

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CRI-2018-063-004531
JUDGE VIA AVL
[2020] NZDC 15519**

BAY OF PLENTY REGIONAL COUNCIL

Prosecutor

v

KEVIN JOHN DAVIES

Defendant

Hearing: 3 August 2020

Appearances: A Hopkinson for the Prosecutor
J Gurnick for the Defendant

Judgment: 3 August 2020

NOTES OF JUDGE J A SMITH ON SENTENCING

Introduction

[1] Mr Davies, you face a single charge that you discharged contaminants into the air from a fire on 29 June. The charge includes products of plastic, paint, painted timber, plastic coated wire, fibrous installations and cement board that appear to have a small quantity of asbestos, which I accept was unknown to you at the time and other materials, such as wood, iron et cetera were also included.

[2] Although there is a single charge there are actually two events that occurred on the same day and it is the second of those two events which is of more concern to the Court. You have entered a plea of guilty to the charge and you are convicted.

[3] The question for the Court today is the appropriate sentence. It appears that you are in a position to pay some financial penalty by way of a fine but depending on the level of that there may be a need to consider community work in addition. That is a matter Mr Gurnick can advise at the end of the sentencing if that would otherwise occur.

Background

[4] Mr Davies, you are the father of the company director who owned the site at Ian Street in Koutu in Rotorua. The site in an urban area and was less than 2 hectares. Two houses were to be demolished to provide for the development of new housing. You took it upon yourself to undertake that work.

[5] You subsequently demolished the existing homes and as I understand it there were two main piles of demolition material. You were told by your son not to burn the materials.

[6] Now I need to add at this point in time that you are a former Chief Fire Officer and you were a volunteer fireman, at least at the time of the offences. However you lived in Tauranga and you were not entirely familiar with the Rotorua system. Notwithstanding your son's directions you contacted the local Fire Service prior to the demolition of the houses to ask if the fire serviced wanted those houses to use for what they call a "live burn". The Fire Service refused as the houses were too close to neighbouring houses.

[7] The demolished piles were near the southern boundary of the site. At some point, you contacted the Rotorua Lakes District Council and sought information on burning the debris. Although there were no particular issues raised by the District Council you did not seek advice from the Regional Council even though Rotorua is in the same region as your residence in Tauranga.

[8] Sometime after 10:00 am and prior to 12.30 pm on 29 June 2018 you set fire to the first pile that contained metals, plastics, timber, glass, insulation, carpet and

underlay. The Council Officers attended at around 12.45 pm and spoke to Mr Ritchie. You did not appear to be in sight at the time.

[9] There was another pile of materials next to the burning pile containing plastics, installation and other prohibited items and 10 metres away there was another pile again containing demolition materials that included a number of prohibited items. This included window frames, carpet, curtains, insulation and plastic downpipes. The Council Officer told Mr Ritchie who seemed to be in control of the site to remove all the plastic and insulation from the fire. He gave him a copy of the *Smoke Sense* pamphlet which lists all the prohibited items for burning. They then left the site around 1.13 pm.

[10] Around an hour and a half later a further complaint was received by the Council because you had set the second pile on fire. It is acknowledged in your statement to the Council Officers that you were aware of their previous visit, why they had visited, and that Mr Ritchie was in attendance at the time. Black smoke ensued from the second pile which contained metal, plastic, timber, glass, insulation and underlay.

[11] When the council officers spoke to you and Mr Ritchie you accepted that some of that waste should not have been burned. Subsequent investigations of the waste after the fire found small amounts of asbestos. There were light fittings with plastic-coated wiring still intact a stove, an iron, plastic pipe and painted items. The fires, according to a neighbour continued to smoulder for two days.

Effects

[12] The most significant effect in this case is the immediate impact on neighbours. The two neighbours (both of whom will **not be** listed here and whose details are to remain confidential, I make an order accordingly). Ms R and Mr D had left their house open and told Council Officers that smoke had gone throughout the house. The end result was that they had to purchase a new couch.

