SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nesbitt* [2004] QCA 333
PARTIES:	**R** **v** **NESBITT, Peter Donald** (appellant/applicant)
FILE NO/S:	CA No 134 of 2004 DC No 82 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction and sentence
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	17 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2004
JUDGES:	McPherson JA, Williams JA, Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – VERDICT – INCONSISTENT VERDICTS – PARTICULAR CASES – PROPERTY OFFENCES – whether it was open to jury to convict the appellant of wilful damage after acquitting him of the alternative verdict of arson *Criminal Code* 1899 (Qld) , s 7 *R v Barlow* (1997) 188 CLR 1, applied *R v Jervis* [1993] 1 Qd R 643, cited *R v Zischke* [1983] 1 Qd R 240, applied *West v Perrier; ex p Perrier* [1962] QWN 5, cited
COUNSEL:	M J Griffin SC for the appellant R G Martin for the respondent
SOLICITORS:	Gilshenan & Luton for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** The appellant Peter Nesbitt was charged on indictment in the District Court at Toowoomba with five counts of offences under the Criminal Code.

Count 1 charged that between 1 July and 11 October 2001, he stalked the complainant Leanne King, with the circumstance of aggravation that he used violence against her property, which was a Holden Commodore sedan; count 2, that on 18 September 2001, he wilfully set fire to that motor vehicle; or, in the alternative, count 3, that he wilfully damaged it; count 4, that between 20 and 25 September 2001, he attempted to set fire to the same motor vehicle; and count 5, that on 5 October 2001, he set fire to another motor vehicle, which was a black Ford utility belonging to Mrs King's ex-husband Thomas King. Each of the offences was alleged to have been committed in Toowoomba, where Mrs King was living at the time.

[2] The jury found the appellant guilty of count 1 (stalking) with the aggravating circumstance of using violence against her car, and also of the alternative count 3 (damaging a motor vehicle); but not guilty of the arson counts 2, 4 and 5. He was convicted and sentenced to imprisonment for 18 months, against which he now seeks leave to appeal. The appeal against conviction is based principally on two grounds, the first being that, having found verdicts of not guilty on each of the counts of arson charged in counts 2, 4 and 5, the jury could not, consistently with the way they were directed by the trial judge, have found the appellant guilty of count 1 with the circumstance of aggravation there alleged. The second is that, having regard to the Crown evidence at trial, the jury could not or ought not to have been satisfied beyond reasonable doubt of the circumstance of aggravation alleged in count 1 of using violence against the complainant Leanne King's motor car. Bereft of that circumstance, it was submitted the appellant's conduct failed to attain the level of stalking; or, at the very least, it did not justify a sentence of imprisonment either at all or of the severity of that imposed.

[3] The points at issue become a little clearer in the light of the narrative, such as it was, unfolded by the evidence at the trial, at which both the complainant and the appellant gave evidence. The relevant events span a period beginning in mid-April 2001 and ending in mid-October of that year. At the beginning of that period, Mrs King, who was separated and divorced from her husband Thomas King, was living with her two daughters aged 14 and 11 at an address at Peake Street in Toowoomba. Her brother introduced her to the appellant, who claimed to have had a lengthy association with the film-making industry. The appellant was, he said, preparing to make a film and needed to employ a personal assistant. After the first meeting on 12 April 2001, the two of them became romantically and sexually involved. The appellant himself, a man of some 47 years of age who was living at Warwick, was separated or divorced from his former wife, with whom he was in dispute in the Family Court over custody of or access to their daughter.

[4] The relationship between the complainant and appellant flourished for some weeks and then ceased. It revived briefly in about June 2001, but finally came to an end in the first few days of July of that year. It is from then that count 1, the complaint of stalking, takes its commencement. The Crown gave written particulars of the conduct complained of. It incorporated some 13 items ranging from sending Mrs King flowers with enclosed cards in July; leaving, or causing to be left, a Pokemon doll at the front door of her residence late at night; forwarding letters and cards to her; sending her a letter with enclosure in mid-August aggressively demanding to be told her examination results, together with another letter in late August, complaining that she had dumped him using the telephone rather than face to face; sending a text message to her ex-husband Tom King saying that a video

