*Ajax v The Queen* [2006] NTCCA 12

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| PARTIES: | AJAX, Samuel (aka Samuel ISAAC) |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 9 of 2005 (20427602) |
| DELIVERED: | 7 June 2006 |
| HEARING DATES: | 4 May 2006 |
| JUDGMENT OF: | MARTIN CJ, MILDREN & THOMAS JJ |
| APPEAL FROM: | Northern Territory Supreme Court, 20427602, 16 February 2005 |

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – Appeal against sentence for arson – sentence manifestly excessive – appeal allowed – resentenced

*Criminal Code (NT)* s 188, s 239, s 251

**REPRESENTATION:**

*Counsel:*

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| Appellant: | V Whitelaw |
| Respondent: | R Coates & N Rogers |

*Solicitors:*

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| Appellant: | Central Australian Aboriginal Legal Aid Service Inc |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Ajax v The Queen* [2006] NTCCA 12
No. CA 9 of 2005 (20427602)

BETWEEN:

**SAMUEL AJAX (aka SAMUEL ISAAC)**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: MARTIN CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 7 June 2006)

**Martin (BR) CJ:**

[1] I agree with the reasons of Mildren J for allowing the appeal and with the order he proposes as to sentence. I also agree that the current level of sentences for arson are too lenient and need to be increased significantly. While, as Mildren J has said, the offence of arson can be committed in a wide variety of circumstances, potential offenders are now on notice that in future they can expect to receive significantly longer sentences of imprisonment for this crime.

**Mildren J:**

[2] The appellant was charged with three counts, namely: arson contrary to s 239 of the Criminal Code; aggravated assault contrary to s 188(1) and s 188(2)(b) of the Criminal Code; and aggravated unlawful damage to property contrary to s 251(1) and s 251(2)(c) of the Criminal Code. On 9 February 2005 the appellant pleaded guilty to each of these counts. On 16 February 2005 the learned sentencing Judge imposed a sentence on count 1 of imprisonment for nine years. In relation to count 2, the learned sentencing Judge imposed a sentence of six months imprisonment. In relation to count 3, a sentence of 18 months imprisonment was imposed to be served concurrently with count 1. The six months imprisonment in relation to count 2 was ordered to be served partially concurrently with count 1 as to three months, making a total effective sentence of nine years and three months. His Honour fixed a non-parole period of five years. The sentences on counts 1 and 3 and the non-parole period were ordered to commence from 2 December 2004.

[3] The facts as presented by the Crown were not in dispute. On the evening of Thursday 2 December 2004, the appellant had been drinking green cans of beer and “brown box” tawny port with friends in Alice Springs, including the female victim TD.

[4] The offender became heavily intoxicated and caught a taxi back to his residence at 17 Engoordina Drive, Larapinta in Alice Springs. He there continued to drink tawny port. At some stage he asked TD whether or not

she loved him. She did not reply because she was too drunk. He then began to punch TD to the head, shoulder and back on several occasions and he also slapped TD twice. TD ran away from the offender's house to the offender's sister's house several streets away.

[5] The appellant, who was still drunk and wild, decided to damage the building which was a ground level rendered brick three bedroom residence. He grabbed two 150 centimetre long iron bars which he used to smash seven windows around the house. Nearby neighbours heard the sound of smashing glass and called the police.

[6] The appellant then opened the electricity meter box at the front of the house and punched the glass cover over the meter. The glass did not break so he swung one of the iron bars at it, smashing the glass and causing it to fall to the ground. The meter was then smashed with the iron bar, causing extensive damage.

[7] He then decided to set fire to some of the furniture inside the house in order to burn the house down. He went to the rear of the house, into the living room and set fire to a lounge chair, the property of the offender's sister, SM, by lighting a match and positioning the flame so that "impinged against" combustible material on the couch. The material caught fire and enveloped the whole couch and nearby window curtains in flames.

[8] As a result, the entire contents of the living room and the adjoining kitchen were soon enveloped in fire. The fire spread through the roof cavity and

down into the adjoining bathroom/toilet and bedrooms. The appellant then walked out of the house, still holding the two iron bars, and hid behind a power transformer box directly across the road to watch the fire.

[9] The fire was reported to the police and the fire service by nearby neighbours, who also attended to try and extinguish the fire with garden hoses. A few minutes later, the police arrived and located the appellant. The appellant was asked to drop the bars, but refused. The bars were knocked from his hands and he was then arrested.

[10] The appellant was secured in the cage section of a police van whilst police checked the burning house for people and began to attempt to extinguish the fire. By this time the fire had engulfed the majority of the house. The fire brigade arrived a short time later and the fire was extinguished.

[11] The dwelling was owned by Territory Housing and rented in the name of the offender's grandmother. The dwelling sustained extensive fire, heat, smoke and water damage to the value of approximately $200,000.

[12] The property inside the dwelling belonging to the appellant's sister, SM, included a number of religious books, four lounge chairs, kitchen appliances and personal clothing worth approximately $8,000, all of which was destroyed by the fire.

