SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dolley* [2003] QCA 108
PARTIES:	**R** **v** **DOLLEY, Timothy William** (applicant)
FILE NO/S:	CA No 398 of 2002 DC No 168 of 2002 DC No 169 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED EX TEMPORE ON:	13 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2003
JUDGES:	de Jersey CJ, McMurdo P and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal against conviction dismissed** **Application for leave to appeal against sentence granted** **Appeal against sentence allowed, but only to the extent of setting aside the sentence of nine years imprisonment for the offence of attempted stealing from a locked receptacle and substituting a term of five years imprisonment in lieu thereof**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – OTHER MATTERS – where erroneous direction subsequently corrected – where circumstantial evidence involved and full circumstantial evidence direction not given CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – PROPERTY OFFENCES – where significant financial consequences of offence – where relevant substantial prior criminal history – where offence due to recklessness rather than intention – whether sentence of crushing effect CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – PROPERTY OFFENCES – where sentence exceeded maximum sentence provided for by legislation

Criminal Code (Qld), s 398(4)(f), s 461, s 536(2)
Penalties and Sentences Act 1992 (Qld), pt 9A

R v Kucks [1996] QCA 57; CA No 470 of 1995, 26 January 1996, distinguished
R v Lockwood; ex parte Attorney-General [1981] Qd R 209, approved
R v Matheson; ex parte Attorney-General of Queensland [1997] QCA 410; CA No 340 of 1997, 14 November 1997, distinguished
R v Rowland and Mealing [1999] QCA 193; CA No 28 of 1999, 26 May 1999, distinguished
R v T [1997] 1 Qd R 623, discussed
R v Webb; ex parte Attorney-General [1990] 2 Qd R 275, discussed

COUNSEL: M J Byrne QC for the applicant
B G Campbell for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant was convicted in the District Court, of the offence of arson, in relation to the spare parts and service division of Southern Cross Ford, in Toowoomba. The charge under section 461 of the Criminal Code, was that on or about the 22nd of March 2002, at Toowoomba, the appellant wilfully and unlawfully set fire to the building.

He had pleaded guilty to related lesser charges, that he opened a safe with oxyacetylene equipment, attempting to steal money and that he broke into the building and entered and stole from it, but he had denied criminal responsibility for what eventuated, the setting fire to the building.

The Crown case was that he broke into Southern Cross Ford and stole items of property. He then returned and entered a small office, called the dispatch room. That room was carpeted and contained large quantities of paper and other combustibles.

He obtained oxyacetylene equipment from the workshop, which he used to cut open the safe in the dispatch room. The Crown contention was that he either deliberately set fire to the building, or that his setting fire to it was wilful, in the sense that he was aware of the likelihood of that result, through use of the oxyacetylene equipment in a small carpeted room full of combustibles, but that reckless of the risk, he persisted in his use of the equipment. The first ground of appeal pursued at the hearing concerned the correctness of the learned Judge's direction on the issue of wilfulness.

In the first part of his summing-up, which was delivered on a Friday afternoon, the Judge rightly drew the attention of the jury to the two aspects of "wilfully", explained in Lockwood [1981] Queensland Reports 209 and 215, that is in the sense that the result following from an act being, as it is put, "positively desired", or where the "doer of an act foresees that the act may lead to damage of the type which actually ensues, but nevertheless recklessly persists in doing the act".

The two aspects comprehend, therefore, a result positively desired, or a result foreseen as a likely consequence. Each

possibility involves "a direction of the mind to the consequences of an action" - page 217.

There has not been any subsequent departure from Lockwood. In The Queen v. Webb [1990] 2 Queensland Reports 275, as to the alleged offender's state of mind, Macrossan CJ, with whom Lee J agreed, spoke at page 278 of the consequence, "in mind, as likely, but...recklessly ignored".

Justice Thomas spoke at page 286 of the offender's being "aware at the time" of the doing of the act, of the relevant consequence. Nothing said in the later case of The Queen v. T [1997] 1 Queensland Reports 623, involved departure from that position. Plainly, the relevant awareness must be contemporaneous with the doing of the act, which is wilful in the Lockwood sense.

