SUPREME COURT OF QUEENSLAND

CITATION:	*R v Birchley* [2003] QCA 277
PARTIES:	**R** **v** **BIRCHLEY, Ian Neil** (appellant)
FILE NO/S:	CA No 60 of 2003 SC No 836 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2003
JUDGES:	McPherson JA, White and Fryberg JJ Separate reasons for judgment for each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant started fire in house of a friend – where evidence indicated appellant acted under the influence of prescription drugs – whether open to the jury to be satisfied beyond reasonable doubt that the appellant had formed the requisite intent CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – ARSON AND LIKE OFFENCES – OTHER MATTERS – where appellant started fire – whether error of law in convicting appellant of an offence under s 462 of the *Criminal Code* (Qld) rather than s 461 – whether it could be shown that appellant "set fire to" house for the purposes of s 461 *Criminal Code* 1899 (Qld), s 27, s 28, s 461, s 462, s 668E(1) *R v B* [1997] 2 Qd R 459, considered *R v De Voss* [1995] QCA 518, CA No 229 of 1995, 24 November 1995, distinguished *R v Lockwood* [1981] Qd R 209, referred to

Spies v The Queen [2000] HCA 43, 3 August 2000; (2000) 201 CLR 603, referred to

COUNSEL: M J Byrne QC for the appellant
C W Heaton for the respondent

SOLICITORS: Ryan & Bosscher for the appellant
Director of Public Prosecutions (Qld) for the respondent

[1] **McPHERSON JA:** I agree with the reasons of White J, which I have had the advantage of reading.

[2] As those reasons demonstrate, the expert medical evidence for the defence at the trial might perhaps have been relevant to showing that the appellant's state of mind in some respects satisfied the provisions of s 27 of the Criminal Code. However, by virtue of s 28(2), those provisions do not apply to the case of a person who has caused himself to be intoxified or stupefied by drugs or intoxicating liquor, which was the case here. Here, as was accepted on the appeal, the applicable provision was s 28(3) of the Code. As to that, the jury were entitled on the evidence, including that of Dr Carroll, to conclude that at the time he caused the fire, the appellant had formed the intention necessary to constitute the offence of attempting to set fire to the house.

[3] The evidence available on appeal falls well short of establishing that he achieved his purpose and the jury were not asked to consider this issue at the trial. In the circumstances, the new ground added on appeal cannot succeed.

[4] The appeal against conviction should be dismissed.

[5] **WHITE J:** The appellant appeals against his conviction for attempted arson on the grounds that the verdict is not supported by the evidence and/ or is "unsafe and unsatisfactory": presumably that the verdict is unreasonable pursuant to s 668E(1) of the *Criminal Code*, see *Gipp v R* (1998) 194 CLR 106 per Kirby J at 147. Mr Byrne QC for the appellant sought and was given leave to add a further ground of appeal in the course of submissions that:

> "An error of law has occurred in that the Appellant has been tried and convicted of an offence under section 462 of the *Criminal Code* when the evidence shows the element of setting fire pursuant to section 461 of the *Code* to be established."

[6] The appellant, a 47 year old medical practitioner, was convicted by a jury on 20 February 2003 of attempted arson of the dwelling house of Ms Cecelia Dunne, a woman with whom he had had a relationship for some three years. The sole question at trial was whether the appellant had formed the requisite intention to burn the house, it being common ground that he was affected by the consumption of a quantity of prescription drugs at the time.

[7] At trial the appellant, who gave evidence, had no recollection at all of the relevant events although that was not apparently so in a record of interview conducted by the police some hours after the fire. The appellant's contention was that he was so affected by the consumption of drugs that he did not form the necessary intention to commit the offence. A body of medical opinion evidence was said to support this

and to make it unreasonable of the jury to convict in the face of that evidence, *M v The Queen* (1994) 181 CLR 487 at 494-5. Those opinions were formed by viewing an audio-video record of interview of the appellant with police starting some four-and-a-half hours after the event as well as toxicology results. Only one medical practitioner actually observed the appellant near the time of the events, Dr Kenneth Carroll, who examined the appellant at the request of police at about 2.30 pm on Sunday, 9 April to ascertain his fitness for interview and his need for treatment for burns to his legs. Dr Carroll concluded that the appellant was fit and accepted that the appellant would undertake his own treatment for burns later.

[8] A number of witnesses spoke with and observed the appellant, both at his home which was very close to that of Ms Dunne and at her house shortly after the fire was extinguished by a neighbour at about 10.35 am.

