SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bourke* [2003] QCA 113
PARTIES:	**R** **v** **BOURKE, Wayne Charles** (appellant)
FILE NO/S:	CA No 349 of 2002 DC No 2124 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2003
JUDGES:	McMurdo P, Williams JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction allowed only to the extent of substituting a verdict of guilty and recording a conviction for the offence of unlawfully possessing a motor vehicle for that of receiving stolen property, namely a tri-axle trailer, as found by the jury** **2. Grant leave to appeal against sentence and allow the appeal only to the following extent:** **i. Set aside the sentence of 18 months imprisonment for receiving and impose a sentence of 12 months imprisonment to be served concurrently for the offence of unlawful possession of a motor vehicle;** **ii. Order that the sentences be suspended after 12 months with an operational period of 4 years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – CONSIDERATION OF SUMMING UP AS A WHOLE – where trial judge gave jury written directions in the course of summing up – where trial judge failed to direct jury that the document was not to be used in substitution for oral

directions – whether the jury were left under a misapprehension that the document was in addition to or in lieu of oral directions

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE – GENERALLY – where trial judge speculated on reasons for aspects of appellant's conduct – where appellant submits that these observations were not supported by the evidence – whether these comments would have unduly influenced the jury's findings of fact

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION – POWER TO AFFIRM OR SUBSTITUTE SENTENCE OR SUBSTITUTE VERDICT OF GUILTY OF OTHER OFFENCE – PARTICULAR CASES – where appellant convicted of receiving – where error in summing up as to element of knowledge – whether conviction for receiving should stand – whether a verdict of guilty of unlawfully possessing a motor vehicle should be substituted

CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – GENERALLY – where appellant's brother convicted of receiving – where accepted that the sentence imposed on appellant should be significantly less than that imposed on his brother – where head sentence of two years imposed on appellant and five years on his brother – where appellant would have to serve at least one month longer in custody than his brother due to operation of s 76 *Corrective Services Act* 2000 (Qld) – whether sentence should be amended to achieve parity

Corrective Services Act 2000 (Qld), s 76
Criminal Code 1889 (Qld), s 408A(1)(b), s 581, s 668F(2)

R v Patterson (1906) QWN 32, followed
R v White [2002] QCA 477; CA No 227 of 2002, 8 November 2002, considered

COUNSEL: R A Mulholland for the appellant
M J Copley for the respondent

SOLICITORS: Butler McDermott & Egan for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Williams JA's reasons and add the following observations by way of emphasis.

[2] Supplementary written material can be of great assistance to jurors, at least in those cases where oral judicial directions are necessarily complex. This appeal highlights the great care that must be taken by trial judges when providing such written material to jurors. The material here was handed in its final form to the jury after effectively being "settled" by counsel and with counsel's consent. Unfortunately, in setting out the elements of all but count 5, the written material referred to "assistance" instead of "knowing assistance". It is also regrettable that the learned primary judge did not clearly emphasise that the written material was only to assist the jury in understanding the oral judicial directions and not as a substitute: cf *R v Petroff*.[1]

[3] The learned primary judge did, however, tell the jury that the written material was to "assist [them] with this process" of considering the verdict for each separate count, on the evidence relating to that count. His Honour's oral directions are not criticised and made it abundantly clear that the "assistance" referred to in the elements constituting each of counts 1 to 4 was "knowing assistance". The jury must have understood that, before convicting on any of counts 1 to 4, they must be satisfied beyond reasonable doubt that the appellant either committed the offence himself or knowingly assisted the person or persons who did.

[4] I agree with the orders proposed by Williams JA.

[5] **WILLIAMS JA:** After a trial the appellant was found guilty on 18 December 2002 of four counts:

(i) Stealing a crane and other property;
(ii) Unlawfully using a motor vehicle, namely a prime-mover, to facilitate the commission of an indictable offence;
(iii) Stealing an excavator valued at over $5,000.00;
(iv) Receiving stolen property, namely a tri-axle trailer.

The guilty verdict of receiving followed an acquittal on a charge of unlawfully using a motor vehicle, namely a tri-axle trailer.

[6] He was sentenced to six months imprisonment on the first count, one year imprisonment on the second, two years imprisonment on the third, and 18 months imprisonment on the fourth, all sentences to be served concurrently.