showing her in the nude would be placed on the internet by 7.30 that night; leaving a message to similar effect on the complainant's mother's answering machine; sending correspondence signed "Julie" to a Mrs Danelle Lambie in early September suggesting that her now deceased son had contracted AIDS from Julie, with a similar letter to the complainant herself on 10 September. The significance of these two communications is that, before his death in a motor accident, Mrs Lambie's son Todd had been the complainant's boyfriend, and there was therefore a prospect that the complainant too had become infected with the disease from him. Three further particulars incorporated the allegations of arson or attempted arson contained in counts 2, 4 and 5. The final particular comprised a text message to Tom King purporting to be from a viewer who claimed to have seen the complainant on the internet, and wished to "make a booking". It was suggested that this was referable to the nude photograph or video image of the complainant which the appellant had threatened to display on that medium.

[5] The incident that specially angered the appellant at about this time and aroused his hostility against the complainant arose out of an invitation from him to her to join him for lunch on her birthday, which was at the end of August. She said she was working and unable to attend on that date, but would get in touch with him to fix a later occasion. The letter he wrote and posted at the end of August was the one in which he announced that he was "really pissed off" with her for dumping him over the phone instead of face to face. It was written in aggressive terms because, as he explained at the trial he said she had charged him with being too mild. The letter fixed the lunch for Thursday 6.9.01 at 12 noon in Banjo's Restaurant in Toowoomba, and ended "Be there!". When he turned up at the restaurant at the appointed time, he discovered before going in that the complainant was accompanied by Tom King and a friend of his identified only as "Biscuit". According to the appellant's account the restaurant receptionist described them to him on the telephone as "two thugs". He thought he was being "set up" and drove off without entering the restaurant or making his presence known. The messages to Tom King and her mother threatening to screen the nude photograph on the internet appeared on the night of that day 6 September. The "Julia" letters were sent over the ensuing few days, and the car burnings followed on 18 and 24 September and the night of 4/5 October.

[6] It was no part of the prosecution case that the appellant had himself actually carried out each of the acts particularised, but rather that he had procured someone else to do or arrange for them to be done on his behalf. That other person was Lesley Banks. She was a 58 year old single mother who lived with her teenage daughter on a farming property some distance from Allora which she owned. Before becoming acquainted with the complainant, the appellant had met Mrs Banks through a local church congregation to which they both belonged and in which he played a part of some prominence as a part-time preacher or leader at various times. She was in financial difficulties with the farm and consulted the appellant about its problems. He claimed to have some acquaintance with sources of finance and he also helped her by paying some of her debts. On one occasion she had, she said, provided him with sexual relief in the form of masturbation (which at the trial he denied) in the course of giving him a massage. According to her account, he prevailed on her to allow him to take a pornographic photograph of her, which he later threatened to publish. He denied having taken any such photograph and nothing of that kind was ever found by the police.

[7] There was no dispute that Mrs Banks was the writer of the “Julia” letters sent to Mrs Lambie and to the complainant in September 2001. She said she had written them at the appellant’s behest, which again he denied. She admitted to having been the organiser of the burning or attempted arson of the complainant’s Commodore vehicle and her ex-husband’s utility. Mrs Banks said she had arranged for those acts to be carried out on the instructions of the appellant. For that purpose she employed Michael Hoskin. He was a 48 year old man, who owed her a favour arising from her permitting Hoskin, his wife and children to occupy a cabin on her property in which to live. She also promised him money which he was desperately in need of. Hoskin in turn engaged a 16 year old youth named Kelly Pearce on a promise of payment to assist him in setting fire to the Kings’ vehicles. When the police began to investigate Hoskin and his connexion with the burning of the vehicles, Hoskin decided that it was wise to make a clean breast of it and he confessed to the police. All three of them, Banks, Hoskin and Pearce, were charged and pleaded guilty to the offences, the former receiving prison sentences. Mrs Banks also signed a form in which she promised to co-operate with State law enforcement agencies in relation to the offences and to give truthful evidence when required. Like the other two, she was, at the very least, in law an accomplice, and they were each cross-examined to some effect at the trial about their parts in these events.