[9] The appellant and Ms Dunne had had a disagreement on Friday evening, 7 April 2000. They had planned to go away together for the weekend but issues arose about Ms Dunne's former husband's weekend access to their children. Ms Dunne left Brisbane alone on Saturday morning for the country. The appellant contacted her three times by telephone on Sunday morning around 10.00 am very angry that she had left him. She said that his speech was slurred, a condition with which she was familiar because he medicated when he was agitated.

[10] The appellant's account given to police in his record of interview which commenced just before 3.00 pm on Sunday afternoon was that he had walked to Ms Dunne's house to retrieve his lawn mower which was in her locked shed, taking some petrol in a container with him. In fact, the appellant had his lawns mowed professionally and had not used his own mower for quite some time. He said that he took his mower out of the locked shed onto the covered patio at the back of the house, washed the spark plug in petrol and tried to start the mower which sparked and went up in flames causing the surrounding area to burn as well as causing injuries to his legs. He said the flames died down, he returned the mower to the shed which he locked and returned to his own home to attend to his burns. Some, at least, of this account was unlikely to be true. There was no damage to the lawn mower.

[11] Mr Walker, the neighbour, was alerted by a smoke alarm and the smell of smoke and went to the back of Ms Dunne's house. He saw the gas barbeque which was on the back patio against a wall of the house with flames apparently coming from the drip tray. Mr Walker then noted that the doorframe of a sliding door giving access from the house on to the patio was "on fire" and that one of the glass doors was broken, presumably by the heat of the fire. He sprayed around the doorway with water from a garden hose, noticed that some vertical blinds were "a molten mass" on the carpet of the lounge room beyond the broken sliding door and that the inside of the house appeared full of smoke. The fire was extinguished and shortly afterwards the fire brigade arrived. The appellant whom Mr Walker recognised as a regular visitor to Ms Dunne's house then arrived in his four wheel drive motor vehicle. He asked the appellant if he knew where Ms Dunne could be contacted and he was told that she was "up at the farm". He said that the appellant did not look "like he was really switched on", in response to a question from the prosecutor, and agreed in cross-examination that he (Walker) had said in his statement to police that the appellant appeared to be affected by something. He added:

> "He appeared to me as if he was just not with it. He was, like, either half asleep or had a big night the night before and was still coming down. I don't know."

[12] Fire Officer Kevin Connolly was at the front of Ms Dunne's house at about 11.00 am and saw the appellant drive his vehicle to the house and engaged him in conversation. The appellant told the fire officer that he had been at the house about a half hour previously borrowing mower fuel which he found near the barbeque and had come back when he heard the commotion. Mr Connolly thought the appellant "seemed a bit strange" and "was a bit vague" with his answers to questions. He noticed that the appellant's eyes "seemed glassy".

[13] The appellant's own alarm system at his home went off that morning and police called to investigate shortly after 12.00 noon. They had a conversation with him near his motor vehicle which was parked in the garage about the propensity of his alarm to malfunction. On request the appellant produced identification from his motor vehicle for the police. They noted red blisters on his feet, that he was limping and that his responses to their questions were "slow and difficult". Those uniformed police then went to Ms Dunne's residence to investigate what they then understood to be a separate matter of a fire. Detectives in attendance at Ms Dunne's house proceeded to the appellant's house and after he initially denied any knowledge of the fire when asked about his burnt legs replied that "it happened when the fire flared up". He told police that the fire had occurred at Ms Dunne's house when he was "tinkering" with the fuel, that is, putting the fuel into a container. He declined to accompany police to the watchhouse and was arrested.

[14] The evidence revealed that the appellant had filled a prescription written by himself for Ms Dunne for Serapax and Normison tablets just after 9.00 am on Sunday morning. Police found a sheet of Serapax tablets from the box with all 10 blisters empty. The Normison tablets were not located. Dr Carroll and Dr Dawson, a physician, gave evidence about the effect of the drugs. Dr Carroll said that Serapax would take from between one-and-a-half to three hours to reach its maximum effect and was dependent not only on the dose but the person's tolerance to the drug. The appellant's own evidence was that he was a regular consumer of Serapax and had taken two at lunchtime on Saturday. Medical evidence was to the effect that Serapax is used to relieve anxiety and its principal effect is drowsiness, slurring of speech if sufficient are taken, confusion, amnesia and forgetfulness.

