IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Fitzgerald, 2010 NSPC 73

Date: 20101123
Docket: 2050132
Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

v.

Kenneth Fitzgerald

Defendant

DECISION

Judge: The Honourable Jean M. Whalen, J.P.C.

Heard: November 23, 2010 at Sydney, Nova Scotia

Charge: Section 434 *Criminal Code*

Counsel: Kathryn Pentz, Crown Attorney
Andy Melvin, Defence Counsel

By the Court:

[1] This is the sentencing decision of Mr. Kenneth Fitzgerald.

Facts:

[2] I find that Mr. Hart left his Dorchester Street home around 7:00 p.m. Sometime between 7:30 and 7:45 Mr. Fitzgerald entered his home and set a home-made molatov cocktail on fire in his living room. It consisted of a plastic pop bottle that had been filled with gasoline with a rag stuffed in the top which was lit on fire.

[3] Mr. Fitzgerald had broken into the house through the front door and entered the home on two occasions. Not only was Mr. Hart's couch, where the fire was started damaged, but his home was severely damaged. The fire killed four of his pets, caused $15,000 damage, and left Mr. Hart homeless. Mr. Hart had no insurance.

[4] A neighbor by the name of Charlene MacNeil, (who lives in the other half of the company house, that shares a common wall, but not insulated), said she heard a thump between 7:30 and 7:45 and subsequently smelled smoke. She thought it was her furnace. She checked but it was fine. She continued to smell smoke and she subsequently opened her frontdoor and she saw flames coming out of Joe's (Mr.

Hart's) door. She called 911 and fortunately the fire department arrived within minutes. Her home and contents suffered smoke damage.

[5] Mr. Hart read his Victim Impact Statement in open court. He stated this is the house where his mother lived with cats and a dog. His pets were all killed. He lost his home that was uninsured and this left him homeless. He was very emotional and indicated this was a very traumatic experience. Mr. Hart, through Crown Counsel, seeks restitution in the amount of $15,000.

[6] Mr. Fitzgerald has a lengthy record beginning in 1979. It contains convictions for drugs, property offences and offences against people. In the pre-sentence report, Mr. Fitzgerald said his memory of the events was not very good, but I would note the details of other fires in the area around the same time were very good when I viewed his statement to police.

[7] I do not believe Mr. Fitzgerald when he said he was not thinking clearly then or when he gave his statement because he told the police what he did that night. He indicated he wanted evidence from the police and he certainly got it. A web-cam was set up by Mr. Hart and recorded Mr. Fitzgerald starting the fire.

[8] There are a number of other places in the statement where I do not believe Mr. Fitzgerald when he stated he could not remember a lot of things. He changed his statement on a number of occasions. In one instance he said he was on lots of medication, and later on he said he was not following them, and then stated Mr. Gerald Roberts had taken them from him.

[9] I would note in one particular spot of Mr. Fitzgerald's statement, he was certainly paying attention to the police officer's questions when he quickly denied that he said he burned the house.

[10] On another occasion he said it was Mr. Hart that drove him to it because he was spreading rumours about the defendant, and on the night in question he jumped up from his couch and went to Mr. Hart's to set the fire.

[11] I would note as well in the statement he gave that Mr. Fitzgerald was aware that a woman lived on the other end of this house and said, "he said he wouldn't go if anybody was home." But he never did anything to check and I find that he was reckless in his behaviour.

[12] He also knew that one could not get house insurance, stating to the investigating officer: “You can’t get insurance on a lot of those old company houses.”

[13] Mr. Fitzgerald does accept some responsibility and feels some remorse, but he also blames some of his peers. In particular, Mr. Fitzgerald now says that it was Mr. Gerald Roberts who put him up to it.

[14] As I indicated earlier, Mr. Fitzgerald now says he was not following his meds at the time, but in the November 19, 2009 statement he said that Mr. Roberts took his meds and threw them away.

[15] The Presentence Report has also said that Mr. Fitzgerald was seeing a psychiatrist, or has seen Dr. Ali, and that he was not on drugs or alcohol when he committed this offence.

[16] With respect to aggravating factors, I find that this was planned and premeditated; Mr. Hart was the specific target. Mr. Fitzgerald was armed, with what I would describe as a molotov cocktail containing an exhilarant; it was a dwelling

house with a neighbour who lived next door; there was $15,000 worth of damage; the pets were killed or were left to die; and the defendant has a lengthy criminal record, a lengthy history of anti-social behaviour; and the inherent dangers in this type of crime. if not to property owners, certainly to fire and police personnel who would respond and be put at risk.

