

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
FAMILY AND CHILDREN DIVISION
CHILDREN COURT**

C-TOBAGO CR 1792-2019-1

BETWEEN

JASON PHILIP SGT

COMPLAINANT

AGAINST

N

CHILD

Before the Honourable Madame Justice Gonzales
Dated November 27, 28, 2019 and July 14, 15 and 23, 2020

APPEARANCES: Ms. Chinebas for the prosecution
Mr. Edmund for the Child

REASONS FOR DECISION

The Charge

1 N was charged with unlawfully and maliciously setting fire to a dwelling house with intent to injure contrary to section 5 of the Malicious Damage Act. The charge was laid indictable but he was given the option of summary trial pursuant to section 99 of the Summary Courts Act. He elected summary trial and pleaded not guilty. The prosecution led evidence by way of sworn statements. The matter was part heard when the Covid 19 pandemic emerged. The matter was completed virtually. N did not give evidence, but called two witnesses and raised an alibi.

Elements of the offence

2 The prosecution must prove beyond a reasonable doubt that N

- 1) Without legal justification intentionally set fire to a dwelling house; accident or negligence would not suffice.
- 2) When he set fire to the dwelling he intended to injure a person. The intent to injure is inferred from the very act, for every person is deemed to intend the necessary consequence of his own actions¹. By section 50 of the Malicious Damage Act it is not necessary to prove an intent to injure a particular person. It is sufficient to prove that the person intentionally set the fire, aware of the possibility that someone could be injured.

General Directions

3 In my approach I reminded myself of and considered and applied, the following:

The prosecution must prove each and every element of the offence beyond a reasonable doubt. The burden and standard of proof rests and remains on the prosecution. N has nothing to prove and where he has raised an alibi, it is for the prosecution to disprove the alibi to the extent that I am sure that N was the person who set fire to the dwelling house of Clane Tobias.

4 The evidence in this matter consisted of witness statements tendered by the prosecution, photographs, a site plan, notes of interview of N and the viva voce evidence of the defence witnesses. I considered all the evidence before me aware that I was entitled to accept all or part of a witnesses' testimony or reject all or part of a witness's testimony. I was also aware that I need not answer every question raised on the evidence but that it was essential that I answer the questions that were necessary for me to reach a verdict in this matter.

5 There is expert evidence from the fire officers and I reminded myself that I could not substitute the expert's primary finding of fact for my own view of their findings however I was free to accept or reject the opinion of the expert. I am

¹ Archbold 15th edition page 430

entitled to draw inferences from the evidence but I must never enter the realm of speculation.

6 Where inferences of equal weight can be drawn from the evidence I must draw the inference in favour of N. If only one inference can reasonably be drawn from the evidence, then that is the inference that I should draw even though it does not favour N.

The case for the prosecution

7 The case for the prosecution was that around 10:00.p.m on Saturday the 13th April 2019 Clane Tobias who occupied a house on Content Trace Mason hall left his home to go to the grocery. On his way to the grocery whilst walking along the main road, a dog from a house on the main road rushed him and almost bit him. A young man, whom both sides agree was N, came out and held the dog and Tobias went on his way to the grocery.

8 Around that same time one Durant went to the back of a neighbouring house in the same Content Trace area to smoke. Whilst there he noticed movement under a nearby house normally occupied by Tobias and started to pay closer attention. He observed a young man crouched under the house with a piece of paper in his hand and what appeared to be a stove lighter. Durant observed a spark coming from the lighter. From the spark he was able to make out the silhouette of a young male. The young man looked in the direction of Durant and he ran from under the house. As the young man ran passed, Durant was able to observe the features of the young man.

9 Three young men approached Durant and had a conversation with him. He looked back and observed that the house was on fire and he observed the young man still running. He along with the other men gave chase. Durant ran after the young man at all times keeping him in view. The young man ran into the back of a house on the main road and closed the door. When Durant and the men arrived at the house Durant went to the front of the house and banged on the window.

He heard voices from within the house enquiring as to why he wanted the young man to come outside.