[15] When Dr Carroll arrived at the cell where the appellant was being held he noted him lying on his side on the bench facing the wall with his back to the door. He was roused immediately his first name was called. Dr Carroll said that he did not think that the appellant was affected by the consumption of Serapax when he conducted his examination of about five to ten minutes duration. He had written in his notes:

> "easily arousable from sleep by calling his name, 'Ian'. He sat up quickly and was immediately aware of his surroundings and that he was in the watchhouse."

In evidence Dr Carroll said he asked the appellant a number of questions to which he got satisfactory answers (it may be presumed) but that was not to say that the appellant was not affected by the Serapax although not an obvious effect. In his view, a person who had taken three Serapax in the morning, as the appellant had

confirmed to him, at the peak of the effect of the dose would be impaired in terms of an ability to drive a motor vehicle.

[16] The appellant's blood was subject to analysis on 12 April, three days after the fire. He was found to have a significant level of Serapax. The appellant was unable to recall whether he had taken the 10 "missing" Serapax tablets and if he had taken them, whether they were taken prior to the fire or when he returned home. He said that he had taken a number of Serapax tablets on the Saturday in order to settle his agitation. He swore that he had taken no relevant tablets from the time he was released from the watchhouse on Monday, 10 April, until the blood test was conducted on Wednesday, 12 April. Those results were reconstructed by medical specialists to suggest that the appellant had between four and sixteen tablets in his system about noon on the Sunday.

[17] The medical specialists were concerned at the appellant's bizarre behaviour as demonstrated on the interview video. He was seen to be wiping his burnt legs with a dirty tissue or rag, rubbing and tearing at the skin – a painful experience - wiping the table with the tissue before yet again wiping his legs. He was seen and heard to laugh from time to time but from a perusal of the transcript the responses were not obviously deranged. Dr Frank New, a psychiatrist, thought it possible the appellant was in "a fugue state", a kind of automatism. Dr P Yellowlees, a psychiatrist, considered the appellant to have "a delirium". Some of the doctors appeared, at times, to address the wrong question, namely, whether the appellant knew the difference between right and wrong when the fire was started. For example, the prosecutor asked Dr W J Kingswell, a psychiatrist called by the defence:

> "… you would concede, would you not, that even in that state of affairs this man would still be capable of making a decision, knowing what he was doing was wrong?—That becomes a bit of a problem. It's possible that what you say is correct, but I don't really know – I do know that when he is interviewed by police, whatever capacity he had at 10.30 – if he had capacity at 10.30 it is certainly lost by 3.30."

Defence counsel asked Dr Yellowlees whether he could comment on the appellant's capacity to understand the difference between right and wrong. He responded that the appellant would have lost the capacity to make those sorts of decisions and to understand what was going on because of his condition due mainly to the ingestion of drugs.

[18] The doctors also addressed the question of the appellant's intoxication on his capacity to form the requisite intention. Dr Dawson, a physician with specialised knowledge of the effects of drugs, concluded that during the record of interview the appellant appeared to have a delirium. Although hampered by not having clinically examined the appellant at the time, Dr Dawson was prepared to say that he did not believe that he could make "any really informed decision, though he may very well try to be very helpful". He agreed in cross-examination that a person affected by a high benzodiazepan ingestion was still capable of making a decision but in "a medical sort of sense you have to make a judgment about whether you see the decision as appropriate …".

[19] Dr Yellowlees said that the appellant appeared to be

> "disorganised, chaotic and spoke and behaved in a repetitive manner which suggested to me that he had a delirium".

He explained delirium as being severely intoxicated by some substance. Dr Yellowlees judged whether a person could form an intention to do something if that person could

> "[use] a considered opinion to make a choice about a particular action that you understand the consequences of."

If the appellant had no recollection of what went on this was evidence that he had been unable to have the requisite intention.

[20] The prosecutor proposed to Dr Kingswell that the appellant, as a consequence of taking a drug,

> "was disinhibited and also his coordination skills weren't as good as they might be. In other words, to use the analogy again with alcohol, that he was to some extent drunk, and that in attempting to set fire to the house, he spilt some petrol on himself or in an area where he was standing as well as spreading it around, and that the fire has commenced after lighting it up and some of it has gone on him. What do you say about that scenario?—I think that is an excellent explanation. That's exactly what I thought had happened."