[13] Both have filed victim impact statements. The prosecution seeks reimbursement for the cost of the new couch and \$1500 each for the impact that both the victims suffered for emotional harm.

The sentencing process

[14] There is something of an argument as to the degree of which culpability applies in a case such as this. I accept the submission of Mr Hopkinson that reparation must be the first issue to be addressed by the Court. Nevertheless, I accept that there is an inter-relationship in certain cases, but not all cases between reparation and the final outcome.

[15] Accordingly, I intend to deal with the matter in the following order:

- (a) Establishing the quantum of reparation for each of the victims.
- (b) Setting the starting point of the fine irrespective of the reparation based upon the current law and the circumstances of the case.
- (c) Adjusting that starting point in accordance with the decision in *Moses*¹. That adjustment can include adjustments for a number of factors including, the reparation, where appropriate.

Reparation

[16] Although the couch cost \$3500 to replace I accept there would be some small sum of betterment in relation to that given it was new. I accordingly consider that fair reparation in such circumstances would be \$1500 to each of the victims to a total of \$3000 for the couch.

[17] In respect of emotional harm this is a difficult matter. The next-door neighbours were particularly concerned about the potential for them to have received

¹ *R v Moses* [2020] NZCA 296

asbestos fibres from the fire. I take Mr Gurnick's point that there were small quantities in the fire and in such circumstances, it is impossible to know if any at all left the site.

[18] I do feel however the concern that they have raised is genuine and consider that each of the victims should receive a payment of \$1000 in that regard for a total of \$2500 each or a total reparation of \$5000.

[19] I will come on to discuss the impact of that on the end result in due course.

The starting point

[20] There are a number of cases quoted to the Court which I do not intend to recite in detail. The simple point is most of those cases have a wide variety of circumstances from a house owners fire, to a fire lit in the back garden of a house to burn vegetation, to those that are deliberately lit. As I pointed out to the parties, it appeared to me the facts in *R v Bill & Yakka*² hold some similarity although at a greater scale. That was a case where a rebuild of a school involved taking and burning demolition materials that were taken to a farm site. Subsequently other items were illegally added by third parties and a fire started.

[21] The similarity is that in this case the demolition and fire was started for the purpose of a commercial objective; namely the reconstruction of the site. I must say Mr Davies, I, like your son, am baffled as to why you decided to burn the demolition materials rather than trucking it to a landfill. Nevertheless, you probably assumed that would be cheaper for you than taking it to a landfill. However, the current case proves that not to be the case.

Purpose of Sentencing

[22] The Sentencing Act 2002 bears upon this in a number of ways but the primary purpose in this case must be to act as a deterrent to others thinking that fire is a simple way of getting rid of materials they do not want.

² *R v Bill & Yakka Demolition Limited* [2019] NZDC 17065

[23] There must be accountability by you to the community. You are a person who should know better. You were a fire officer and know well the consequences that can occur from burning incorrect materials.

Culpability

[24] The fire was lit deliberately however I accept Mr Gurnick's submission and that does not mean this is at the very highest level of deliberateness. The prosecution accept that this should be regarded as highly careless although I must say, I go further than that. I accept you were not aware of the small amounts of asbestos on the fire, however you should know as a former Chief Fire Officer that plastics can be dangerous when burnt. There is an element of recklessness as to the consequences of you lighting the fire. I accept however that it was not a deliberate flouting of the rule in the plan or the law.

[25] When I consider the size of the fire it is the second event which concerns me most and warrants a higher starting point in this case. However, taking into account all the factors I consider that the appropriate starting point is \$20,000. Now in doing that I have not taken into account the events that have occurred after 29 June 2018. The simple reasons for this are they were not stressed by the prosecution and they are not part of the charge. Thus, in focussing on the events of that day I have concluded that a higher fine than \$20,000 is not appropriate as a starting point.