10 A woman came out of the house and the young man eventually came out. The woman was told of the allegations but she claimed that N was at home and had just gone to dispose of some garbage. Durant tried to explain to the woman that it was clear that N was sweating because of his recent run. Durant by this time had called the police and the fire department. A man arrived on the scene, who turned out to be the young man's father. He attempted to remove N from the house but one "Billy Goat" effected a citizen's arrest and did not allow N and his parents to leave until the police arrived.

11 By the time the police arrived the house at Content Trace was completely destroyed by fire and N was taken to the police station. He was released but subsequently arrested. Three days later, N was identified by Durant as the young man whom he observed with the paper and lighter on the night in question through a group identification exercise witnessed by a Justice of the Peace and N's Duty Counsel.

12 The Trinidad and Tobago Fire Service was able to ascertain that the cause of the fire was incendiary, that is, it was started by someone setting fire to the house. N was interviewed and denied his participation in the offence. He claimed that he was at home at the material time with his family members. At around 10:00 p.m. when the fire started he was at home with his parents and grandmother and he was putting his sister to bed. A little after 10:00 p.m. he went by the step of his house where he observed three men running toward his house. He then heard a knock on the door of his house and as he opened the door one of the men grabbed him by his jersey. He denied leaving his home any time after 10:00 p.m. that night.

13 He said that when he was in the house his grandmother was watching him painting. She told him to carry out the washing machine and the parts for the car,

when he carrying out the rubbish the dog was barking at someone and he went and move the dog. He said that he does not know the person whom the dog was barking at but he accustomed seeing him. The man lives in the house that was burnt down on the 13th April 2019. It should be noted that N gives no time when he left the house to throw out the parts.

The case for the defence

14 N did not give evidence but raised an alibi on the evidence of his father Adrian Rogers and another relative Shannon Dottin. According to the father, N was busy doing chores in preparation for his grandmother's 70th birthday celebration. He finished painting around minutes after 8. Shannon arrived at the residence a little after 8 and N was still painting upstairs. A little after 9:00p.m he took the garbage outside with a wheel barrow. His sister Shamelia accompanied him and the grandmother Shannon saw him return. After that he went inside the downstairs portion of the house. Shannon and her grandmother returned upstairs.

15 At the request of his father N took his 5-year-old sister who had fallen asleep on the chair to her bed. His father sat in the drawing room with him as N switched the television channels for him. He asked the father for five dollars then he asked his father to borrow his phone.

16 After N went inside, Shannon went about her business and was on her phone when she was alerted to something by her grandmother. She looked outside and saw a blaze and smoke. A few minutes later she heard banging on her door. The father who was downstairs with his family also heard a commotion and sent N upstairs to see what was going on. It was at that stage N ran passed Shannon and opened the door. The men grabbed N and accused him of setting fire to the house. This was vehemently denied by Shannon.

17 The father thought that N was taking long so the mother left to enquire what was going on upstairs. The father heard loud argument upstairs so he got into his car and drove round to the front to see what was taking place. When he

arrived he saw that some, men had collared N and they attempted to collar him. He said some words to them which he chose not to disclose and he and N's mother tried to get him in the car to take him to the police station but the men who had gathered did not allow that. The parents of N eventually took him to the Moriah police station.

18 Shannon also testified that as far as she knew N was of good character having had no previous convictions.

The agreed facts

19 It is agreed that the house occupied by Mr. Clane Tobias was set on fire and burnt to the ground on the 13th April 2019. It is also agreed that a group of men one of which was Aaron Durant went to the home of N while the house was still on fire, and accused N of setting fire to the house. It is agreed that, that night N and his family denied he was at the scene of the fire.

The issue to be determined

20 The issue to be determined was whether N was the person who had set fire to the dwelling house at Content Trace on the night in question. In determining the main issue in dispute I considered the alibi of N first, simply because if I accepted his evidence that he was at home at the time of the alleged incident then I would have to find him not guilty. I reminded myself that if I had doubts about his alibi or in other words, if I was in the middle ground, that is, I was not sure of his alibi then I would have to find N not guilty because it would mean that the prosecution had failed to discharge its burden of disproving the alibi beyond a reasonable doubt. If I rejected the alibi, it did not automatically mean that he was guilty but I had to revisit the case for the prosecution to satisfy myself to the extent that I was sure that N had set fire to the dwelling house with intent to injure. I also reminded myself that where the defendant raises an alibi it is not for him to prove that he was not at the scene of the crime at the time in question but it is for the

prosecution to disprove his alibi beyond a reasonable doubt. There is no burden on N to prove anything even when he calls witnesses.