In defence counsel's address to the jury, earlier on the Friday, counsel had contended that for the charge to be established, the Crown needed to show that the relevant likely consequence of the use of the oxyacetylene equipment in those circumstances, namely setting fire to the building, must have been actively going through the appellant's mind at the time he was operating the equipment.

Counsel suggested to the jury that the appellant's focus would rather have rested on getting into the safe and that he would not have been turning his mind to what happened next. It was

in that context that the learned Judge went on to seek to elucidate for the jury the meaning of "aware at the time".

The Judge told the jury, in effect, that direct awareness in that immediate sense, need not have existed. It was not necessary, he said, that the Crown establish that the likelihood was actively going through the appellant's mind as he was cutting into the safe, but it would be sufficient if the Crown were to establish in the appellant, the existence of a more general awareness of appreciation of that prospect, as being, for example, something "imprinted on his mind", just as family details and the like were imprinted on the jurors' minds, although not the subject of immediate active attention during the summing-up, because they were concentrating on what the Judge was saying. That approach to the matter was not correct. It was indeed necessary for the Crown to establish an actual awareness in the appellant at the time of the cutting, of the relevant likely consequence of his act.

Such an awareness might properly be inferred from relevant circumstances. Counsel for the respondent, before us, rightly submitted that the Crown did not have to establish that the appellant was "thinking" of the relevant risk throughout his use of the equipment. It would, as was submitted, have been sufficient if at some stage when the appellant was preparing to use the equipment, or using it, he became aware of or foresaw the likelihood of a fire, even if he thereafter thought no more about it.

Well, following the departure of the jury on the Friday afternoon, defence counsel made submissions critical of his Honour's direction, pointing to the reference in Lockwood, to foreseeability, submitting that "not just a general awareness, but a positive foresight" was required.

Defence counsel submitted, unsuccessfully, that the Judge should discharge the jury. When the trial resumed on the following Monday morning, the Judge, continuing his summing-up, told the jury in orthodox and comprehensive terms, that they must be satisfied that, as the appellant cut the safe, he was aware that it was likely that the building would burn, in the sense that it had to be in his mind at the time, "that he was...conscious of the fact that the building was likely to catch alight from what he was doing" and later, "that he foresaw while he was doing what he did", that likely result. The Judge used the terms "foresight", "awareness" and "consciousness" interchangeably and there could be no reasonable criticism of that.

While on the Friday afternoon the learned Judge had told the jury that the Crown need not establish direct immediate awareness in the mind of the appellant, while cutting, of that likely result, suggesting the more general awareness or appreciation of the prospect would suffice, he did on the Monday following, put the matter consistently with the law.

That emerges from the passages to which I have referred already. Additionally, he concluded his further direction on this matter with these following passages:

> "I should say in fairness, Mr Davis, defence counsel, put that matter to you in other ways. He used the word "foresight" and he said at one time the Crown would have to prove that at the time the accused used the cutting equipment, he foresaw or thought, it was likely he would set fire to the building. Well, that submission is quite correct. He submitted to you another rhetorical question: 'Do you necessarily think that he was thinking as he used it - this is likely to set fire to the building'. Well, that is an appropriate submission, ladies and gentlemen, and that's something that the Crown would have to prove before you could convict."

In my view, the learned Judge's extensive and accurate further directions on the Monday morning adequately corrected the misdirection of the previous Friday afternoon and I say that, notwithstanding his Honour's not having said in terms on the Monday, that his direction on the Friday had been erroneous. I turn to the other basis upon which the conviction is challenged.

The learned Judge correctly instructed the jury that the relevant awareness of the appellant fell in this case to be determined by inference from proved circumstances. Counsel for the appellant submitted that the Judge should have given the full circumstantial evidence direction, including the warning that the inference should not only be a rational inference, but the only rational inference which could be drawn from the circumstances. That direction was not given.