[17] Mr. Melvin says that there are some mitigating factors. He says that there was a change of plea and that should be considered mitigating, although crown says, no, that was mid-trial and he should not receive any benefit.

[18] Mr. Melvin also argued that Mr. Fitzgerald had a lengthy history of mental health. The Crown disagrees that there was no linkage with Mr. Fitzgerald's mental health issues. This court finds that to be the case.

[19] Mr. Melvin urged me to consider Mr. Fitzgerald's post-offence rehabilitation.

[20] Mr. Melvin submitted that Mr. Fitzgerald has mental issues and cognitive issues and that he referred the court to a Discharge Summary, his client's statement of June 2, 2009, and page 4 of the Presentence Report. He also suggested Mr. Fitzgerald pled

not guilty because he was violently assaulted in a federal prison. As well, he states a third party instigated the arson and used the defendant.

[21] Mr. Melvin argues that Mr. Fitzgerald has been under very strict house arrest while at Harvest House, although I note there have been two variations since his release. Mr. Fitzgerald says he has had no breaches.

[22] Mr. Melvin called three witnesses from Harvest House, in particular, Mr. Sangster, who testified he had noted a change in Mr. Fitzgerald. He was more comfortable with them and his medications are in balance. He could not speak to any specific training that Mr. Fitzgerald was engaged in to assist his rehabilitation, although he did say Mr. Fitzgerald reads the Bible and attends Bible study.

[23] Mrs. Mackery runs the women's residence and teaches recovering men to read. She said Mr. Fitzgerald is involved in the recovery program. As well, he's also fixing a set of drums. She said that Mr. Fitzgerald can stay as long as he feels the need, or he can go live in the community.

[24] Mr. Cal Maskery, the Director of Harvest House, in Moncton outlined the spiritual program their residence follows. He said Mr. Fitzgerald was not in school in an education program, or specific job training program. However, he is doing some odd carpentry jobs with Harvest House staff and he said that Mr. Fitzgerald wanted to stay on to encourage other young men and to build their new structure.

[25] With respect to Mr. Fitzgerald's mental health issue, I reviewed the assessment report completed by Dr. Theriault and dated July 8, 2009. It was Dr. Theriault's opinion that Mr. Fitzgerald is:

> "...feigning symptoms of mental illness. Specifically, he is feigning symptoms of a psychotic illness with reported features of auditory and visual hallucinations and is feigning cognitive impairment. There is no evidence to suggest that Mr. Fitzgerald is currently suffering from any active psychiatric disorder.
> He has a long history of conflict with the law dating back to his juvenile years. A long standing history of poly-substance abuse and alcohol abuse and an ongoing problem with anti-social behaviour with drug and alcohol abuse. In the 80's there were several hospitalizations with the diagnosis of acute substance abuse and anti-social personality disorder, but note that Mr. Fitzgerald's file stated that Mr. Fitzgerald engaged in manipulative behaviour."

[26] June 2, 2009 hospital notes indicate that Mr. Fitzgerald complained of hearing voices and telling him to kill others and do away with himself. His involuntary status

could not be clinically justified as Mr. Fitzgerald was agreeable to voluntary hospitalization and:

> "...by a strange set of coincidence he had become suicidal only when he was apprehended by police.
> Mr. Fitzgerald complains of memory difficulties relating to long-term memory. In normal circumstances where there is a progressive memory impairment over time, recent information is lost first, followed by long term memory impairment. For example, he reported he couldn't remember where he was born, how many children were in his family, whether his parents were alive or dead and where he lived, his criminal history or subsequent history of mental health history. Yet, upon observation Mr. Fitzgerald had no difficulty with recognition of staff, no difficulties with confusion and no difficulties in understanding conversations and dealing with day to day activities.
> He showed no medical difficulties which would explain his memory loss. Therefore, these memory complaints must be considered to be contrived or feigned. This pattern of Mr. Fitzgerald, that is of utilizing feigned symptom ology to relieve social stress appears to be well established.

[27] The court was cautioned that Mr. Fitzgerald "will likely attempt to use that symptomology during court appearances as a way to circumvent the purposes of the court process."