The alibi

21 I now turn to consider the alibi raised by N. N did not give evidence and I drew no adverse inference from this. In assessing the evidence of the alibi I considered that neither the witnesses for the prosecution nor the defence were able to provide a definite time when this fire began, everyone gave approximations. What can be ascertained is that the incident unfolded sometime around 10:00p.m. What is clear is that the entire incident happened very quickly, a matter of minutes. I examined closely and carefully the evidence in relation to time and timelines and how it impacted on the alibi.

22 I considered what N had to say about his whereabouts that night. He did not give evidence so I had to rely on the statements he made to the police during the interview. The fact of the interview was not challenged neither was the contents of the notes of the interview. I had no difficulty in accepting that the child was interviewed and he made the noted replies. I now had to consider whether what N said when he was interviewed by the police was true or not.

23 In assessing this, I reminded myself that N was a child of good character and therefore it was more likely than not that he was speaking the truth in his responses. After examining the responses carefully, I formed the view that whilst it raised an alibi, there were no times given for his actions, no timelines and his responses were not entirely supported by the two witnesses he called to support his alibi. For example he did not mention being in the living room with his father. When asked where his family members were, who he claimed were home with him, he responded that his granny was watching him painting and then she told him to carry out the garbage. He gave no account of his whereabouts after putting his sister to sleep, and only accounted for his actions earlier on in the night. His answers were generally vague, without much detail which failed to convince me

that his version of events were true. Despite his good character I did not accept that he was being truthful when he said in that he was at home around minutes to 10 and 10 o'clock.

24 I also carefully examined the evidence of the two witnesses he called in support of his alibi. Shannon avers that N started moving the garbage closer to 10:00 p.m. sometime after 9:30 but closer to 10:00p.m. after which his father called him inside. She left and went upstairs. It means therefore that Shannon is unable to say where N was when she went upstairs. The father on the other hand contends that N started moving the garbage a little after 9:00p.m he took about 5-10 minutes, he was inside the house by about 9:20 and he never left the house until closer to 10 when they heard the banging. His evidence as to when N moved the garbage, when he returned and when he went indoors is therefore inconsistent with the timeline given by Shannon. While the father says that N did not leave the house I considered that he was someone who had reason to give favourable evidence for N, after all, this is his son. Even though Shannon said that when the men were banging violently on the window she heard N pass her and went and open the door, at that time she could not say where N had come from, to run pass her. Because the timing is crucial in this matter and no one is able to give definite times, this incident could have happened in a very short space of time maybe 10 minutes, maximum and because of the inconsistencies referred to, I did not accept that Shannon and the father were able to account for N's whereabouts between the time he put his sister to bed and when the men confronted him at the home. In other words, I rejected the alibi. I reminded myself that a false alibi does not mean that N was guilty.

25 Having rejected N's alibi, I did not use my finding that his alibi was false to support the identification, as I formed the view that there were other plausible reasons why, he would have lied about where he was, that did not point to guilt. I then turned to consider the case for the prosecution, to see whether they had satisfied me to the extent that I was sure that N was at Tobias' house that night.

Whether Aaron Durant was a credible witness

26 The case for the prosecution depends entirely on the evidence of Aaron Durant. He is the only eye witness. I therefore had to assess his evidence to determine whether or not he was a credible witness because the case for the prosecution stands or falls on his testimony. The defence is contending that Durant was being dishonest when he said that N was the person who set fire to the house. I found Durant to be a witness who had nothing to gain, neither had he any interest in this matter. I considered that the witness Durant did not waiver in his testimony, he was not discredited in cross examination but in fact he became a stronger and more convincing witness in cross examination. He was not inconsistent; neither did he contradict himself in any way. There were no major or any proven omissions in his evidence. His evidence was coherent, plausible, lucid and made sense. This was a witness who was involved and not on periphery of what was unfolding. When challenged by members of N's household he was able to point to the fact that N was wet with sweat on his face, his hands were sweating and his jersey was wet, as proof that N had been running shortly before. He invited them to rethink their claim that N was inside in light of this. This evidence from Durant was uncontroverted. I found Durant to be a credible witness and I therefore accepted the evidence of Durant.