Adjustment for personal factors and other matters

[26] As is clear from the decision in Moses all of the various adjustments will need to be taken into account to adjust the starting point. Accordingly I must consider what increases or deductions should be made. No one has suggested any increases nor can I see any proper basis to suggest that I increase the starting point. To the extent that your experience as a fireman was involved that has been taken into account in the starting point.

[27] There are three major issues which I need to consider:

- (a) The adjustment for good character and remorse;

- (b) The adjustment for a plea of guilty;
- (c) The question of what I would call a combination of your financial situation and reparation.

[28] I deal with them in turn.

Good character and remorse

[29] Mr Hopkinson submits that 5 percent is appropriate to recognise usual remorse and your previous good character in relation to Resource Management Act 1991 charges.

[30] Mr Gurnick stresses your attendance at the restorative justice conference and although there were no positive outcomes from that there does appear to have been an apology and also your attendance to speak to the neighbours is a matter I can take into account. This would justify a small increase in the remorse from you and those two categories and I attribute 8 percent.

Guilty plea

[31] I come now consider the question of a guilty plea.

[32] There was at an earlier stage a plea of not guilty to the charge. This was at a time when there were a number of charges not only against you but against the company. Furthermore, it appears that a request for a sentencing indication was made at a relatively early stage and that has then progressed to a hearing in September 2019, with a decision being issued in January 2020 of this year. Thereafter Mr Hopkinson acknowledges that issues relating to the Covid-19 Pandemic interfered and this is the first date on which the matter has been able to be dealt with.

[33] Mr Hopkinson accepts that there has been no expense to the prosecution in raising this matter and it has been resolved with appropriate dispatch given the circumstances. I, accordingly, allow a full 25 percent for early plea.

Financial situation and reparation

[34] I move now to consider questions of reparation and your financial circumstances.

[35] There is an argument that these should be considered together and it does seem to me that they are inter-related. The reason I say that is there is no strict allowance provided for your financial circumstances nor for reparation. There may be circumstances where the Court might consider the affected parties are limited to the victim as identified in the victim impact statements. This is not one of these cases.

[36] Beyond the immediate impact on the neighbours there are wider consequences for the Rotorua community. In terms of the plan, this is one of the worst airsheds in New Zealand and the discharge of these toxins into the air in Rotorua is a serious matter.

[37] Secondly, it was within an urban area and although the two victims identified were worst effected there would have been more general effects in the area.

[38] I take into account that you are a super-annuitant and it may have been that your desire to assist your son which led to you deciding to cut corners by burning on site rather than removal to a landfill.

[39] The circumstances in which you lit the second fire is not explained. It is a further concern to me and it seems to show an attitude on your part that you knew what was best. I hope you have re-evaluated that attitude. Nevertheless, I take into account that your circumstances are very limited.

[40] In the end I consider that I should allow a total discount for all factors from the starting point taking into account remorse, the reparation payment and your financial circumstances of 55 percent. That is generous and it allows just over 20 percent for your financial circumstances and the reparation payment.

[41] The end result is that accordingly I order that you are to pay to Ms R \$2500 in reparation, to Mr D \$2500 in reparation and a fine of \$9000 together with solicitor's

fee of \$130 and Court costs of \$113. 90 percent of the fine is to be paid to the Bay of Plenty Regional Council. (Full names of victims are on Court files and are confidential).

Payment by instalments

[42] Mr Gurnick made application under s 81 Summary Proceedings Act 1957 that you could pay this amount by instalment under s 81(1)(b) of the Act and to enter into arrangements with the Registrar to do so.

[43] I direct the Registrar to enter into such discussions to make suitable arrangements for payment. This is not opposed by the prosecution and in fact it was signalled by them during the hearing.

District Court and Environment Court Judge

Judge J A Smith
District Court Judge

Date of authentication: 18/08/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.