[28] What is the appropriate sentence for Mr. Fitzgerald.

> "It is a basic theory of punishment that the sentence imposed bear a direct relationship to the offence committed. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserved the punishment received and feel confidence in the fairness and rationality of the system. To be just, the sentence imposed must also be commensurate with the moral

> blame-worthiness of the offender. A sentence that is not just and appropriate produces only disrespect for the law."
> " *Sentencing, Clayton C. Ruby et al (6th ed.) para. 21*

[29] These common law principles have been codified in section 718.1 and 718.2 of the *Criminal Code*.

[30] Parliament codified a number of other important values to help sentencing judges give effect to the fundamental principles of proportionality. The articulated principles however, are general in form, and moreover they provide no mechanism for resolving the inevitable conflicts that arise between these various principles in individual cases.

[31] Sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence. In crafting the appropriate sentence the court must have regard to the factors set out in the code as well as the nature of the offence committed and the personal circumstances of the offender. According to the Supreme Court of Canada the appropriate sentence will also depend on the circumstances of the community in which the offense took place.

[32] Other common law principles of sentencing must also be appropriately applied. In the end, the punishment must be proportionate to the moral blame-worthiness of the offender.

> "It must be remembered that in many offenses there are varying degrees of guilt and it remains the function of the sentencing process to adjust the punishment for each individual offender accordingly.
>
> The appropriate sentence for the specific offender and offence is therefore determined, having regard to the compendium of aggravating and mitigating factors present in the case. It is the weight attached to the aggravating and mitigating factors which shape and determine sentence imposed and this is an individual process. In each case the court must impose a fit sentence for this offense in this community.
>
> The nature and gravity of the offence is properly the central factor in sentencing. It is and must be the first rule that prompts the court. The concern behind this consideration is that there should be a just proportion between the offence committed and the sentence imposed.
>
> Our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed having regard to the nature of the crime and the particular circumstances in which it was committed." *Sentencing, Clayton C. Ruby et al (6th ed.) para. 2.6*

[33] The public must be satisfied that the offender deserved the punishment received and must feel a confidence and fairness and rationality of the sentence. In this principle of proportionality is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may be imposed only on those

who possess a moral culpable state of mind. The cardinal principle is that punishment shall fit the crime.

[34] Mr. Fitzgerald's counsel also encouraged me to consider the post offence rehabilitation efforts of his client. This area concerns the Defendant's progress in dealing with personable problems and efforts to improve or repair one's social situation. They can be considered as mitigating factors. They may warrant credit because they show both a recognition of personal difficulties and a commitment to remedying them.

[35] Of course, one needs to show sincerity and motivation and this is usually done through material from a treatment program, job, family or friends. I would note with respect to Mr. Fitzgerald, there have been no specifics given for job training, education or counselling. The effect of the post offence efforts would obviously depend on sincerity, actual progress and relevance to the offence.

[36] Mr. Melvin also asked me to consider the acts of reparation or compensation put forth by Mr. Fitzgerald. Prior to the trial, Mr. Fitzgerald said in his statement he was going to give Mr. Hart his home. Post plea of guilty, I would note that Mr.

Fitzgerald indicates he could pay him $20.00 per month. Given his lack of financial ability, that would take Mr. Fitzgerald 62½ yrs. to pay off the restitution. There is no letter of apology from Mr. Fitzgerald.

[37] It is impossible to know with 100% certainty whether an act is purely one self-interest or reflects remorse and a concern to rectify any harm done.

[38] Mr. Melvin also urges me to consider the fact that Mr. Fitzgerald was under duress because Mr. Roberts had threatened him. I would note, as Mr. Melvin noted that duress is limited by section 17, such that there is evidence of compulsion but no defence to the charge. Because it can considered less blame-worthy to act under threat than of one's own initiative, these situations can mitigate a sentence.

[39] Mr. Fitzgerald now says that he was put up to it by Mr. Roberts. Other than that submission by Mr. Melvin on sentence and in the second statement of Mr. Fitzgerald, there is no other evidence.

[40] Mr. Melvin would also like the court to consider the fact that sentencing did not happen right away at the change of plea. He argues that while Mr. Fitzgerald has

been awaiting sentence, there has been no repetition of any offending behaviour an important mitigating factor. I would note the extent of it's influence though is effected by the gravity of the offence, and it is diminished by a lack of remorse or denial that the offence was a serious matter.