I do not, however, accept that submission. The Judge clearly instructed the jury that proof of the relevant awareness was an essential element of the charge to be established beyond reasonable doubt. The direction concerning the need to exclude other rational hypotheses consistent with innocence, is but a logical elaboration upon the Crown's obligation to establish guilt beyond reasonable doubt.

Certainly, that is in an essential direction, where what is sought to be inferred, involves a matrix of facts and circumstances, as for example, how or whether a murder has been committed in a case where no body has been found. That is but one example, but in a case like this, where the fact to be inferred is itself but one element of the offence, the direction that in order to convict that fact must be inferred beyond reasonable doubt, adequately directs the jury to the test to be applied, because obviously, if the inference is drawn beyond reasonable doubt, then ipso facto, all other reasonable possibilities must have been excluded. In my view, the appeal against conviction should, for those reasons, be dismissed.

The learned Judge imposed a sentence of 12 years' imprisonment for the offence of arson committed on the 22nd of March 2002. That was in the context of his sentencing the appellant, who applies for leave to appeal against sentence, for a raft of other offending and the Judge was conscious of the need to have regard to the totality of the appellant's criminality, while not imposing sentences which would be crushing in

effect. I will come to the other offences.

When sentenced, the applicant was 28 years old. In relation to the arson, the Judge sentenced the applicant on the basis of reckless indifference to the likely consequence of the burning of the building and he was plainly right to proceed on that basis.

The extent of the loss, including the cost of replacing the building, the loss of plant and equipment, additional operational costs, loss of income, loss of motor vehicles and relevant claims, amounted to the extraordinarily high amount of $6 million.

Commercial losses aside, a canteen operator lost a business and other citizens lost their vehicles. The loss of the spare parts outlet led to inconvenience in operations elsewhere within the State. While the Judge accepted that the case was not in the category of arson where human life was directly at risk, he pointed out that the premises were situated in a populated part of the city.

The Crown submitted for a penalty overall of at least 11 years, whereas the defence submitted for nine years, plus an activated six months' suspended sentence, with suspension after one-third. On any view, a substantial term was warranted for the arson.

The learned Judge took the view that the pleas of guilty for

the other offences were not indicative of remorse. There was no sign of remorse in respect of the arson for which the applicant was convicted by the jury.

The applicant came before the Court with a substantial prior criminal history, including many convictions for dishonesty. He had been given the benefit of community based orders and had re-offended. He had been imprisoned, including for 18 months, in 1994.

In May 2001, he was sentenced to six months' imprisonment for entering houses and committing offences within them, that term being suspended for three years. It was that term which the Judge activated while requiring that that six months be served concurrently within the umbrella of the overall 12 year sentence imposed for the arson.

I turn now to the offences to which the applicant pleaded guilty. They involved a spate of property offending committed between September 2000 and March 2002, comprising nine offences of breaking entering and stealing, two of entering and stealing, one of attempted stealing from a locked receptacle, three of stealing, three of unlawful possession of a motor vehicle, with a circumstance of aggravation and two of wilful damage.

The value of the property stolen or damaged, was approximately $64,000. In two instances, the applicant modified the identification marks of vehicles. Additionally, he pleaded

guilty to the dangerous operation of a motor vehicle in Toowoomba, on the 18th of April 2002.

At about 6.25 p.m. that day, he drove around inner city streets in Toowoomba on a late night shopping day, reaching 160 kilometres per hour, in a 60 kilometres per hour street, passing through a red light, conversing on a mobile phone, while driving and speeding through a car park, eventually ramming into a police vehicle. The Judge described it as the behaviour of a person "almost out of control".

For the arson, the applicant was imprisoned for 12 years. For the nine counts of breaking entering and stealing, nine years. For attempted stealing from the locked receptacle, nine years, although the maximum was five years - see sections 398, subsection 4, paragraph (f) and 536, subsection 2 of the Criminal Code. For two counts of entering and stealing, nine years. Three counts of stealing, two years. For three of unlawful possession of a motor vehicle, with a circumstance of aggravation, nine years. For two wilful damage counts, two years and two years for the dangerous operation of the motor vehicle. Those terms were ordered to be served concurrently, together, concurrently, with the six months' activated sentence.