[7] The appellant appeals against his convictions, and seeks leave to appeal against the sentences on the ground they are manifestly excessive. The appellant's counsel asked for and was given leave during the hearing to raise the following grounds of appeal against conviction:

(1) The learned trial judge erred in law in supplying written directions to the jury that were confusing and inconsistent with his oral directions.
(2) The learned trial judge failed to make it clear to the jury that the written directions should only be used in order to understand the oral directions and not as a substitute for them.

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1 [1980] 2 ACrimR 101, 115-116.

(3) The learned trial judge misdirected the jury in inviting them to reject the defence case on grounds that were not supported by the evidence and were speculative.

(4) The learned trial judge's treatment of the defence case in the summing-up was unfair.

(5) The learned trial judge misdirected the jury with respect to the count of receiving in failing to direct them that an essential element of the offence was that the appellant had the requisite state of mind at the time of receiving the trailer.

[8] The evidence established that a prime-mover pulling a tri-axle trailer with a crane on the back was stolen from a government depot at Stapylton between 9 and 13 August 2001. Various items of property were in or on the prime-mover and trailer at the time it was stolen. On 21 August 2001 police located the crane and other items of property taken from the Stapylton depot on a property owned by Raymond Bourke, a brother of the appellant, situated at Kin Kin. The crane was buried in the ground on that property. There was also evidence given by a police witness as to finding lengths of timber amongst that property.

[9] The evidence also established beyond doubt that between 9 and 13 August 2001 an excavator was stolen from a property at Scarborough. In the early hours of 13 August 2001 a police officer saw that excavator on a low loader attached to a prime-mover travelling on Deception Bay Road towards the Bruce Highway. Later that morning that unit was located parked near the Ampol service station at Burpengary. The prime-mover pulling the low loader on which the excavator was positioned was the prime-mover stolen from Stapylton. There was evidence that timber under the tracks of the excavator on the trailer when it was at Burpengary was very similar to timber seen by police at Kin Kin on 21 August 2001 with other property stolen from Stapylton. The low loader on which the excavator was positioned was not the trailer stolen from Stapylton.

[10] On 15 January 2002 the tri-axle trailer taken from Stapylton was located on Miva Cattle Station near Tiaro. The trailer had been freshly painted. The appellant had arranged to carry out contract spraying on that property and that work had commenced on the day prior to the trailer being found there. Near the trailer was a spare wheel which fitted the tractor used by the appellant.

[11] There was evidence from the police officer who saw the prime-mover and low loader travelling on Deception Bay Road that it was being followed by a white or light coloured utility. The police officer whilst driving in the vicinity noted some chunks of concrete on the roadway which had apparently been knocked from the overpass nearby. The appellant later stated to police that he was following the prime-mover when it collided with the overpass.

[12] The console operator at the Ampol service station Burpengary observed the prime-mover and excavator pull off the highway, and identified the appellant as the customer who purchased a Red Bull can of drink approximately 10 to 15 minutes later. That would place the appellant at the service station at around 3.30 a.m. A similar softdrink can was later found near the prime-mover and low loader.

[13] The Burpengary weighbridge operated by Queensland Transport was nearby. Two inspectors arrived at that weighbridge at approximately 3.30 am and their evidence

was that shortly afterwards they saw the prime-mover and trailer parked near the exit of the service station and the entrance to the weighbridge. The lights of the prime-mover were on and the motor was running but no driver or passenger was in sight.

[14] After sunrise one of those inspectors, Deshon, was approached by the appellant who inquired about the driver of the prime-mover. The appellant said words to the effect that he had "to come back at about that time to help him find some parts". The appellant, who was then driving a green Ford Fairlane, left. At about the same time a police officer spoke with the appellant's brother, Raymond Bourke, near the prime-mover and low loader. The Constable also spoke to the appellant whom he observed leaving the weighbridge. The time was put at about 7.15 am. It was then the appellant said he was following the semi-trailer when it hit the bridge and that he pulled him up "because a great big pipeline was dangling along the side of the road". He said he knew the driver as Dave and there was a "little old bloke with him".

[15] The appellant told the police officer he had seen the driver a short time earlier, between 6.30 am and 7.00 am, at one of the cafes on the Bruce Highway and from there he had driven off in a white Triton utility with blue wheel flares saying he was going to get some parts for the truck. The appellant said that he and his brother were just going to get some breakfast when they saw the white utility.