Whether Durant was mistaken when he identified N

27 The defence is saying that if I find that Durant is credible then I should consider whether he was mistaken. In determining this issue, I had to consider the reliability and accuracy of the identification evidence. Reliability in the sense that if I find that the Aaron Durant was not a credible witness then I could not rely on his evidence and I could not accept his identification of N. In such a case I would have to find N not guilty of the offence. If, however I find that he was a reliable witness in the sense that I found that he was truthful I had to go further and consider whether he was accurate in his identification, this is because an honest

witness could be mistaken. Having found Durant to be a credible witness, I then turned to consider whether Durant was an accurate witness, that is, I considered whether he was honest but mistaken.

28 In assessing whether he could have been mistaken, I applied the guidelines laid down in the case of **Turnbull v R**². I considered the distance at which Durant had N under observation, a distance of about 22 m. That is far and under the house was dark. I noted however that Durant's attention was focused on N because he was curious as to what N was doing under the house. I also noted that he was able to distinguish clearly, paper in the person's hand and a lighter. He was able to give that level of detail. I formed the view that Durant had an unobstructed view of what was happening under the house though, at that stage he may not have been able to see N's face clearly, if at all. I considered however, as N ran past him, the closest distance he came to him was five feet, a little less than 2 meters. He was able to see the face of N clearly at that distance. Now N was running and according to Durant very fast, so that he would only have had a fleeting glance. As N ran past him, he not only observed the physical features of N but he was also able to observe that N appeared to be scared. He was aided in his identification by lights from emanating from buildings.

29 This fleeting glance would have been an unsafe basis on which to accept the identification of N if it stood alone. However, it does not. The evidence is that Durant gave chase and throughout the chase he kept N in view, never losing sight of him at a distance of 5 feet away. He followed N until N entered his home through the back. That is when he ran to the front, knocked on the window of the house and N and his family came out. When N came outside Durant was able to recognize N as the person he had seen under the house and he confirmed that he was the person he was pursuing because N was wet and sweaty as someone who had been recently running, would have been.

² [1977] QB 224

30 I also found that from the time Durant heard the noise under the house to the time he knocked on the window of N's home his focus was wholly and solely on N. In other words, there was nothing else going on that distracted him and there is no evidence that anything obscured his view at any point in time. Even when N was stooping under the house Durant seem to have had a clear line of vision as N was able to look in his direction and take off running when he realized he was being observed. Durant could have clearly seen N under the house and while it is not clear whether N could have seen him, N certainly became aware of his presence. I also considered the description that Durant gave of N. He described him as a young male, *"round face with kinda square head, very dark African, his eyes big and gazing, open lips low hair cut but a little height not flat, wave cut, strong, muscular body with the body of a big man about 6ft 3 in tall he had on a dirty khaki long pants black and grey stripe jersey"*. Now this is a pretty detailed description that fit N to a tee. I placed no reliance on hairstyle because hairstyles can change, I placed no reliance on the clothes N was wearing that night as clothes cannot reliably identify a person however I noted that N in his interview confirmed that he was wearing a black and grey jersey and a brown pants which in my view confirms the credibility of Durant as a witness.

31 I also considered the potential weakness of the identification evidence, specifically, that even though the general area was lit, under house would have been very dark. N was in a stooping position which meant that Durant would not have had a full view of his face and throughout the chase N's back was toward Durant. I found that these potential weaknesses did not undermine the strength of the identification, given that Durant kept N under his view during the chase leading straight to his home. N was also identified by Durant as the perpetrator to his family members and the police within minutes of the fire. This was identification evidence that started off weak and grew more compelling as it unfolded.

Whether the group identification was fair

32 The prosecution led evidence of a group identification of N which took place at the Lowlands Mall about three days after the fire. The defence has argued without challenging the evidence, that that the group identification was unfair. The defence allege that the identification exercise was held during school hours and therefore the child was prejudiced because he was the only child at the Mall that hour. A group identification follows, as far as possible the same principles as an identification parade so that the conditions are fair to the suspect, in a way to test the witnesses' ability to make an identification. I noted that the identification exercise was conducted in the presence of the child's mother and his attorney, without objection. I did not accept that the child was prejudiced by the holding of the group identification. The fact that the child was at the mall after 1:00p.m when most other children of his age would be in school at that hour was in no way prejudicial to the N. There was nothing in the identification exercise that prejudiced the child in anyway. I did not accept counsel's contention that the group identification exercise was unfair.