[8] Judging from the printed record on appeal of the evidence at trial, Hoskin and Pearce emerged reasonably well from the cross-examination, and there is some basis for thinking that the jury accepted their evidence. They, however, were told nothing about the appellant’s identity and the prosecution was compelled to rely on Mrs Banks to establish the appellant's part in these events, which he emphatically denied, in order to prove his responsibility for the offences charged against him. Mrs Banks did not stand up to cross-examination at all well. She said that at the time she had been under heavy stress and taking medication. Her evidence suffered from numerous inconsistencies and discrepancies, which Mr Griffin SC amply exploited both at the trial and in his submissions before us on appeal. Nevertheless, it would, I consider, have been open to the jury to accept her evidence of the appellant's involvement especially where it was confirmed by testimony of other persons or evidence tending to support or confirm parts of her account. Mr Martin, who appeared for the Crown on appeal, took us to the detail of these matters to some of which I will now refer.

[9] The overwhelming circumstance in favour of the Crown’s hypothesis of the appellant’s involvement in Mrs Bank’s actions was the complete absence of any reason why she would otherwise have participated in a campaign against Mrs King. The two women did not know each other at all, had never spoken, and had never met. Mrs King lived in Toowoomba and Mrs Banks at or near Allora, some 70 kms distant. Mrs Banks had no reason to harbour any animosity against the complainant. In contrast, on the evidence, the appellant at any rate from 6 September 2001, had a motive for harming her.

[10] It is true that it remains a mystery why Mrs Banks was prepared to risk involving herself in serious crimes on his behalf; but the jury may well have formed the view that he was a persuasive individual who succeeded in manipulating her to his ends. He had acquired a degree of influence over her by managing her financial affairs to the extent of paying some of her debts: a sum of $800 was mentioned at one point in the evidence. His own testimony may not have impressed the jury. It was admitted that, on one occasion he represented himself to have been in Canada,

when he was in fact in Warwick; and that he was not in Sydney as he had claimed on another occasion but at home, when one of the car burnings took place. His credit was impugned in cross-examination by reference to his previous criminal record, which included a conviction in New South Wales for obtaining credit by deception, and more recently in Queensland for making a false complaint to police that his daughter had been abducted, when she in fact was in his custody at the time of the complaint.

[11] Apart from the inherent improbability that Mrs Banks had, without prompting from him, resolved of her own accord to target Mrs King for no reason at all, there was a series of minor items of evidence tending to support her evidence that the appellant was the moving force in the offences alleged.

[12] According to Mrs Banks, she learned of Mrs King from the appellant, who told her of the termination of his relationship with her and of his wish to restore it. Some independent confirmation of his responsibility or authorship of the Julia letters can be found in the "pretext" telephone call between the appellant and the complainant, which was recorded on 22 September. In it he denied having sent the letter to Danielle Lambie, but he appeared to know it referred to some infection calling for a blood test. In any event it is difficult to see how Mrs Banks, as the writer of the letters, could have become familiar with Todd Lambie's former intimacy with the complainant except by the appellant's having passed this information on to her.

[13] Then there was the evidence of Mr Scott Erickson. He was the principal of a company Yamate Pty Ltd carrying on the business of a private investigator in Toowoomba. On 1 August, a woman calling herself Lesley Banks telephoned from Warwick to engage his services to find out the address of someone named Leanne King and her children, whom she also named. The complainant had by then moved from her Peake Street address in order to escape the appellant's attentions and he was trying to locate her. Mrs Banks gave a description of the complainant's Commodore and said that Leanne King was psychotic and abusive to her children, whom Mrs Banks wished to protect. Erickson quoted a service fee of $330, and $55 per hour thereafter. In fact, the Yamate bank statement shows that a sum of $110 was credited on 1 August and another similar sum on 3 August. Their source was traced to the appellant, which supports the hypothesis that it was he who was seeking out the complainant. There were some subsequent inquiries from Mrs Banks ending on 15 August about the progress of the investigation, but in the absence of payment in full of the service fee, it was not carried to a conclusion. Much later Erickson met the appellant together with a Mrs Koka when he came to see him about investigating the subject criminal charges in September 2002.