[16] That is a summary of the evidence against the appellant; it can thus be seen that it was a circumstantial case. The appellant himself did not give evidence, thus there was no competing sworn evidence which might have provided a basis for the jury concluding that there was an innocent explanation for the appellant having an unusual series of contacts or associations with the stolen property.

[17] In the circumstances the prosecution case was a strong one and, subject to the issues hereinafter discussed, there is no basis for saying that the verdicts were unsafe and unsatisfactory.

[18] Grounds 1 and 2 of the amended grounds of appeal raise issues as to the procedure followed by the learned trial judge in giving the jury, in the course of his summing-up, a written document setting out the elements of each offence and indicating some of the questions the jury would have to ask in relation to each. A copy of the document is in the record. With respect to all counts, other than that alleging receiving, the document raised the question whether the appellant was criminally responsible personally or because the acts in question were done by others "with his assistance". The submission was made that the document erroneously formulated the question because it should have referred to "knowing assistance".

[19] At the material point in his summing-up the learned trial judge said:

> "I will tell you what evidence is available to you in relation to each count. To assist you with this process, I have prepared a sheet, which my Associate will distribute now which lists each of the counts on the indictment in a summary way and sets out what the elements are for each".

[20] In the course of his oral remarks which followed the learned trial judge regularly used the expressing "knowing assistance" in dealing with the element of the offence being discussed. With respect to count 1, stealing, he used the term "knowing" on

no less than six occasions. With respect to count 2, unlawful use of the prime-mover, he used the terms "knowing" or "knew" on four occasions, and in relation to count 3, stealing the excavator, he used the term "knowing" on two occasions.

[21] Senior counsel for the appellant conceded that he could not point to any error in the oral summing-up. His submission was that, because the jury had the written document with them in the jury room, there was a danger that they would have overlooked the important element of "knowing" when considering the issue of assistance, and that in consequence the verdicts could not stand. That was compounded, in his submission, because the learned trial judge did not expressly tell the jury that the written document could only be used in order to understand the oral directions and not in substitution for them. There are a number of cases in which courts have said that such a direction should be given when the jury is provided with some material in writing. In *Petroff* (1980) 2 A Crim R 101 the Court of Criminal Appeal, New South Wales, affirmed that approach.

[22] Whilst it is clearly desirable that some express words to the effect that the document is not to be used in substitution for oral directions should be used, the real question will always be whether the jury were left under a misapprehension that the document was in addition to or in lieu of oral directions.

[23] In the present case the jury were told that the document was there to "assist" them with the process of following the analysis by the learned trial judge in his oral summing-up. Given what was said in the course of the summing-up, and in particular the repeated use of the term "knowing", the jury could not have been left in any doubt as to what the real elements of the offences in question were. Whilst it would have been better if the learned trial judge had given a specific direction along the lines indicated, the failure to do so in the circumstances of this case does not constitute an error. When considered in the light of the summing-up the document was neither confusing nor inconsistent with the oral directions; the jury would clearly have understood that the term "assistance" in the document meant "knowing assistance."

[24] Amended grounds 3 and 4 can also be dealt with together.

[25] The learned trial judge set out accurately the defence case. The appellant had given an innocent explanation of his involvement when he spoke to the inspectors and police at Burpengary. The jury could not exclude, as a reasonable hypothesis consistent with innocence, that the criminality was that of other family members and that the appellant was someone who was not involved in it.

[26] Thereafter the learned trial judge went on to make some comments for the assistance of the jury when considering the defence case. It should be said that on numerous occasions, including specifically at this stage in the summing-up, the learned trial judge reminded the jury that such factual matters were for them to consider and make their own decision. The learned trial judge told the jury they "might like to think about" things such as why would the appellant need to flag down the driver of the prime-mover if there was already an escort vehicle with it. Also, why would the appellant need to be making arrangements to get spare parts if there was already an escort vehicle available.

[27] He then commented that it may have been "a bit of bad luck" at that time that the inspectors opened up the weighbridge which was not normally operating. He

pointed out that that would have "posed a difficulty for someone who was driving a stolen truck with a stolen excavator on the back which was too heavy for the truck".

[28] Then the learned trial judge referred to the fact that the truck was "sitting there with the engine running", and he raised the possibility of someone associated with the truck hiding in the bush keeping an eye on it. He went on to raise the possibility that one of the reasons why the appellant may have returned around daylight was that "somebody had been left there up in the bush to keep an eye on things".

