

**IN THE HIGH COURT OF NEW ZEALAND  
PALMERSTON NORTH REGISTRY**

**CRI 2011-054-002466  
[2012] NZHC 2388**

**NEW ZEALAND POLICE**

v

**EWEN KERRY MACDONALD**

Hearing: 14 September 2012  
Counsel: P L Murray for Crown  
G King and P S Coles for Accused  
Sentence: 14 September 2012

---

**SENTENCING OF SIMON FRANCE J**

---

[1] Mr Macdonald you appear for sentencing on six charges. I will address each in turn, in chronological order:

- (a) The first charge is theft. In December 2006 you and a co-offender, Mr Callum Boe, set out at night to poach trophy stags. The animals were kept in a paddock next to the house of the owners. The sole motivation was the challenge of seeing whether you could successfully kill and remove them. You and your companion shot and killed two stags. You then removed them and buried them back on your farm in holes that you had dug earlier in the day. The proximity of the paddock to the family home understandably left the owners with fears for their safety. It was necessary to install security equipment, and their young daughters were affected for some time.

- (b) The second charge is intentional damage, namely the releasing and therefore destruction of 16,000 litres of milk from a vat. The value of the milk was \$5,000. The reason for this offending requires explanation. You and Mr Boe were long-time and proficient night-time poachers. A favourite venue was the property of Mr Graeme Sexton. Eventually you were caught. Mr Sexton agreed to a meeting at which you and Mr Boe admitted your offending and agreed not to do it again. It seemed matters were at end but you came to believe that, notwithstanding the agreement, others had been advised of your offending. You decided on revenge. Your targets were Mr Sexton, and Mr Barber, a neighbour who had played a role in you initially being caught.
- (c) The releasing of the milk was the first act of revenge.
- (d) The second, which leads to the next charge of wilful damage, was directed at Mr Barber. You intended to do the same thing, but unfortunately he had no milk stored that evening. Unfortunately may seem an odd word to use, but it is appropriate because rather than being deterred, you decided upon a much more callous and brutal revenge. The Barbers had 19 calves held in a nearby shed and you and Mr Boe killed all of them. One was still alive but dying when the scene was discovered the next morning.
- (e) Third, seven months later, you and Mr Boe returned to the Sexton property and burned to the ground a 110 year old whare which had been a treasured possession of the family, full, as one would expect, of family memories and experiences. This act is the first charge of arson.

[2] I have received victim impact statements from Mr Sexton and Mr Barber. Each expresses dismay at what occurred. For the Sextons the needless loss of a piece of history has hurt in a way that must have been predictable to you when you did it. Your stated intention was to annoy and hurt, and you certainly achieved that.

[3] For Mr Barber, most difficult was dealing with the scene that confronted him and his wife that morning. They describe the act, amongst other things, as nasty, cruel and senseless. I agree. A theme that also emerges is the sense of disbelief they feel that someone with a farming background would act as you did. It is an understandable sentiment.

[4] The four offences I have just described can, in my view, be loosely considered together, and I intend to fix a separate penalty covering the totality of that offending.

[5] The second group of offences consists of two acts of damage. They have been well publicised and relate to the property of Mr Scott and Mrs Kylee Guy. At the relevant time it had been decided that you and your wife Anna would occupy the main existing house on the farm. A nearby property was purchased on which Mr and Mrs Guy were going to live. There was an existing homestead on the property. It needed repair and the decision was taken to start afresh. So the old house was put on large commercial truck trailers to be moved.

[6] At this point, for reasons that are unclear but where you say it was just as a joke, you and Mr Boe set fire to the house. You rode out there with fuel and set it alight. The trailers were also damaged beyond repair.

[7] The loss in relation to the trailers was approximately \$650,000. Of this the insurance company suffered losses of \$462,000, and the trailer owners \$190,500. The loss has had an impact on the removal company's profitability, and viability. Both companies would like reparation but I am advised you have no capacity to pay.

[8] Finally, there is a charge of wilful damage relating to the home being built for Mr and Mrs Guy. The house was at the stage of being ready for internal plastering work. Again, in a premeditated move you and Mr Boe set about destroying it internally. Holes were punched in a majority of the gib walls, some plumbing fittings ruined and many windows smashed.