In challenging the 12 year term for the arson, counsel for the applicant relied on Matheson, Court of Appeal 340 of 1997, together with Kucks, Court of Appeal 470 of 1995 and Rowland and Mealing, Court of Appeal 28 of 1999.

None of those cases is closely comparable with this one, although that does not mean they are devoid of assistance. The effect of the seven year term imposed in Matheson, for example, was imposed upon a man who had never previously been to gaol, whose arson resulted in destruction to the value of $1 million.

This applicant had been to gaol and the extent of the destruction here was plainly on a completely different scale. The Court of Appeal noted furthermore that the seven year term imposed upon Matheson was, in any event, low.

I consider nothing especially useful can be drawn for present purposes from the report of Kucks. Rowland and Mealing sentenced to nine years, burnt an apartment block, causing damage valued between $200,000 and $300,000. Here, of course, the loss, as I have said a number of times, was $6 million, although that is to be weighed against the very serious direct risk to the residents of the apartment block in Rowland and Mealing, some 80 of them, an obviously critical factor.

It may, however, be said that there is always some risk to the public in circumstances like these and the sentencing Judge referred to its being a populated area, with a breeze blowing. Nevertheless, direct danger to people must put such a case into a particular category.

Then again, unlike this applicant, Rowland and Mealing pleaded guilty to the arson. For those reasons, none of those cases

is directly comparable. How then does the sentencing Court proceed? Well, as said in Rowland and Mealing on appeal:

> "In the absence of directly comparable sentences, the Court should have regard to fundamental principles, giving account to such factors as deliberation, pre-mediation, the extent of the loss occasioned and the great degree of risk to health and safety of the community. In the absence of appropriate precedents, the Court should have regard to the whole of the range of penalty provided by the legislature. The maximum penalty for arson being life imprisonment."

In this context, is 12 years' imprisonment for this instance of arson a manifestly excessive penalty? It is certainly a very high, stern penalty.

The penalty for the arson should have been substantial. The offence was committed by a person with a substantial prior, relevant criminal history who had previously been imprisoned for a substantial period.

The arson had massive financial and other consequences. It was committed against the background of serious other property offending, serious to the extent of occasioning loss of more than $60,000 to various people over a period of 18 months' offending.

Further, there is the circumstance that the activated six month sentence would ordinarily fall to be served separately or cumulatively as also possibly the penalty for the quite separate and isolated offence of dangerous operation of the motor vehicle.

On the other hand, he fell to be sentenced not as having intended to burn the premises but for his recklessness, and I repeat the damage was to property, not people. If the Court were sentencing for the arson taken alone with conviction following a trial, then notwithstanding the enormous loss and the applicant's relevant substantial prior criminal history the circumstance that it did not cause immediate danger to the lives of residents or nearby residents should probably have meant that the penalty rest at around nine years' imprisonment.

But then one must take account of the quite separate property offending and the dangerous operation of the motor vehicle and the activation of the six months' suspended sentence.

I accept the submission for the applicant that the property offending taken alone would warrant a head sentence of five years' imprisonment suspended because of the pleas of guilty after two. That is not to limit the range applicable to that sort of offending which counsel for the respondent submitted here would go beyond that. I agree with that submission.

There is certainly well arguable basis that to some extent if one were considering these situations in an isolated and artificial way the penalty for the separate property offending should be served cumulatively upon the penalty for the arson.

Then finally there is the activation of the six months' suspended sentence. If that is to be meaningful and the legislative intention behind the provisions relating to suspended sentences properly reflected, then there should be provision built into the overall sentence such that that can be seen to be served as a term of imprisonment activated following the suspension.

Through that process plainly one could reach a penalty of 12 years' imprisonment. It would then be necessary to apply the totality principle. For an offender 28 years old would a 12 year sentence be of crushing effect?