[29] The challenge made to the summing-up in that regard is that it was pure speculation, unsupported by any evidence, that someone might have been hiding in the bush. Certainly there was no specific evidence indicating that such was the case. The only evidence which might have supported that proposition was from a police officer to the effect that the appellant's brother was noted, when he was standing beside the vehicle, to be wearing wet and dirty jeans.

[30] The comments in question were unnecessary, but no more than an indication to the jury of the type of question they should consider in determining whether or not they accepted the appellant's innocent explanations for his presence in the vicinity of the stolen prime-mover and excavator.

[31] This was not a major part of the summing-up and I am not satisfied that the learned trial judge exceeded the bounds of propriety in making the observations which he did. As already noted the judge regularly reminded the jury that such matters were for them to consider. He also right at the end of the summing-up gave the jury the cautionary direction that even an entire rejection of the appellant's explanation did not lead necessarily to verdicts of guilty. Then again, finally, he reminded the jury that they could disregard any view that he might have indicated he held about the facts if they did not agree with it.

[32] In the circumstances there was no error in the summing-up in this regard and overall the treatment of the defence case in the summing-up was not unfair.

[33] There is however, as pointed out by counsel for the Director of Public Prosecutions, an error in the summing-up on the receiving count. When first dealing with the elements of that offence the learned trial judge said: "at the time when it came into his possession or at a time when it was in his possession, he had reason to believe that it had been stolen by someone". Shortly afterwards he said that the jury had to be "satisfied beyond reasonable doubt that at some time, when the accused had the trailer in his possession, that he had reason to believe that someone had stolen it." Later, towards the end of the summing-up he again said: "you should at least be satisfied that the accused knew that the trailer had been stolen and had it in his possession at some stage between 8 August and 16 January with reason to believe that it had been stolen". Whilst redirecting the jury he said with respect to the receiving count:

> "It is whether at some point during that whole period, from the time that the trailer left the Main Roads Depot until it was found on the property … whether at some point during that period you are satisfied that the accused had it in his possession and that at that time he had reason to believe that it had been stolen".

[34] Since the decision of the Full Court in *R v Patterson* (1906) QWN 32 it has been the law that the time at which the accused must have knowledge the property was stolen

was the time at which he received possession of it. There was, in consequence, a clear error on the part of the learned trial judge in directing the jury in terms that knowledge of the fact the property was stolen was sufficient if that knowledge was obtained at some time during a period the property was in the appellant's possession.

[35] It follows that the conviction for receiving cannot stand. However, counsel for the respondent submitted that this court should substitute a verdict of guilty of unlawfully possessing a motor vehicle, namely a tri-axle trailer, the offence created by s 408A (1)(b) of the Criminal Code. (By the definition in s 1 of the Code a trailer is a motor vehicle). The guilty knowledge for that offence need not be had when the property is received into possession.

[36] Section 581 of the Code essentially provides that upon an indictment charging a person with an offence of unlawfully receiving anything that person may be convicted of the offence of unlawful possession of a vehicle if that other offence is established by the evidence. Section 668F(2) of the Code is in these terms:

> "Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

[37] Section 668F(2) was recently considered by this Court in *R v White* [2002] QCA 477. There McPherson JA, with the concurrence of the other members of the court, referred to comparable legislation in other Australian States and noted what the High Court regarded to be a condition precedent of the operation of such provisions, namely that "it appears to the Court of Criminal Appeal to the point of certitude that the jury did find certain acts or omissions and that those acts or omissions, as a matter of law, made the accused guilty of the other offence". (*Spies v The Queen* (2000) 201 CLR at 621).

[38] Here, in order to convict the appellant of receiving, given the instructions of the learned trial judge, the jury had to be satisfied that he received the trailer into his possession, and that at some point whilst it remained in his possession he knew, or became aware, that it was stolen. That must mean, for purposes of s 408A of the Code, that the jury was satisfied beyond reasonable doubt that the appellant had possession of the trailer without the consent of the person in lawful possession thereof with intent, at least, to deprive the owner or person in lawful possession thereof of the possession thereof temporarily. Unless the jury was satisfied of those matters beyond reasonable doubt it would have been possible for them to have arrived at a verdict of guilty of receiving. It therefore seems clear that the submission of counsel for the respondent is correct and this court should substitute a verdict of guilty of unlawful possession of a vehicle.