[9] It was a targeted cruel act, motivated as were the earlier acts of damage, by the desire to hurt. On this occasion it was exacerbated by the horrible insults you painted on the walls, directed at Mrs Guy.

[10] The impact on them and the wider family, including your own, was significant. As well as feelings of loss and dismay, it was apparent at the trial that at the time of these events there was real concern created by malicious targeted damage by what was believed to be an anonymous person. The offending impacted significantly on Mr and Mrs Guy, as one would expect, but the impact went wider than that and affected all your wider family.

[11] I propose to impose a second separate sentence in relation to these two offences.

### **Offender**

[12] Mr Macdonald you are presently 32 years old with no previous offences prior to the events I have just detailed. The offending has been well publicised as a result of the trial you recently faced, and there is no doubt you have lost much as a consequence of the offending. Your marriage has ended, and you advise you have no capacity to pay reparation.

[13] You have had the support of your family throughout this time, and continue to do so. I have received a letter from your parents which reflects their care for you but also their recognition that you have done wrong.

[14] In terms of personal factors relating to you, the most contentious to be resolved today is the question of remorse. You have written to the Court expressing remorse, and wishing that sentiment to be passed on to the victims of your various acts. You express shame at what you have done.

[15] On your behalf Mr King emphasises what he submits are tangible signs of insight into the wrongness of what you have done. These relate to actions you took subsequent to damaging the house. At trial the proposition advanced was that this

act was something of a watershed that caused you to rethink where you were heading. It is said you became a better and more attentive father and husband; you undertook courses, became a school trustee and entered the farmer of the year competition. Concerning Mr and Mrs Guy you assisted with landscaping on the house, gave Mrs Guy a present of her favourite tree and arranged for a Kaumatua to bless the house. Your wife testified at trial to noticing a change.

[16] The purpose in emphasising all this, as part of a sentencing exercise, is that acceptance by me of your remorse would justify a reduction in your sentence.

[17] I have reflected on the points Mr King makes, and on your letter, but in the end I do not accept the submission. I have the advantage of having seen your interviews with the Police at the time Mr Guy's murder was being investigated. That occurred after these events for which you are now being sentenced. I have had regard to your initial denials, and the manner of them; and then also to your subsequent admissions to this offending, and the manner of them. I saw and heard no sign of remorse; indeed if anything there were statements consistent only with continuing indifference.

### **Starting point**

[18] The starting point is the initial figure that the offending attracts without paying any attention to who did do it. In the present case Mr King, by reference to what happened to Mr Boe when he was sentenced, says it should be four years for everything. That is a reasonable submission because usually co-offenders do have the same starting point. However, I take a different view of the seriousness of the offending from that earlier sentencing, and find myself unable to agree with four years. I suspect it is because I am in a better position having had much more involvement with all these matters but I record that I do not accept a starting point of four years adequately captures the seriousness of what you have done, so consider it afresh. Alerted to this viewpoint, Mr King submitted I nevertheless needed to have regard at some point to issues of parity.

### **First link in sentencing chain**

[19] I turn first to the offending against others farmers in the community. It is difficult to isolate one of the charges as the most serious because each has its own features:

- (a) the burning of the whare caused the loss of a treasured piece of family history;
- (b) the killing of the calves was brutal, and seems worsened by the fact that it was just an alternative chosen on the spot when milk was not available to spoil;
- (c) the hunting of the deer and the release of the milk are lesser in monetary value but driven either by revenge or a total lack of respect for other people's property.

[20] Comparable cases are few and far between.<sup>1</sup> Given the number of offences, the total value of the damage (\$20,000, plus whare, plus consequential expenses) and the nature of the offending (shooting animals, killing animals, and arson), I take a starting point of two years, three months. By way of aggravation are the motive for three offences which was the unworthy one of revenge for having other offending disclosed, all offences were pre-meditated, some involved considerable planning, and three discrete victims were targeted. I add four months for those factors.

[21] I turn then to credit. I have already discussed remorse. I do not give any credit for your previous clean record since by your own admission you had previously on numerous occasions been entering property unlawfully and shooting and stealing deer.