In re-examination Dr Kingswell said:

> "He set a fire, so I suppose he knew something would catch fire. He discussed it with the police later. So I guess to some extent he knew the nature of the act. The issue of control we don't know, but he certainly controlled some aspects of the act and then whether he had the capacity to think through whether it was wrong. I guess this is one that might be seen as akin to intent. We don't really know what he intended. He might have clearly intended to set fire to the place, but it was an inept of [sic] attempt and he would have been in that state of delirium really unable to reflect on the rightness or wrongness or the sort of moral worth of that act, I think. He was quite simply deprived of the cognitive ability to think through why the ordinary man would do or not do that act."

Dr New said that unless a person was grossly affected by the consumption of a drug to the extent of falling about, it was difficult to appreciate the extent that the person's mental processes were impaired. He was confident that the appellant's higher levels of judgment were impaired. He agreed that it was quite possible that the person could act deliberately in setting a fire or maliciously causing damage, that is, could still make decisions but may have been affected in his capacity to think through the consequences.

[21] The drift in the questioning from an examination of the effect of the consumption of various quantities of drugs on the appellant's capacity to form an intention to whether he was able to appreciate that setting fire to the house or attempting to do so was wrong, or its ultimate consequences, was not helpful. It is not the case, as contended for by the appellant, that the overwhelming preponderance of evidence favoured a conclusion that a reasonable jury must have had a reasonable doubt about the appellant's intention. In addition to the expert medical evidence, the jury had the evidence of people who saw and spoke to the appellant very close to the time the fire was started and of Dr Carroll who observed him and interacted with him just prior to the commencement of the record of interview. The jury had

evidence that the appellant had sufficient functioning to be able to drive his motor vehicle to Ms Dunne's house, park it effectively, drive back to his own house and park it in the garage without incident. He had sufficient appreciation of matters to give an explanation of how he came to be at Ms Dunne's house and sustain his burns, albeit an explanation that hardly stood up to close scrutiny. Some of the evidence of some of the specialist doctors was informed by an assumption that the appellant had consumed the 10 Serapax tablets missing from the discarded sheet. The appellant told police and Dr Carroll that he had taken three although the toxicology results would suggest that at the time of testing that was not the case. However, there was no evidence to infer that, if taken, those further drugs were ingested prior to going to Ms Dunne's house on the first occasion on Sunday morning. Further, the jury simply may not have accepted the appellant's evidence that he had taken no drugs after his release from the watchhouse and the blood test on the Wednesday. This was not a case like *De Voss* [1995] QCA 518, CA No 229 of 1995, 24 November 1995, where the jury disregarded uncontradicted expert evidence.

[22] Upon a consideration of the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant had formed the requisite intent to set fire to Ms Dunne's dwelling house on 9 April.

[23] Turning to the new ground of appeal, s 462 provides that:

> "Any person who -
> (a) attempts unlawfully to set fire to any such thing as is mentioned in s 461;
> is guilty of a crime ..."

Section 461 provides that:

> "Any person who wilfully and unlawfully sets fire to any of the things following, that is to say -
> (a) any building or structure whatever …
> is guilty of a crime…"

Section 462 is governed by the definition of "attempt" in s 4, namely:

> "4(1) When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.
>
> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on the offender's part for completing the commission of the offence, or whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of the offender's intention.
>
> …".

[24] No issue was raised below as to whether the charge of attempted arson was correctly brought. The appellant was represented by very experienced counsel. It is the expression "sets fire to" to which attention must be given for it is clear that neither the vertical drapes which appear likely to have melted in the heat, nor the barbeque which the evidence does not suggest was damaged, constitute a building or structure. This court in *R v B* [1997] 2 Qd R 459 when considering the expression "sets fire to" in s 461 said at 463:

> "This phrase appears to have been adopted at a time when the principal building material which would be employed for internal use was wood and grave dangers were associated with it should it become ignited, whereas some modern structures can be damaged by the application of fire or heat without their burning in the sense of oxidising or having their chemical composition altered. Some modern materials may, however, be melted and effectively destroyed. Other common law jurisdictions have moved away from inviting the sterile debates that can be involved in determining whether any part of a structure has been consumed by fire as opposed to being simply scorched: note the tension that is involved between two longstanding decisions dating from an earlier time, *R v Parker* (1839) 9 Car & P 45; 173 ER 733 and *R v Russell* (1842) Car & M 541; 174 ER 626. Thus, the *Crimes Act* 1900 (NSW) s 195(b) refers to damage "caused by means of fire" and the *Criminal Damage Act* 1971 (UK) s 1(3) refers to "damaging property by fire"."