[41] I have already noted the substantial economic loss suffered by Mr. Hart. A small loss perhaps by someone on a fixed income may be catastrophic while a large loss to an institution like a bank may be inconsequential and I would find that the loss to Mr. Hart is catastrophic in that it left him homeless.

[42] So what is a fit and proper sentence for the offence of arson and for Mr. Fitzgerald. Section 434 carries a maximum penalty of ten years in prison. Arson is committed in a number of different ways by a broad cross-section of offenders and sentencing reflects such. The court takes note of the lost property and will pay particular attention to the degree of danger to life represented by particular fact situation.

[43] The crown supplied the court with numerous cases and those sentencing varied. In *R. v. K.H.* (1994), 146 N.B.R. (2d) 372, the adult co-accused received 4 ½ and 5

½ years for the offences. There was no evidence that the defendant's mental illness had any cause on his behaviour. I find the same with Mr. Fitzgerald. There is no connection although Mr. Fitzgerald tries to suggest same in the statement he gave to police. Mr. Melvin distinguishes this case by saying that the damage exceeded $3 million dollars, and that the categories of arson Mr. Fitzgerald does not fit into those, and that he was under the influence of a third party.

[44] In *R. v. Fewer*, [2004] N.J. No. 433, the deterrence was emphasized and the defendant ensured the house was not occupied. The aggravating factors in that case were the defendant's criminal record, the loss suffered by the victim and the inherent dangers. Mr. Fitzgerald, I would find, did not ensure that the entire home, 'that old company house', was not unoccupied. His actions were deliberate, planned, reckless and dangerous, and there was substantial financial loss. Mr. Melvin would distinguish this case by saying that the defendant, *Fewer supra*, had a history of arson.

[45] In *R. v. Quigley*, [1998] B.C.J. No. 561, the court talked about the planned nature of the offence and, despite the mental illness of Mr. Quigley in that case, he got 5 years. I would note that Mr. Fitzgerald made the cocktail. He entered twice and knocked over the stove pipe the second time he entered. There was a planned nature

to this offence. Mr. Melvin argues that Mr. Quigley in that case, got the five years because he was resistant to rehabilitation.

[46] With respect to *R. v. Porsche* [2007] B.C.J. No. 2393, the defendant in that case got 5 years consecutive for an arson as part of a global sentence. Mr. Melvin argues that there were 10 charges and the defendant in that case was also high on drugs.

[47] In *R. v. Fitzgerald,* [2008] B.C.J. No. 142, but no relation to the defendant. The defendant before the court, got 8 years and the sentence was upheld up on appeal. The court said that it needed to protect the public from arsonists and emphasized the principles of denunciation and deterrence. Mr. Melvin would argue that that case should be distinguished because the defendant in that case was paid to set fires.

[48] In the case of *R. v. Fox,* [2002] O.J. No. 2496, the Ontario Court of Appeal agreed that a conditional sentence was unfit for these types of crimes.

[49] In *R. v. Roswell,* [2002] N.J. 73 (Nfld S.C.) the sentence was 2 years, less a day and the court said the sentence was lenient because the defendant suffered a mental disorder and he had also drank alcohol at the time of the offence. I would note that

the court in its decision indicated jail was an appropriate sentence (between 2 and 6 years.)

[50] The defendant, Mr. Fitzgerald, was not under the influence of alcohol or illegal drugs, nor is there any medical evidence to suggest that his mental health effected the commission of this offence. Mr. Melvin says he would distinguish *Roswell* by saying that in that particular case the defendant had no remorse and there alcohol and drugs involved and here Mr. Fitzgerald was threatened to set the fire.

[51] The case of *R. v. C.P.M.*, [2009] A.J. No. 247, emphasized general and specific deterrence. The sentence must reflect: 1) the inherent dangers of the offence, and 2) the unintended and fatal consequences. Here, Mr. Fitzgerald had a grudge against Mr. Hart and the consequences were intended by Mr. Fitzgerald. Mr. Melvin would distinguish this case by arguing *R v. C.M.P. supra* that the defendant was setting the fires while the firefighters were trying to put them out, and that Mr. Fitzgerald has been actively trying to address his mental health issues.