[14] Then there was the involvement of Hoskin in the matter of the key to Mrs King's car. Like Mrs Banks, Hoskin did not know Mrs King and could not have recognised her. Mrs Banks received from the appellant some information about her daily movements and the registration number of her vehicle. Mrs Banks gave Hoskin a manila envelope which contained a pair of gloves and a key said to fit Mrs King's Commodore. There was some evidence that it had previously been tried and it fitted the vehicle. They followed her car to the parking area of the shopping centre at Clifton Gardens which she frequented, where they identified the vehicle registration number on a car parked there. On access being gained to it by means of the key, it was found to be fitted with a locking device rendering it

immobile, and the plan to steal it had to be abandoned. On the way home, the expedition stopped at a BP service station, where Mrs Banks made a call to the appellant to report what had happened. The telephone records of the appellant's telephone showed the receipt of a call from that location at about the time in question. Hoskins had evidently broken into the wrong car, which was not the one belonging to Mrs King, and Mrs Banks reported this back to him. It was said to be hardly likely that Mrs Banks would have provided Hoskin with a key which she knew would not fit Mrs King's car and which she said she obtained from the appellant; but the force of Mr Martin's submission on this point is somewhat blunted by the fact that, for this particular make and model of the vehicle, it was apparently not difficult to find keys that would open it.

[15] Finally, there was the telephone call made by Hoskin to the appellant's number in September after the burning of vehicles had taken place. By this time he was becoming desperate for the payment from Mrs Banks, who told him that she had not yet received it from the unnamed person who had engaged her to carry out the arson. Hoskin eventually prevailed on her to provide not only the name but the telephone number of the appellant, the latter of which he recorded in his diary. He called that number and asked to speak to Peter Nesbitt. The person who answered said it was Nesbitt who was speaking. Hoskin said he was the fellow who "had done the jobs he wanted done" and he wanted the money. According to him, the speaker at the other end said "Well, the money's at the house", to which Hoskin replied "well, it's not there". Hoskin was very angry and he terminated the call when asked who he was. The appellant admitted receiving some such call, but claimed he had simply said that he did not know what the caller was talking about. Mr Martin submitted that the jury were entitled to accept Hoskin's version, which involved an implied admission on the appellant's part that money was due from him to someone for "jobs" done on his behalf. It was certainly not much, but it may have amounted to some slight support for Mrs Banks' evidence against the appellant.

[16] This "trail of breadcrumbs", as Mr Martin described it, may have helped to persuade the jury that, despite the evident shortcomings in the testimony of Mrs Banks, she was telling the truth when she said it was the appellant who had procured her intervention to carry out some of the acts directed at Mrs King that were charged against him. There was some further evidence in the form of records of telephone calls, which supported Mrs Banks in her claim that she and the appellant were in frequent touch with each other at critical times. The real question, however, is why the jury accepted her evidence that he had assisted, counselled or procured her to carry out some of the acts particularised by the Crown, but not those involving the burning of the Kings' vehicles. The answer suggested by Mr Martin was that, although they were satisfied that the appellant had arranged for some damage to be done to Mrs King's vehicle, they were not prepared to accept beyond reasonable doubt the evidence of Mrs Banks to the effect that he had in fact counselled or procured her to arrange for the burning of the vehicles.

[17] The hypothesis that the jury approached the matter in this way derives some force from the evidence given by Hoskin. He said that, from the time when Mrs Banks first approached him, the proposal always was that Mrs King's vehicle was to be "totally annihilated". Something akin to burning or complete destruction was, on Hoskin's account, always in contemplation and was not simply a later development of the plan. The evidence of Mrs Banks, on the other hand, was that when the appellant approached her his initial instructions were that Mrs King's car

should simply be taken into the bush and have its wheels removed. The appellant's plan was that, without her car, Mrs King would be rendered immobile and being unable to take her children to school, she would be forced to turn to the appellant for assistance, thus enabling him to restore the relationship between them.

[18] If the jury were impressed by what Hoskin said, but not nearly so much with the quality of the evidence given by Mrs Banks, the hypothesis advanced by Mr Martin is by no means implausible. It does not explain why the conspirators went on to destroy Mr King's utility; but again the jury might not have been fully persuaded by Mrs Banks' evidence about the instructions she received from the appellant in that respect. This leads on to Mr Griffin's first ground of appeal, which is that the jury failed to follow the directions of the learned judge concerning the appellant's criminal responsibility for the circumstance of aggravation averred in count 1 of the charge of stalking against the appellant; and that they could not properly have returned a verdict of guilty on count 3 if they had followed the judge's directions on that issue. There was, it was submitted, an element of inconsistency in their verdict of guilty on that alternative count charging wilful damage to Mrs King's car, and their verdicts of not guilty on counts 2 and 4 charging arson arising from the same damage.

