

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**CR NO'S 590-592/18
89-90/19**

CROWN

v

DAVID TONORIO

Date: 9 August 2019

Appearance: Messrs K Bell and J Epati for the Crown
Mr N George for the Defendant

SENTENCING NOTES OF DOHERTY J

[1:33:59]

[1] David Tononio, you are now for sentence on a number of matters. The most important of which were three charges of arson that were dealt with by a jury last week and a jury came back with three guilty verdicts earlier this week.

[2] The first of those was of a commercial premises, a supermarket, the Friendly Mart in Arorangi on 14 June of last year. Eight days later the Tex Mart in Arorangi was also burned to the ground, on 22 June. And then a couple of weeks later Raro Mart in Avarua was also burned to the ground, on 8 July.

[3] You have also pleaded guilty today to two burglaries on Friday, 22 February 2019. Those were dwelling houses where you took a laptop from one and cash from another. You were on bail for the arson charges when you committed those burglaries. You were also serving a probation sentence in relation to another burglary for which you had been convicted and sentenced.

[4] So I am sentencing you in respect of the arsons and those two burglaries today.

[5] On each of the arson matters you broke into the premises with an intent, I think it is fair to say from the evidence I heard, to steal alcohol, cigarettes and cash. In two of those burglaries it is not known exactly what was taken because the fire pretty much destroyed everything. But in relation to one of them you did take those things – alcohol, cigarettes and money.

[6] I think it is a fair conclusion to draw that you decided that the places needed to be burned down because you thought you had been caught on security cameras. Each of these premises had closed circuit television cameras which were activated.

[7] Whatever your motive, the fires certainly had the effect of destroying any evidence of you having been in there. The hard drives where they kept the recordings of the security cameras were destroyed and any fingerprint or other DNA evidence was destroyed.

[8] In the Friendly Mart you set two fires. One of them you set fire to some papers at one end of the building and at the other end some other office equipment was set alight.

[9] On the Tex Mart fire you took kerosene to start it. The evidence was that there was no kerosene product within the stock of those premises yet kerosene was deemed to have been an accelerant that started the fire.

[10] It is not certain where the fire started and with what in the Raro Mart fire but there was evidence that there were tins that had contained paint thinners found in various places in and around the building. They were not where they were usually stored.

[11] These fires had a considerable effect on not just the owners of the stores but also their employees and the wider community.

[12] In relation to the Friendly Mart, the total amount that was destroyed and the total amount of damage in a monetary sense is not exactly known. But in addition to the replacement value of the store the owner had to take out a substantial loan to help finance the construction of the replacement building.

[13] The insurance policy did not cover loss of wages for the owner and her eight employees. That loss of income was a considerable burden not just on her, but on those employees as well. Understandably there was considerable stress on her and on them. There was also an anxiety

which she felt about an arsonist being at large. And I have information that that was not just confined to her but to the general community.

[14] Added to that was the personal loss to her and her family of not just business records but research into family land matters, her genealogy records, photographs, artefacts, family photos and a 30 year collection of historical books on not just these islands but the South Pacific generally.

[15] It is fair to say that had a considerable effect on her although, and I would like to refer to her statement to me; she says she is “grateful for the community’s acts of kindness” that they received following this fire and the loss.

[16] As to the Tex Mart, the total cost or value to the owner is in excess of \$450,000. But again, like the previous owner, there was not just that but the anger, the sadness, the disgust, the anxiety that this placed on him and his business cannot be underestimated.

[17] That fire had an added element. When it was lit there was a man sleeping in and on the premises. His job was to look after the shop while the owner was in New Zealand and it is good luck rather than good management that he was not killed. The fire investigator expert who gave evidence to the jury said that if he had not got out when he did, within another minute or two he would have been consumed by the fire and there would have been a homicide investigation.

[18] He too lost something personal, his bike. It went up in the conflagration. He too informs me of the sort of emotional stress that has been on him – he has been unable to sleep and for a period he cried uncontrollably with the anxiety. He also blamed himself a bit – he was there to take care of the premises and he feels that he did not, although no blame should be attributed to him.

[19] The Raro Mart had considerable damage – \$3 million worth in the building and the stock that was in it. That business was insured for \$2.4 million. So there has been an actual out of pocket loss of \$600,000 to the owner that cannot be recouped. There are also the considerable downstream losses of the trade, the turnover and the effect on his staff.

[20] It goes wider than that though. These three fires, together with some that had been lit in Aitutaki, and one of which is still under investigation, have had a considerable impact on the business community and even perhaps the homeowner community on these islands.

[21] I have a note from a local insurance broking service telling me that the people who provide insurance for the Cook Islands have taken a different view. Premiums have gone up. Some as much as 400 percent; by four times. Many in the range of 40 – 200 percent. And that broker advises that, and I quote “these arsons have forever changed the insurance landscape for the Cook Islands”.

[22] The underwriters who produce and provide that insurance have lost confidence. And these fires have been a major contributor to that loss.

[23] Those are large sums of money but there are also large personal anxieties to those involved. You have no hope at all of paying any of it.

