW1's house and told PW2 to go over to her house to talk to her aunt who is bedridden. PW2 hesitated but did ns as she knew the Accused's aunt was sickly.*

*When PW2 was at the Accused's home, the Accused went straight to PW1's kitchen, opened up the gas cylinder and then turned on the two burner stove. Thereafter, the Accused went into the sitting room and lit a curtain with a match.*

*After a few minutes PW2 came out of the Accused's house and noticed smoke coming ut of PW1's house and alerted PW3 to the same. By the time PW3 ran up the stairs to the sitting room, the whole sitting room was engulfed in flames and was burning down the whole house (sketch plan compiled by A/Sgt. Naupoto is attached herewith).*

*The matter was reported to the police and the Accused was caution interviewed. Prior to being caution interviewed the Accused underwent psychiatric assessments and was fit for interview. In her caution interview she fully admitted to the allegations put to her (Q/A 24-36). Thereafter another psychiatric report was issued on 07/03/17 where her initial psychiatric assessment was re-confirmed (attached herewith).*

6. According to the summary of facts filed by the prosecution previously, you went to the Lami Police Station soon after the incident and informed the Police that you had set fire to the complainant's house. You were taken for a psychiatric assessment on 18<sup>th</sup> March 2016 and Dr. John Jeffery the examiner of St. Giles Hospital had opined that you are fit to be interviewed. You voluntarily admitted yourself at the St. Giles Hospital from 18<sup>th</sup> to 22<sup>nd</sup> March 2016 and you were said to have been experiencing mild depression.
7. You were interviewed under caution on 24<sup>th</sup> March 2016 in the presence of your sister. You cooperated with the police and made admissions to having set fire to the complainant's house on 17<sup>th</sup> March 2016. You told the police that you have been drinking beer and rum since 1.00am on 17<sup>th</sup> March 2016 and that you visited the complainant's house on the same morning as you were angry at the complaint and others for supposedly gossiping about you and alleging that you

were having an affair with your nephew. You admitted that the reason you wanted to get everyone out of the complainant's house was that then you could burn that house.

8. During the hearing on mitigation and sentencing, your counsel pointed out that you are extremely remorseful for what you did and you are in the process of making arrangements to pay for the damages suffered by the complainant as decided by the court that dealt with the civil suit filed by the complainant. It was submitted that you have admitted your liability in the said case. You are 37 years old and you are the mother of 7 children.
9. In terms of section 362 of the Crimes Act 2009 ("Crimes Act") read with section 3(4) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), the maximum punishment for the offence of arson is imprisonment for life.
10. I find that there is no clear consensus with regard to the range of sentence that should be applied for this offence despite the fact that the tariff for this offence is often stated as a term of imprisonment between 02 to 04 years following the case of *Lagi & Others v. State* [2004] FJHC 69; HAA0004J.2004S (12 March 2004). To give an example, His Lordship Justice Temo, in the case of *State v Raralevu* [2015] FJHC 374; HAC026.2013S (22 May 2015) had stated thus;

*"Arson", as an offence, is viewed seriously by the law makers of this country. It carried a maximum penalty of life imprisonment. Previous case laws had set a tariff between 2 to 4 years imprisonment (see Kelemedi Lagi & Others v State, Criminal Appeal Case No. HAA 0004 of 2004S, High Court, Suva, which was endorsed by the Fiji Court of Appeal in Niko Lesu and Sunia Vosataki v State, Criminal Appeal No. AAU 058 of 2011). However, the Fiji Court of Appeal, in Damodar Naidu & Another v Reginam, Fiji Law Report, Vol 24, 1978, pages 93 to 106, approved a sentence of 7 years imprisonment for accused no. 1 and 10 years imprisonment for accused no. 2,*

*for burning down a number of shops in Rakiraki Town, in May 1977. Of course, the final sentence will depend on the mitigation and aggravating factors.*

11. In *State v Seru* [2016] FJHC 841; HAC32.2015 (21 September 2016) His Lordship Justice Madigan when deliberating on the appropriate sentence to be passed for the offence of attempted arson, stated thus;