[52] Mr. Melvin, on Mr. Fitzgerald's behalf indicated that the court should consider and should grant Mr. Fitzgerald a conditional sentence. He cited the case of *R. v.*

Sharpe, (2008) ABPC 100 wherein the defendant and husband had been drinking and had set fire to her own home. The husband had suffered burns to his arm and back. At paragraph 26 the court discussed the moral blame-worthiness and stated that the consequences were unintended and the conduct was at the lower end of the scale.

[53] Here I find that Mr. Fitzgerald's consequences were intended, Mr. Hart was targeted and his conduct was certainly not at the low end of the scale.

[54] In the case of *R. v. Bauming*, [2007] ABPC 223, the parties were going through a matrimonial litigation and the husband lost $70,000 in personal property and $80,000 in the house; it was not about revenge but a rejection of the past break-up and the court did not see a need for specific deterrence. Here I find that Mr. Fitzgerald was seeking revenge against Mr. Hart as a result of him spreading rumours or as he now suggests, he was put up to it by Mr. Roberts, who had ongoing problems with Mr. Hart.

[55] In *R. v. Proulx*, [2000] 1 S.C.R. 61, it says that a conditional sentence does denounce unlawful conduct and conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made

aware of the severity of these sentences. Defence counsel says that a conditional sentence is appropriate because, one, this is not a serious personal injury offence and therefore Mr. Fitzgerald is eligible for the court to consider a conditional sentence, and two, the court should focus on Mr. Fitzgerald's rehabilitation among other factors.

[56] The court read several letters of support from community organizations and individuals that were written on his behalf and Mr. Melvin suggests that I should consider the defendant's inability to plead guilty because of his jail experience and this sheds light on his reason for going to trial. Mr. Fitzgerald was cooperative with the police, although I note he denied it in the first statement he gave to police and then blamed the third party in his second.

[57] Mr. Fitzgerald did express remorse initially, but it seems to the court it was only to save himself from jail. During the defendant's time on recognizance, there was no breach and Mr. Melvin says that this shows Mr. Fitzgerald does not pose a danger to the community if under supervision of Harvest House.

[58] Mr. Melvin also argues that Mr. Fitzgerald has done exceptionally well towards rehabilitation and made remarkable strides. Although, I said earlier, that the court

notes it has heard no specifics with respect to Mr. Fitzgerald and Mr. Melvin lastly says that if sent to jail he would backslide and any prospects of change in prison would be low.

[59] With respect to the availability of a Conditional Sentence Order, I quote extensively from the case of *R. v. C.P.M. supra* beginning at paragraph 27.

> In *R. v. Proulx*, Chief Justice Lemare explained that a conditional sentence is reserved for those who are not given a penitentiary sentence. In paragraph 49 he explained that Parliament intended that a conditional sentence be considered only for those offenders who would have otherwise received a sentence of imprisonment of less than two years. Hence, a residual sentence of 6 months or more would make the option of a conditional sentence unavailable. The relatively short length of the Conditional Sentence Order militates its utility in these circumstances. However, it does not make such an order impossible.

[60] At para. 28 in *Proulx*, Justice Lemare points out that s. 742 contains the prerequisite of a conditional sentence order and on December 1, 2007 an amendment to this section was proclaimed. The effect was to add new prerequisites. These new prerequisites are found at the beginning of a section which reads:

> "If a person is convicted of an offence other than a serious personal injury offence as defined in s.752, a terrorism offence or criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more. The portions that apply to this offender, I have underlined. The effect of that amendment was to preclude a Conditional Sentence Order for offenders who had committed personal injury offences as defined by s. 752 where a

maximum penalty for such offences was ten years or more. Section 434 is an offence with a 14 year maximum.

At the time of these offences the relevant portion of s. 752 applicable here reads:

> A personal injury offence means a) an indictable offence, other than high treason, treason, 1st degree murder or 2nd degree involving ss 2 conduct endangering, or likely to endanger the safety of another person. Section 434 does not set out as an element of the offence endangerment to life or safety. This is in contrast to s. 433 which has an element of causing bodily harm where the property is inhabited or occupied. My reading of the definition of serious personal injury offence does not mean that the offence is required to have such an element to meet the definition. Rather, the offence committed must involve conduct endangering or likely to endanger life or safety of another person. The standard of proof required is proof beyond a reasonable doubt. It is not every instance where a person commits a s. 434 offence that a serious personal injury offence is committed. This must be determined by examining the facts surrounding the commission of the offence. At paragraph 31 the court goes on to state admittedly not all of the conduct supporting these offences could meet the definition. For example, the fire to the tarpaulin and the fire to one of the fires set in the dumpster did not prove the type of endangerment necessary. However, in most instances, the offender set fire to a vehicle, patio furniture near residence in which people were sleeping. Some of those people put the fire out themselves. In my opinion the safety of sleeping residents was endangered by the reckless fire setting close to the residence late at night."