33 I placed little reliance on this identification exercise however, as Durant, in any identification procedure at this stage would identify the individual he had already identified on the night of the 13th April 2019. In those circumstances I placed little reliance on the purported identification exercise that took place on 16th April 2019.

Whether reliance should be placed on the recognition evidence

34 Durant stated that he knew N before that day, by seeing him around. While I accepted this evidence I placed little reliance on this evidence of recognition. On the night of the fire when Durant made the observation and at the time he spoke to the police the basis of his identification was not recognition of someone that he knew before but it was on the basis that he observed this male person, whom he described, whom he gave chase to, until N entered a two storied house and when

N reemerged he recognized N as the person who ran past him and whom he chased.

35 I formed the view that the evidence of recognition came long after the fact, some seven months after Durant gave his first statement to the police, after N was identified, after he was pointed out at an identification exercise and after N was charged. There is no evidence as to how or why he only spoke of recognizing N a whole 7 months after the fact. Durant does not say when during that 7-month period he recognized N. Was it the same night? At the group identification? Or some time thereafter? So while I believed him on that issue, I did not rely on that evidence in the sense that it did not assist me in determining whether when N was identified on the 13th of April 2019 the identification was honest and accurate.

Findings of fact

36 Having considered all of the above I found that Durant was not mistaken when he identified N. I accepted the evidence of Aaron Durant that N was the person whom he had seen setting fire to the house of Clane Tobias that night. Having accepted this evidence, I was satisfied that N could not be at two places at the same time so that the prosecution had disproved the alibi, having established that N was the person who had set fire to the house of Clane Tobias.

37 I found that after N came back from disposing the garbage, he was not with his father in the drawing room until the commotion started. He did leave the house again and made his way to the house occupied by Tobias.

38 I found that what N said in the interview was in keeping with what Durant said, that N went to the back of the house, went up the stairs and closed the door. Because they were running behind him he got to the house first and he ran up the stairs, that is why he was able to see them coming towards the house when he was on the step. He closed the door behind him and Durant and the others then went to the front of the house and started making a commotion for him to come

out. The father upon hearing the commotion drove around to the front where Durant and N, his mother and grandmother were.

Whether the prosecution proven its case beyond a reasonable doubt

39 The defence has led evidence of N's good character. I have already dealt with this in so far as it relates to his credibility. I now consider that because N is of good character it is less likely that he would have committed the offence with which he is charged. The issue I had to determine was whether the prosecution has proved its case beyond a reasonable doubt, despite N's lack of propensity to offend. In other words, has the prosecution made me sure that even though N is less likely to commit the offence that he did in fact do so.

40 Given the strength of the case for the prosecution although I gave consideration to N's good character. I found that even though he had no prior disposition to offend, his good character, was of little weight on the issue of whether he had committed the offence or not. I was satisfied to the extent that I was sure beyond any reasonable doubt, that N had deliberately and intentionally, set fire to the dwelling house of Tobias using a lighter and what appeared to be ball of paper or at least he was reckless as to whether or not the dwelling house was set in fire.

41 The prosecution does not have to prove an intention to injure a particular person. The natural consequence of setting fire to a dwelling house is the possibility that someone could be injured. A person intends the natural and necessary consequence of his actions. What the prosecution had to satisfy me of, so that I am sure, was that N was aware of the possibility that someone could be injured, if he set fire to the dwelling house. From his statement to the police N knew that the house was occupied by Tobias. I considered his age which was stated as 14 on the notes of the interview and which was the only information had in evidence before me. Given his age and the fact that he knew that Tobias lived in the house I was satisfied that he was aware of the possibility that Tobias or

someone else could be injured if the house was set on fire. In those circumstances I am satisfied that N intended to injure.

Decision

42 It is for these reasons I find N guilty of the offence of setting fire to a dwelling house with intent to injure.

G Gonzales

Judge