*[15] There is no predetermined tariff for the crime of attempted arson but the accepted sentences for arson itself range from 2 years to 10 years. Two years has been held to be appropriate where there is no danger to human life and 4 years where there is such a danger. These are sentences passed for a crime with the maximum penalty of life imprisonment, and there is no reason why a tariff for attempted arson should be more.*

*[16] If then there is an attempt to burn down a building then an appropriate sentence would start from a term of two years. If the attempt is to harm persons inside the building or is reckless as to whether there would be harm to inhabitants then the sentence should be one of at least 4 years. If the attempt is an attempt to effect large scale arson, for example on a large scale shopping area or a sensitive Government building then the sentence could be in the range to 7 to 10 years. (See *Damodar Naidu & Anor v R. C.A. (1978) FLR93*).  
[Emphasis is mine]*

12. In my judgment, in the case of *Lagi* (supra), the Learned High Court Judge does not set a general tariff for the offence of arson. In that case, the Learned Judge was considering an appeal against the conviction and sentence from the magistrate court. This is what the Learned Judge said in arriving at the range of 02 to 04 years;

*“In this case the respondent appears to have ensured that the house was empty when he lit the fire. However the fact that he accompanied a group of men who threatened the occupants, the fact that the arson was motivated by revenge and the*

*serious consequences of the arson on the victims who were forced to leave the village they called home, called for a sentence within the 2 to 4 year range.”*

13. It is pertinent to note that the date of offence relevant to the aforementioned case was 19<sup>th</sup> January 1999. The judgment in the Magistrate Court was delivered on 19<sup>th</sup> August 2003. Under section 7(a) of the Criminal Procedure Code (Cap. 21), the procedural law that was in force at that time, a Magistrate did not have the jurisdiction to pass a sentence exceeding 05 years imprisonment. The aforementioned section was amended by Criminal Procedure Code (Amendment) Act No. 13 of 2003 which came into force from 18<sup>th</sup> September 2003 where the term of imprisonment that could be passed by a Magistrate was increased to 10 years.
14. Therefore, during the time the case of *Lagi* (supra) was dealt with in the Magistrate's Court, though a Resident Magistrate had the jurisdiction to hear a case of arson with the consent of the accused in terms of section 4(1) read with the first schedule of the then Criminal Procedure Code, the maximum sentence a Magistrate could pass at that time was an imprisonment term of 05 years.
15. In my view, the reference to the 02 to 04 year range in the case of *Lagi* (supra) should be understood in that perspective. That is, firstly, it was pronounced in relation to the facts of that particular case and more importantly, considering that the maximum sentence a Magistrate could impose at the relevant time was 05 years imprisonment. I am not persuaded that *Lagi* (supra) should be read as having established a general tariff to be applied in the High Court for the offence of arson.
16. By making arson an indictable offence and fixing the punishment for arson as life imprisonment, the lawmakers have clearly indicated their intention to treat arson as a very serious offence. The whole purpose of having arson as an indictable

offence is lost if the offenders convicted of arson are to be given imprisonment terms between 02 to 04 years as a general rule. It is pertinent to note that even the penalty for the offence of attempt to commit arson under section 363 of the Crimes Act is an imprisonment term of 14 years. In my view, the range of 02 to 04 years imprisonment does not reflect the seriousness the lawmakers intended to attribute to the offence of arson.

17. The court of appeal in the case of *Lesu v State* [2014] FJCA 214; AAU58.2011 (5 December 2014) had made the following observation with regard to the tariff for the offence of arson;

*[38] It is now established that the tariff for arson as decided in the case of Lagi v. The State (supra) and thereafter in several other cases is presently established to be 2 to 4 years imprisonment.*

18. Then at paragraph 43 of the said judgment the court said;

*[43] Arson is an extremely serious offence and the maximum penalty is life imprisonment. Despite the serious penalty, as mentioned earlier, the Courts in Fiji for considered reasons have placed the tariff for arson between 2 years and 4 years imprisonment.*