In my view, while the 12 year term effectively imposed here for the arson must be considered high, stern, salutary, at the top of the range for this offending, it did not fall outside the range such that this Court should consider it manifestly excessive and susceptible of reduction.

The Court should, however, order that the sentence of nine years' imprisonment imposed in respect of the offence of attempted stealing from a locked receptacle be set aside and a sentence of five years' imprisonment imposed in lieu thereof. That is because the nine years in fact imposed exceeded the maximum of five years provided for by the code. This would be a purely formal direction without practical consequence.

I should also say that while one may have differed from the approach taken by the learned Judge to the terms particularly

imposed for the separate instances of property offending, the question of modifying those terms becomes purely academic when seen against, on my judgment, the sentence of 12 years' imprisonment for the arson being upheld.

If the result of this decision is that the 12 year term is effectively upheld, then I think it is very important that when this judgment is subsequently examined for the purposes of other cases it be appreciated quite clearly that the 12 years was upheld in the case of an offender who not only committed this arson but committed it in the context of very serious additional property offending.

I would grant the application for leave to appeal against sentence and allow the appeal but only to the extent of setting aside the sentence of nine years' imprisonment imposed in respect of the offence of attempted stealing from a locked receptacle and substituting in lieu thereof a term of five years' imprisonment.

THE PRESIDENT: I agree with the orders of the Chief Justice for dismissing the appeal against conviction. The effective sentence of 12 years' imprisonment was high, but in the end I am not persuaded that it was manifestly excessive for the following reasons.

First, the sentence of 12 years' imprisonment was a global one recognising the many offences committed by the applicant not just the arson offence. These other offences included an

activated six months' suspended sentence, dangerous driving and many serious property offences involving over $60,000 worth of property. Many of these offences were committed on business where the applicant had previously worked.

Second, the arson had very serious aspects to it. Although it was a reckless and not an intentional arson, it caused $6 million damage to property and untold distress and hardship to the many waves of people affected by its consequences. An arson of a dwelling has a more direct possibility of injuring others but any arson risks personal injury. This building was close to a residential area. It is always possible that someone may be unexpectedly present, even in a commercial building, and firemen and rescuers are always at risk. Indeed, two firemen were treated at hospital for minor injuries arising from this arson.

Third, the applicant is a somewhat mature man of 28 years and his criminal history does not suggest he has promising prospects of rehabilitation.

Fourth, the provisions of Part 9A of the Penalties and Sentences Act 1992 (Qld) do not have application to any of the sentences imposed here.

Finally, it is of particular concern that after the applicant committed the arson he went on to commit a further property offence using oxyacetylene equipment inside a building, the very circumstances that led to the commission of the arson.

This demonstrates a complete lack of insight or remorse.

I agree with the Chief Justice's reasons and with the orders proposed by him.

WHITE J: I agree that the appeal against conviction should be dismissed for the reasons expressed by the Chief Justice. I also agree that the application for leave to appeal against sentence should be refused other than as indicated by the Chief Justice. I agree with the observations of the Chief Justice and the President that the sentence for arson is high but the criminal background of the applicant, the other offences for which he was being sentenced on that day and the serious losses to many people make the sentence that was imposed not such as this Court ought to interfere.

It might be thought rather surprising that arson is not an offence included in the schedule to the Penalties and Sentences Act to which Part 9A dealing with serious violent offences refers.

Such a crime has the potential for inflicting very serious harm on people who might be in the vicinity and the known capacity of fire to spread causing devastation unless contained suggests that this is well known in the community; yet the schedule does include drug offences and bomb hoaxes, not immediately apparent, one might observe, as violent offences. I agree with the orders proposed.

THE CHIEF JUSTICE: I agree with the observations just made by Justice White in relation to the composition of the schedule and I will ask the Principal Registrar to refer a copy of these sentencing remarks to the Office of the Honourable the Attorney-General. The orders will be as I have indicated.