[13] The appellant was conveyed to the Alice Springs watch house and held under the provisions of s 137 of the Police Administration Act.

[14] On Friday 3 December 2004, the appellant participated in an audio and video recorded interview during which he made admissions to the offences. When asked why he assaulted TD, he replied, “I was just thinking whether she liked or didn’t like me, too drunk, angry, too drunk, drinking, get wild”. When asked what had made him angry, he explained, “She don’t love me, then I hit her, I say you don’t love me, I get wild”.

[15] When asked why he smashed the seven windows and the meter box, he stated, “I was drunk wild”. When asked why he set fire to the couch, he replied, “I was too drunk, I was trying to light the bottom of the couch”. When asked what he was trying to do by setting fire to the couch, he replied, “Burn the house down, I was wild drunk”. When asked what he thought would happen if he set fire to the couch, he replied, “Burn the house”. When asked how much of the house he thought would burn, he replied, “Big room, lots”.

[16] The appellant, who was born on 1 November 1981 and who was 23 years of age at the time of the offending, had a lengthy prior record of offending, commencing in 1998 when he was still a juvenile. His serious convictions began as an adult in 2001. His convictions were mainly for unlawfully entering a dwelling with intent to commit a crime, stealing, unlawful damage to property and trespass. In addition, he has two prior convictions for assaulting a female. A number of breaches of suspended sentences have been proved. He has been sentenced to imprisonment on a number of

occasions, although it would appear that the longest sentence that he has served is imprisonment for 13 months.

[17] The learned sentencing Judge said that it was clear that the appellant had "no regard for the law, intended to protect people from violence and to protect property from damage". His Honour noted that the appellant had been released from prison only a few weeks prior to committing these offences.

[18] Because of the appellant's plea of guilty and cooperation with the police, his Honour allowed a one-quarter benefit, i.e. it must be assumed in relation at least to the sentence of imprisonment for nine years for the arson that his Honour would have otherwise imposed a sentence of imprisonment for 12 years.

[19] His Honour noted that an explanation for the appellant's conduct lay in his mental condition; that the appellant had been under attention by mental health practitioners for about five years; that in March 2000 he was in and out of the psychiatric ward at Alice Springs, but ultimately was discharged; it was then suggested that the appellant may have been suffering from inhalant intoxication by the smelling or sniffing of petrol or other substances; that in 2001 the appellant's condition was reported as improving with a suggestion that the appellant suffered from mild cerebral atrophy related to petrol sniffing. However, it was also accepted by his Honour that the cerebral atrophy was such that when the appellant was affected by

alcohol he was unable to cope and ended up in trouble with the criminal law. His Honour found that there was a high risk of re-offending in those circumstances and his Honour hoped that adequate services would be available in the prison to assist the appellant to cope with better and resist any temptation to drink alcohol when he is free again.

[20] The grounds of appeal sought to be agitated are that the sentences imposed were manifestly excessive; that the sentence imposed for the offence of arson was outside of the range of sentences ordinarily imposed in the Northern Territory; that too little discount was given for cooperation with the authorities and an early plea of guilty; that too much weight was given to general deterrence; that too little weight was given to the appellant's background and poor life circumstances; and that too little weight was given to the appellant's mental health problems.

[21] So far as the sentence of nine years for the arson is concerned, material presented to the Court indicated that the highest sentence recorded for arson in this Court in relatively recent times is imprisonment for five years with many of the sentences in about the three year range and some of them considerably less.

[22] Counsel for the respondent conceded that the sentence imposed by the learned sentencing Judge was well in excess of sentences that had been imposed for the offence of arson committed in similar circumstances. Having regard to the great disparity between the sentence for arson imposed

by the learned Judge and the general run of sentences imposed by this Court for similar offending, the Court unanimously allowed the appeal and invited further submissions from counsel on re-sentencing.

[23] A matter which was of some concern to his Honour, the sentencing Judge, was that the appellant's brain damage made him a risk of offending again in a similar manner after his release from prison.

[24] Counsel for the appellant has provided further material to the Court which demonstrates that since the appellant's incarceration an order had been made by the Local Court under the provisions of the Adult Guardianship Act appointing the public guardian as the adult guardian of the appellant. The order was made by the Local Court on 29 March 2006, pursuant to s 15(2)(b) of that Act. The order is conditional only and conferred on the adult guardian the following authority and functions:

> "(a) to make decisions concerning [the appellant's] rehabilitation and training so as to facilitate his access to support services as required;
>
> (b) to make decisions concerning [the appellant's] health care and to consent to any health care that is in his best interests, except as otherwise provided in s 21 of the Adult Guardianship Act;
>
> (c) to act as an advocate for [the appellant] as required."

[25] The Court has had the opportunity to consider the confidential report prepared by the investigative officer of the Executive Office of Adult Guardianship. It is apparent that the guardianship panel was of the view that

when the appellant is ultimately released from prison he will need to have amendments made to the guardianship order so as to empower his guardian to make orders concerning his health care decisions, to make financial decisions on his behalf and to make decisions relating to his accommodation.