19. The remarks made in paragraph 43 in *Lesu* (supra) which is reproduced above suggests that there was some concern regarding the adequacy of the tariff of 02 to 04 years imprisonment given the maximum penalty of life imprisonment, but the court assumed that it is the settled tariff for arson in the High Court. Upon perusing the said judgment it appears to me that the court was not properly assisted by the parties and the court had not had the benefit of considering *inter alia*;

- a) the judgment of the court of appeal in the case of *Damodar Naidu & another* 1978 FLR 93 where sentences of 07 years and 10 years were imposed for the offence of arson;
  - b) the judgment of the court of appeal in *Koya v State* [1997] FJCA 15; AAU0011u.96s (affirmed by the Supreme Court) where a tariff of 03 to 05 years considered by the High Court for the offence of arson was not disturbed; and
  - c) The judgments of the High Court in *State v Solanki* [2000] FJHC 202; HAC5.1999 (11 May 2000); *State v Ravinesh Deo and A. Kamal*, High Court, Labasa Criminal Case No. HAC 005 of 2013 (13 March 2014); and *State v Nakato* [2014] FJHC 418; HAC284.2012S (11 June 2014); where either the tariff of 2 to 4 years was not applied or the court deviated from that tariff.
20. For the reasons I have outlined above, I would decline to apply the range of 02 to 04 years as the tariff for the offence of arson.
21. Considering the objective seriousness of the offence of arson, that is, the act of wilfully and unlawfully setting fire to a property, I would select 05 years imprisonment as the starting point of your sentence.
22. I consider the following as aggravating factors in this case;
- a) You had set fire to a dwelling house that belonged to another;
  - b) You had access to that property to commit the offence because you were related to the owner of the property who had his trust on you and therefore, there is a breach of trust; and
  - c) The loss suffered by the complainant to the total value of \$40,600 as agreed by you, (the value of the house destroyed - \$ 37,000 and the value of the items lost in the fire - \$ 3,600).



23. Considering the above aggravating factors, I would add 04 years. Now your sentence is 09 years imprisonment.
24. I consider the following as your mitigating factors;
- a) You are a first offender;
  - b) You are remorseful;
  - c) You cooperated with the police; and
  - d) At the time of the offence, you were suffering from mild depression.
25. In view of the above mitigating factors I would deduct 04 years and 06 months of your sentence. Now your sentence is an imprisonment term of 04 years and 06 months.
26. Given that you did plead guilty on the first occasion your plea was taken I consider it appropriate to grant you a one third reduction of your sentence. Accordingly, I deduct 01 years and 06 months of your sentence in view of your guilty plea and arrive at 03 years imprisonment.
27. I hereby sentence you for an imprisonment term of 03 years. I order that you are not eligible to be released on parole until you serve 02 years of that sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Act.
28. Considering all the circumstances of this case and the strong mitigating factors in your favour, I consider it appropriate to partially suspend your sentence in view of the provisions of section 26(1) of the Sentencing and Penalties Act. Hence, I order that you serve 06 months of the above sentence forthwith and the balance period of 02 years and 06 months is suspended for 02 years. Therefore, your non-parole period would be relevant only in the event you are to serve your full term.
29. Section 24 of the Sentencing and the Penalties Decree reads thus;

*"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

30. It is submitted that you had been in custody in view of this matter from 31/03/16 till 16/06/16. The period you were in custody shall be regarded as a period of imprisonment already served by you. I hold that the period to be considered as served should be 03 months.
31. In the result, you are sentenced for 03 years imprisonment with a non-parole period of 02 years. You should serve the first 06 months of that sentence forthwith and the balance period of 02 years and 06 months is suspended for 2 years. Considering the time spent in custody, the time remaining to be served before your sentence is partially suspended is 03 months.
32. I hereby acknowledge the assistance given by both counsel in this case, especially the contribution of Mr. Chand on the issue of the applicable sentencing tariff.
33. Thirty (30) days to appeal to the Court of Appeal.



Vinsent S. Perera

JUDGE

**Solicitors;**

**Office of the Director of Public Prosecutions for the State.  
Legal Aid Commission for the Accused.**