[61] At paragraph 32 the court goes on to quote:

> "In *R. v. Neve* the court held that to meet the definition of serious personal injury offence set out in sub paragraph (a) the crown must demonstrate beyond a reasonable doubt violence or endangerment that is objectively serious. The demonstration of this requires an examination

> of the actual conduct of the offender during the commission of the offence and not simply a reference to the offence itself. The test is not whether the endangerment was possible, that endangerment was likely."

[62] And finally, at paragraph 37, the court goes on to state:

> "The prerequisite to a conditional sentence is a sentence of less than two years. In *Proulx* Chief Justice Lemare held that there is a two stage process to determine the availability of a conditional sentence order. At the first stage of the analysis the judge does not set a term of fixed duration. Rather, the judge simply has to exclude probation alone or a penitentiary term. If either possibility is appropriate than a conditional sentence should be imposed. The fundamental purpose and principles of sentencing are considered to the extent to narrow the range at this stage. And that the second stage the sentencing judge determines the principles of sentencing comprehensively to determine whether a conditional sentence order is appropriate. The duration and venue of the sentence are then determined and if a conditional sentence is imposed the conditions should then be set out."

[63] Upon examination of Mr. Fitzgerald's conduct during the commission of the offence: I find that Mr. Fitzgerald saw Mr. Hart leave his house, that he was angry at Mr. Hart for 'spreading rumours', and that Mr. Roberts and Mr. Hart had some ongoing difficulties.

[64] Mr. Fitzgerald made the molotov cocktail, broke into Mr. Hart's house, put this molotov cocktail on the couch and lit it on fire. The second time he entered, he knocked over the stove pipe. He knew that a lady lived next door and he was reckless

as to whether or not she was at home. He intended the consequences of his act, that gasoline was an exhilarant and he knew that those houses were old.

[65] The examination of the photos of Mr. Hart shows extensive damage and the neighbor could smell smoke on her side of the house and it occurred between 7:30 and 7:45 in the evening.

[66] I find setting the fire in that location, at that time, constituted actions that were likely to endanger residents of this company house and therefore it is a serious personal office pursuant to s. 752 of the *Criminal Code*.

[67] Even if I did not find that this was a serious personal injury offence I would conclude, based on all of the above, that it is not an appropriate offence to receive a sentence of two years, less a day and thus make Mr. Fitzgerald ineligible for a conditional sentence order. Taking into consideration purposes and principles of sentencing, a period of incarceration greater than two years is appropriate.

[68] Mr. Hart should feel safe in his community, he should be protected from Mr. Fitzgerald and those that would be like minded. There have been a rash of suspicious

fires in the community. Mr. Fitzgerald referred to them in his statement. A message of deterrence must be sent to Mr. Fitzgerald and those who would be like-minded.

[69] In Mr. Fitzgerald's statement, he said he was angry at Mr. Hart and he was thinking of shooting him. Instead he lit his house on fire. He now says Mr. Roberts threatened him and put him up to it, but I would note, to my knowledge, Mr. Roberts has not been charged with any offence, including uttering threats in relation to this offence or any other.

[70] Even if that was the case, Mr. Fitzgerald is not, nor was he that cognitively challenged that he did not understand what he was doing was wrong or dangerous and he intended the consequences of his actions.

[71] Based on all of the above the following will be the sentence of this court.

[72] Mr. Fitzgerald stand up please sir. There will be a DNA Order issued on the arson charge. There will be a s. 109 weapons order. I find that you used an incendiary device. There will be no victim fund surcharge. There will be a stand alone restitution order in the amount of $15,000 made payable to Mr. Hart. And there

will be a five year federal prison sentence. I will give you credit for the time you spent on remand and therefore you will serve four years, 251 days in jail.

J.