[25] The evidence about whether Ms Dunne's house had actually been "set fire to" is limited, no doubt because it was not an issue in the trial. Mr Byrne now contends that the evidence supports a conclusion that there was actual burning of the residence in respect of the "wooden" doorframes of the sliding door from the patio into the lounge/rumpus room area. That submission may go beyond the evidence which I will consider in a moment. The consequence of such a finding, Mr Byrne submits, is that since s 461 and s 462 are not alternative verdicts, s 668F has no operation because the jury could not "on the indictment have found the appellant guilty" of the offence of arson under s 461. Mr Byrne also refers to *Spies v The Queen* [2000] HCA 43, 3 August 2000, (2000) 201 CLR 603, 613, where the High Court (Gaudron, McHugh, Gummow and Hayne JJ) when considering the Victorian equivalent of s 668F held that the new verdict must be one which was open on the indictment and, in effect, a conviction for a "greater" offence may not be substituted for a lesser charge. The offence of arson requires the prosecution to prove not only that the person charged unlawfully set fire but "wilfully" set fire to the dwelling. In *R v Lockwood* [1981] Qd R 209 a court of five held that "wilfully" where used in ch 46 of the *Code* required proof that the accused person either (1) had an actual intention to do the particular kind of harm that was in fact done or (2) deliberately did an act, aware at the time he did it that the result charged in the indictment was a likely consequence of his act and that he recklessly did the act regardless of the risk. Proof of an actual intention to set fire to the dwelling is required for an attempt – a greater obligation on the prosecution.

[26] The real issue is whether the evidence supports a conclusion that the appellant "set fire to" the dwelling. Mr Walker, the neighbour, said that the first thing that caught his eye was the barbeque which was burning. Thereafter he "saw the doorframe was also on fire" and later "and then I saw the fire around this doorway here, up around the bottom and up the side" indicating the fire around the doorway to the

lounge room/rumpus room. Constable Hoile from the Acacia Ridge Police Station said that her observations were of "charring and black – black type of damage to the rear sliding glass door area at the rear of the house". Fire officer Connolly agreed that he saw what appeared "to be fire damage around the corners of this patio", meaning the general area because the wooden structure of the pergola part of the patio was undamaged.

[27] Sergeant Darren Pobar from the Forensic Services Branch noted that the frame of the patio was timber, that the exterior walls of the house were a granosite finish, possibly brick underneath, the floor of the patio was concrete and the roof was an alconite-style material. He was asked the location of the main fire damage and identified the area between the two glass doorways as the vicinity where the fire started. He spoke of the general fire damage caused to the external framing and glass of the door which afforded access to the lounge and some fire damage to the other doorway. Sergeant Pobar had samples of glass and residue of the floor area from the front of the doorway to the lounge tested. The laboratory results indicated petrol on some of the samples and Sergeant Pobar concluded that the fire was caused as a result of human involvement.

[28] Ms Dunne gave evidence about the damage to her home with the assistance of photographs. She used the imprecise expression "fire damage" when describing the area. She described damage to the area surrounding the two doors but was not asked from what material the doorframes were made. A perusal of the photographs would suggest that the doors and their frames are aluminium. There is no evidence to indicate the material of the surround to the doorframe but it, too, looks to be aluminium. Mr Byrne refers to photograph exhibit 13. Similarly exhibits 12 and 11 show close-ups of the doorframe area. It looks more as though paint has bubbled and come off that area than that there has been any consumption of the underlying fabric by fire. This is a jury question but it seems very much a case of the modern materials referred to by Macrossan CJ and Davies JA in *R v B* which melt or are scorched rather than consumed by fire. Perhaps what was seen to be burning was the petrol rather than the dwelling.

[29] The evidence by no means supports the contention that the appellant was inappropriately charged with attempted arson rather than with arson itself. Indeed, on the present state of the evidence there would have been a real prospect that the prosecution would have been unable to have established that essential element - "sets fire to". In *R v B* the structure was a telephone booth and the damage primarily seems to have been the melting of the handset. The principal witness saw the accused boys tear up the telephone book, set it alight and then hold the handpiece over the flame until it caught fire when they ran away. The witness approached the booth, saw that a piece of the wall had caught fire and by the time the fire brigade arrived "it was pretty well alight". Whether this was a sufficient setting fire to the telephone booth was the subject of submissions at the trial. Here there was no challenge to the charge and the evidence does not support a conclusion that the appellant actually set fire to the dwelling of Ms Dunne. There is nothing in this ground of appeal.

[30] I would dismiss the appeal against conviction.

[31] **FRYBERG J:** I agree with White J that this appeal should be dismissed, for the reasons given by her Honour.