[26] We have also been provided with a copy of the report of the consultant clinical psychologist, Mr Tyrell, whose opinion is that the appellant is functionally intellectually impaired due to the combined effects of poor schooling (having no literacy and very little numeracy) and both broad mild organic brain impairment and specific mild to moderate impairment, almost certainly involving the cerebellum. This specific impairment he found is due almost certainly to inhalant misuse.

[27] Mr Tyrell observed:

> "It is important to note that while his brain impairment as it relates to his intellectual abilities (cf motor abilities) presents overall as relatively mildly disabled in his sober state, it will predispose [the appellant] to rapid acute major impaired judgment, problem solving and related intellectual deficit when he misuses alcohol or any other mood altering drug.
>
> For now there is little doubt that he does not have the intellectual ability or other know how to navigate his way to effective position of negotiation or self-advocacy within the ASCC or the Department of Justice – should he or others believe that his situation needs to be reviewed."

[28] The Court also received an affidavit from a Mr Bens, a prison officer at the Alice Springs Correctional Centre, who came into contact with the appellant

in the course of his duties because he noted that the appellant walked with a somewhat awkward gait, displayed involuntary arm, eye and neck movements, talked with a tendency to stutter and appeared to lack confidence and lack eye contact. These symptoms were noted also by Mr Tyrell whose view was that his motor disabilities were consistent with substance abuse, e.g. petrol sniffing.

[29] Mr Bens noted that the appellant was very vulnerable to sexual predation teasing, bullying and "humbugging" by some prisoners and for that reason his housing in the prison was carefully selected and constantly reviewed. Mr Bens noted that the appellant appears to be easily led by other prisoners which gets him into further trouble and that he also generally required a "pre-unlock reminder to get ready" and "one to one counselling".

[30] It is apparent from Mr Bens' affidavit that notwithstanding Mr Bens' efforts, the appellant's time in prison may be harder than for other prisoners. There is also a risk that should Mr Bens be transferred or retire from the prison service that other prison officers will not be as sympathetic. To some extent these problems will be addressed, not doubt, by the adult guardian.

[31] The other aspect of this evidence is that demonstrates that the appellant's risk of offending when released ultimately from prison may not be as high as previously thought.

[32] The evidence suggests that it is a distinct possibility that upon the appellant's release from prison the terms of the adult guardianship order are

likely to be broadened by the Local Court and that this may assist him from re-offending, particularly by controlling his consumption of alcohol.

[33] In all the circumstances and having regard to the general level of sentencing in this area, I consider that an appropriate head sentence for the offence of arson, in this case, is imprisonment for four years. I would not alter the sentences imposed by the learned sentencing Judge in relation to the other offending and, like the learned sentencing Judge, I would order that the sentence of nine months imprisonment for the offence of assault be served concurrently as to six months, resulting in a total sentence of imprisonment of four years three months. I would fix a non-parole period of two years two months; sentence and non-parole period to be backdated to commence on 2 December 2004.

[34] Before leaving this appeal, I think something needs to be said about the current level of sentencing for offences of this kind. Arson is potentially an extremely serious offence as it carries a maximum penalty of imprisonment for life. The current level of sentences are, in my view, too lenient and need to be increased significantly. The offence of arson, of course, is an offence which can be committed in a wide variety of circumstances. The extent to which a sentencing court needs to impose a deterrent sentence will often be determined by factors, such as the value of the property destroyed, whether the property was occupied at the time particularly at night by persons who are asleep, the level of risk to other persons in neighbouring properties as well as to police and fire fighters involved in checking the premises for

occupants and in fighting the fire, whether the offender was intoxicated at the time, whether the owner of the property will suffer any consequential loss over and above the destruction of the property itself (for example in the case of business premises by the loss of profits due to disruption to the business), whether or not anyone was in fact injured or killed as a result of the fire and if so the number of victims and the extent of those injuries. Matters going to mitigation will often include cooperation with the authorities, pleas of guilty, lack of prior convictions and in the case of Aboriginal persons in particular, may include the fact that the defendant has been brought up in an impoverished section of society which has become dysfunctional through the affects of alcohol or other drug misuse. These of course are not intended to be a complete list of all of the aggravating or mitigating factors which the sentencer will be required to consider.

**Thomas J:**

[35] On 4 May 2006, the Court unanimously agreed the appeal should be allowed and invited further submissions from counsel on re-sentencing.

[36] I have read the draft decision of Mildren J. I agree with the reasons he has stated as being the reasons why the Court unanimously allowed the appeal.

[37] I have considered the further submissions from counsel on sentence. I agree with the reasons expressed by Mildren J and with the sentence he proposes.

[38] The offence of arson is a serious offence. I agree with the comments of Mildren J that sentences for this offence should be increased taking account of, but not limited to, the factors he has identified.

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