---

<sup>1</sup> *Shaw v Police* HC Timaru CRI 2008-473-20 21, August 2008, Fogarty J has some similarities. The starting point was two and half to three years.

[22] You are entitled to credit for a guilty plea. I accept it was made straight away after you were charged, but that needs to be put in some context. It occurred after initial denials at the time and then repeated denials when confronted during the investigation. It was only when Mr Boe disclosed the offending and his role in it that you admitted guilt. By then the case against you was overwhelming. I reduce the sentence on this group to two years, one month.

### **Second link in the chain**

[23] I turn to the second offending. The relevant features here are:

- (a) the total destruction of a house and two trailers, with losses approaching \$700,000;
- (b) the timing of the damage to the new house, which was targeted to cause maximum hurt and engender fear;
- (c) the reinforcement of those targets by the graffiti.

[24] Again the actions were completely premeditated, down to later disposing of the paint used near Taupo. The intentional damage was done at a time when you were going to be out of town, so as to provide you with a cover story. It was aimed at family members, and involved causing distress and fear to your own family and the Guys. There was a real breach of trust, particularly as regards Mr and Mrs Guy senior who had provided you with so much. I note that the arson did not involve any immediate risk to life, other than that always inherent in needing to extinguish it.

[25] I consider the appropriate sentence, before deductions, is four years, three months.<sup>2</sup> That reflects, in general terms, two years, six months for the arson, 18 months for the damage, and a three month uplift for the premeditation and breach of trust.<sup>3</sup> The same guilty plea credit reduces this to three years, five months.

### **A totality adjustment**

[26] The total sentence is currently five years, six months. I consider some adjustment appropriate to reflect the difference in outcomes with Mr Boe, who was your co-offender on all these offences. The relevant figure for that comparison is a four year starting point which is some way below my end point. I consider fairness requires some acknowledgement of that. I, therefore, reduce the overall sentence to five years. I consider any sentence below that would not meet the purposes of the Sentencing Act in terms of holding you accountable for this series of targeted and malicious offences. The final overall sentence will, therefore, be five years.

[27] The Crown has urged me to impose cumulative sentences for each offence to reflect the individual harm suffered by each victim. I hope that these sentencing remarks have shown that each situation has been considered, and the final outcome includes recognition of each offence. The method I have chosen is orthodox, and I see no need to depart from it.

[28] Finally, I note the Crown has sought reparation of \$250,000. The sentences I have imposed reflect both the damage caused and the reality that Mr Macdonald has no capacity to pay. I do not consider that any purpose is served by creating expectations that cannot be met so make no reparation orders.

[29] Please stand.

---

<sup>2</sup> The arson cases to which I have had regard are *Howarth v R* [2010] NZCA 523, *Carlos v R* [2010] NZCA 248, *R v Rameka* CA426/04, 16 June 2005 and *R v Mohi* [2007] NZCA 139. *Howarth* reviews several sentencing decisions at [49]–[52].

<sup>3</sup> One could adjust the balance between the two offences without producing a different total. The lesser uplift reflects the fact that premeditation has also been considered on the first group of offences.



[30] Mr Macdonald, I sentence you as follows:

- (a) for theft (11054001257) of the stag, 9 months' imprisonment;
- (b) for intentional damage (11054001255) in releasing the milk, 9 months' imprisonment;
- (c) for intentional damage (11054001254) in killing the calves, 12 months' imprisonment;
- (d) for arson (11054001256) in burning the whare, 2 years' imprisonment.

[31] Then in relation to the offending against Mr and Mrs Guy:

- (a) on the charge of arson (11054001253), 3 years' imprisonment; and
- (b) on the charge of intentional damage (11054001252), 2 years' imprisonment.

[32] The two arson sentences are cumulative on each other meaning a total term of 5 years' imprisonment.

---

Simon France J

Solicitors:

P L Murray, Vanderkolk & Associates, Palmerston North, email: [paul@bvalaw.co.nz](mailto:paul@bvalaw.co.nz)

G King, Barrister, Lower Hutt, email: [greg.king@paradise.net.nz](mailto:greg.king@paradise.net.nz)

P S Coles, Principal, Palmerston North, email: [karen.c@broadwaylegal.co.nz](mailto:karen.c@broadwaylegal.co.nz)