[39] The fact that the jury found the appellant "not guilty" of unlawfully using that trailer is not inconsistent with a finding of being guilty of unlawfully possessing it. There

was evidence on which a jury could find the appellant had possession of the trailer whilst it was on Miva Station, but there was no direct evidence that he did anything which constituted a use of it.

[40] It follows that the conviction for receiving should be set aside and a verdict of guilty of unlawful possession of motor vehicle substituted. That means, of course, that the sentence of 18 months imprisonment for the receiving count must be set aside, and this court must re-sentence the appellant for the substituted offence. But that exercise should be left until after consideration of the application for leave to appeal against sentence generally.

[41] Not only does the appellant contend that the sentences imposed were manifestly excessive, but he also submits that he has a justifiable sense of grievance when his sentence is compared with that imposed on his brother Raymond Francis Bourke.

[42] R F Bourke pleaded guilty to four counts of receiving and two other comparatively minor offences. One of the receiving counts related to property from the depot at Staplyton, and in particular the crane which was found buried underground on his property. The receiving count in question also refers to a prime mover and trailer but it is not entirely clear whether or not they were same items with which the appellant was charged. The total value of the property the subject of the receiving charges to which R F Bourke pleaded guilty was $1,127,500.00; most of it involved trucks, trailers and heavy earth-moving equipment.

[43] R F Bourke was 46 years of age at the time. As noted by his sentencing judge he had been well regarded in the community until the death of his son, after which he had developed symptoms of depression. Medical evidence satisfied the sentencing judge that he was suffering from depression at the time the offences were committed. R F Bourke had a criminal history (mainly property offences) but it was noted that the most substantial offence occurred about 20 years ago.

[44] R F Bourke was sentenced to five years imprisonment on the receiving charges, but because he had co-operated with the authorities to a certain extent, and had pleaded guilty, that sentence was suspended after 15 months.

[45] The appellant was aged 46 and provided support to his seven children when able to. He had a criminal history which included offences of dishonesty but none for some years. He has a number of convictions for drink driving. He has not previously served a term of imprisonment.

[46] The excavator, the subject of count three, the stealing charge, was valued at about $180,000.00 and it suffered damage which cost some $54,000.00 to repair.

[47] It was accepted before the sentencing judge, and again in this court, that the sentence imposed on the appellant should be substantially less than that imposed on his brother. The proportionality evidenced by head sentences of two years and five years respectively reasonably reflects the respective degrees of criminality. The appellant did not plead guilty and there was no suggestion that he co-operated with authorities. That means he does not have the benefits of the discounting factors available to his brother.

[48] Because the head sentence was imprisonment for two years, the appellant would have to serve two thirds of it, that is 16 months, before becoming eligible for

conditional release: s 76 of the Corrective Services Act 2000. That means that, given the sentences as they stand, the appellant would have to serve a minimum of one month longer in prison than his brother, even though his brother received a head sentence more than double that imposed on him. It is that which it is submitted gives rise to the appellant's sense of grievance.

[49] The appropriate relativity in all the circumstances referred to would require the appellant to serve 12 months imprisonment as compared with his brother's 15 months.

[50] It is already noted the appellant has to be sentenced for the substituted offence of unlawfully possessing a motor vehicle. In the circumstances he should be sentenced to imprisonment for 12 months for that offence.

[51] The appropriate relativity referred to above can be achieved by ordering that the sentences imposed on the appellant be suspended after 12 months with an operational period of four years.

[52] The orders of the Court should therefore be:

1. The appeal against conviction should be allowed only to the extent of substituting a verdict of guilty and recording a conviction for the offence of unlawfully possessing a motor vehicle for that of receiving stolen property, namely a tri-axle trailer, as found by the jury.
2. Grant leave to appeal against sentence and allow the appeal only to the following extent:
    iii. Set aside the sentence of 18 months imprisonment for receiving and impose a sentence of 12 months imprisonment to be served concurrently for the offence of unlawful possession of a motor vehicle;
    iv. Order that the sentences be suspended after 12 months with an operational period of 4 years.

[53] **PHILIPPIDES J:** I agree with the reasons of Williams JA and with the orders proposed.