CITATION: R. v. Mirzakhalili, 2009 ONCA 905
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COURT OF APPEAL FOR ONTARIO

Doherty, MacPherson and Armstrong JJ.A.

BETWEEN:

Her Majesty the Queen

Appellant

and

Ahmad Mirzakhalili and Mehran Mirzakhalili

Respondents

Holly Loubert, for the appellant

Ahmad Mirzakhalili and Mehran Mirzakhalili, respondents appearing in person

Heard and released orally: December 16, 2009

On appeal from the sentence imposed by Justice Denis J. Power of the Superior Court of Justice, on September 19, 2008.

By the Court:

[1] The respondents, a father and son, were convicted of three criminal offences – arson damage to property, arson for a fraudulent purpose, and attempt to commit an indictable offence (fraud). The offences related to an explosion and fire caused by the

respondents at their family business, the Tanning Depot, in Ottawa, with an intent to defraud an insurance company of $200,000.

[2] On September 19, 2008, the trial judge sentenced the respondents to conditional sentences of two years less a day. The Crown appeals on the basis that the sentences are disproportionate to the gravity of the offence and the degree of responsibility of the offenders, fail to meet the need for general deterrence and denunciation, and are demonstrably unfit in the circumstances.

[3] We agree. This court has consistently held that conditional sentences are not appropriate for serious arson offences: see, for example, *R. v. Fox*, [2002] O.J. No. 2496 and *R. v. Hirnschall* (2003), 176 C.C.C. (3d) 311. In *Hirnschall*, Laskin J.A. said at paras. 24-26:

> I have little doubt that the conditional sentence was "demonstrably unfit" when it was imposed. I agree with the Crown that it did not reflect either the gravity of the offence or Mr. Hirnschall's moral blameworthiness. The catalogue of considerations in favour of a jail term was overwhelming. Mr. Hirnschall destroyed a local landmark; he put the lives of several fire fighters at risk; the fire destroyed one business and caused financial hardship to many others; and Mr. Hirnschall committed the offence entirely out of greed, his desire to reap the benefits of the insurance proceeds.
>
> Moreover, other than the absence of a previous criminal record, little can be said in mitigation. Mr. Hirnschall has shown no remorse. He led no evidence to suggest jail posed any greater risk to his health. The trial judge ought to have sentenced him to a term of imprisonment.

> Indeed, a conditional sentence for Mr. Hirnschall seems out of step with the recent judgments of this court in arson cases. An example is *R. v Fox*, [2002] O.J. 2496 (QL) (Ont. C.A.), a seemingly less serious arson

[4] Both *Fox* and *Hirnschall* were cited and relied on by the Crown in its submissions at the sentence hearing. The trial judge made no reference to them – let alone try to explain why they did not govern this case – in his sentencing reasons.

[5] In our view, the circumstances of the arson committed by the respondents are every bit as grave and reprehensible as the circumstances in *Hirnschall*.

[6] The arson was well-planned – gasoline was acquired, deadbolts to a door were unlocked, debris was cleared away from a door to permit entry, a motion sensor was moved, and a burglar alarm was bypassed.

[7] Incredibly, the respondents followed through on their plan to blow up and burn down their own store even after they discovered that people were working late in the adjoining framing shop in the strip mall. There is no doubt that the explosion and fire jeopardized the lives of these people.

[8] The respondents used an accelerant (gasoline) that not only 'accelerated' the fire but also created a substantial gaseous explosion that blew the windows of the tanning salon out into the parking lot.

[9] Moreover, it needs to be underlined that arson always jeopardizes the lives of fire fighters and other emergency personnel who respond to fires. Indeed, in this case, as fire personnel were searching through the smoke for casualties or persons trapped in the building , they evacuated in mid-search because they were concerned that the building might explode again.

[10] We recognize the obvious: substantial deference is owed to the decisions of judges imposing sentences on offenders convicted at trials where they presided, saw the witnesses, and heard all the evidence. However, in our view, this is not a close case. The trial judge said: "General deterrence of course in this kind of situation is extremely important, and indeed is of prime importance in this matter." Unfortunately, the conditional sentences imposed by the trial judge ignore this proposition.

[11] In *Fox*, which is directly on point but was not referred to by the trial judge, the court said that the conditional sentence "imposed by the trial judge was unfit for such a serious offence." In *Hirnschall*, which is directly on point but was not referred to by the trial judge, the court said that the trial judge "ought to have sentenced him to a term of imprisonment." These statements apply fully in this case.

[12] In our view, a fit sentence would have been two years less a day in custody. Accordingly, the appeal is allowed. Bearing in mind the passage of time, the compliance of the respondents with their conditional sentences thus far, and the good reports of rehabilitation for both respondents, the appropriate sentence at this juncture is 12 months

in custody for both respondents. The Crown and the respondents will make arrangements for the respondents to turn themselves in to custody, failing which warrants may issue.

RELEASED: December 18, 2009 ("D.D.")

"Doherty J.A."
"J.C. MacPherson J.A."
"Robert P. Armstrong J.A."