[24] Counsel has said that you continue to deny your involvement in these fires. Therefore, it could not be said you have any remorse at all. That is pretty much what is told to me by the Probation Service who have given me a report. At time of these fires you appeared to be unemployed, you helped around the home, and that is about all that can be said.

[25] You were brought up in what appears to be a loving and hardworking family, and they maintain their support for you. In fact, they provided an alibi for you in your trial. The fact that you were convicted or found guilty by the jury on each of these matters shows that they were disbelieved by the jury.

[26] Mr George cannot say much for you because you do not accept that you did these things. It has gone so far as to advise the Court that he has instructions to appeal the verdicts. However, he asks for leniency on your part.

[27] The purpose of sentencing you today is not difficult to articulate. Firstly, you have to be held accountable for your actions. Secondly, there needs to be denunciation of this type of conduct. By that I mean you need to know, and the community generally needs to know that these types of activities will not be countenanced here.

[28] And that leads on to another purpose of sentencing; deterrence. Not just for you personally but for anyone else who might think that breaking into premises and then setting them on fire to destroy any evidence of that crime should be countenanced.

[29] Those who commit burglaries in those circumstances need to know that the Court on behalf of the community will take a stern approach.

[30] Arson is a crime where, because the circumstances differ so greatly between each one, there are no, what are called, tariff decisions. There are no indications from the higher Courts that this fire should have “X “as a sentence.

[31] There is no doubt however that these three arsons are of considerable importance here. The Crown has referred me to a couple of decisions, one of which related to the burning down of the Courthouse here in Avarua back in the early 90s and the two men who were convicted of that crime received sentences of imprisonment of 13 years and 10 years respectively.

[32] The Crown says that when you take these three fires together, that is the sort of level of sentence the Court should be starting or actually ending it. Each of these arsons carries a maximum sentence of 14 years imprisonment. The burglaries carry a sentence of 10 years imprisonment each. And it is another principle of sentencing that the Court has to look at where your offending comes in the scale of 0 to 14 for example.

[33] The worst crimes get the heaviest, or the top sentences. And that is what happened with the Courthouse fire. That was so reprehensible for the Cook Islands that the Court started very nearly right at the top. I have to decide where your offending starts within that continuum.

[34] The aggravating features are, firstly, the number of the charges and the number of the arsons in particular. The damage and loss both direct and indirect, that is in the millions of dollars in terms of monetary loss. But there is also the emotional loss to not just the owners and workers here but the general community. It has been reported that that was very widespread, that people were anxious throughout this island around June, July and August of last year that an arsonist was at large. It is also an aggravating feature that the lighting of these fires was done to cover up other crimes, namely the burglaries.

[35] There is also the fact that they were lit at night when there was a risk that others might be on the premises and were not known to whoever lit the fire. And that happened with Mr Aziz in Tex Mart. There is also premeditation. Certainly, the kerosene taken to the Tex Mart fire and used as an accelerant there. I think also that whoever, and it is you, committed the burglaries decided that the best way to get rid of any evidence was to light the fires and you did that with that in your mind.

[36] There can only be one mitigation factor in your favour, and that is your age. You were 17 and a half years of age when you lit these fires and you are now 18 and a half.

[37] The higher Courts have said that the method of sentencing is to try and strike a figure, which in your case will be in years, for the basis of sentencing and then to add or subtract for either the aggravating features or the mitigating features and then come to an end sentence.

[38] The Crown tells me that in this view that sentence should be somewhere to end around 10 to 12 years.

[39] I take the Raro Mart as the lead charge, and I take it because it had the most damage – \$3 million plus worth. But it is only first by a slim margin. The Tex Mart is another fire where there was that risk to Mr Aziz.

[40] I think either one of those on their own would bear perhaps an 8 year starting point – 8 years imprisonment. It is another principle of sentencing that the Court needs to take into account totality. So if it was 8 years for those two, added together that is 16 plus say 6 years for the next one, and so on and so on, we would get up into the 20 or 30 year mark. But that would not be right. I have to take into account the totality.

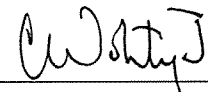
[41] And as best I can I think taking 8 years as a starting point I would uplift for the other charges, including the burglary charges you pleaded guilty to today, to start at 10 years imprisonment. There is only one thing that I can give you a credit for and that is your youth. Even then the Crown says that that should be minimal. Because while you might have been relatively young in age, you had a relative sophistication about your offending. Throughout this time there were a number of burglaries and other matters.

[42] I think you should still get some credit for your youth. You are 18 and a half, and whatever the end sentence is, is going to considerably affect your life and as best I can I think a credit of 18 months for your youth is appropriate.

[43] Therefore, on each of the arson charges you are sentenced to 8 and a half years' imprisonment and 2 years on each of the two burglaries. The terms will be concurrent, that means run alongside each other, not be added together.

[44] You will therefore serve a maximum sentence of 8 years and six months imprisonment. There is no hope of reparation and no orders are made.

[45] Thank you.



Colin Doherty, J