[19] I was initially impressed with Mr Griffin's submission on this point. If the jury acquitted the appellant of the charges of arson or attempted arson by burning in counts 2 and 4, it is not immediately apparent how they could have arrived at a verdict of guilty on the alternative count 3 of wilful damage to the same vehicle on the same occasion, especially when the damage consisted of burning it. But this is to overlook the elements of the charge that had to be proved by the prosecution. They were not merely that the vehicle had been damaged by being burnt, but, more generally, that the appellant was criminally responsible for that result. Because it was not being alleged that the appellant had by his own act brought about that result, it was only by the operation of s 7(1) of the Code that criminal responsibility for it could be sheeted home to him. The provisions of s 8 of the Code were not relied on at the trial. Section 7 (as it originally was) of the Code abolished the common law distinctions between principals in various degrees and attached criminal responsibility to each of the persons described in what are now the four paragraphs of s 7(1) of the Code for having "taken part" in committing the offence, which that sub-section "deems" them to have committed. Some reliance was placed by the Crown at trial on s 7(1)(b) in the case against the appellant as having done acts for the purpose of enabling Mrs Banks to commit the offence; but the prosecution against him was based essentially on s 7(1)(d) as a person "who counsels or procures any other person to commit the offence". Giving the word "offence" in this provision the compound meaning attributed to it in *R v Barlow* (1997) 188 CLR 1, 9-10, has the effect that what the Crown had to establish here was not one element but at least two, which were that the vehicle was damaged by being burnt, and that the appellant was the person who counselled or procured it to be done.

[20] For the second of these two elements to be established, it was incumbent on the prosecution to prove that "the counsellor or procurer knew that what he counselled or procured was an offence": *West v Perrier*, *ex p Perrier* [1962] QWN 5, at p 11, in the sense that he knew of the act that was to be done: see *R v Jervis* [1993] 1 Qd R 643, 648. It was at this point that, as it turned out, the case against the appellant faltered. Unless the jury were prepared to accept the evidence of Mrs Banks about

the appellant's instructions to burn Mrs King's vehicle, they were left only with her evidence against him that all that he had counselled or sought to procure was taking her car into the bush and disabling it by removing the wheels. Dismantling or dislocating machinery has been held to constitute a form of damage: see the decisions cited in *R v Zischke* [1983] 1 Qd R 240, 245, and it was therefore possible for the jury to find that the appellant had counselled or procured Mrs Banks to cause wilful damage of that kind to Mrs King's vehicle by treating it in the manner in which he told her to do.

[21] His Honour directed the jury on this aspect of the case by telling them:

> "Well now, counts 2 and 3 you'll see are in the alternative and perhaps I can digress to explain that. You will remember that the evidence of Banks was that the original arrangement was that the accused really arranged with her to get somebody to take the car up in the bush and take the wheels off and disable it in some way. Well, ladies and gentlemen, that could amount, if that occurred, to wilfully and unlawfully damaging the motor vehicle …".

And, again, a little later:

> "You need to ask yourselves was he involved relevantly, which I'll come to in a moment in the arson, because that was what happened to the vehicle, it was burnt to some extent; or was he only involved as [*sic* in?] a plan to disable it, which would be wilful damage. So that's why these two things are in the alternative. You couldn't convict of both …".

[22] It should, of course, be emphasised that what actually happened was that the car was not only damaged but burnt, which on this footing was not something that the appellant was proved to have counselled or procured; but by their verdict of guilty on count 3 the jury must have found that the appellant had counselled Mrs Banks at the very least to damage the vehicle by dismantling the wheels as he suggested. Dismantling it is a form of "damage" to property within s 469 of the Code, even if it is a lesser form of damage than arson under s 469. Both are forms of Injuries to Property under Division 2, of Part VI of the Code concerning Offences relating to Property. It was therefore open to the jury, having acquitted the appellant of counts 2 and 4, to find him guilty of the lesser form of damage that he counselled Mrs Banks to do to Mrs King's car. In this respect the case is broadly comparable to those under s 7 in which an accused who is charged under s 7(1) with having assisted a murder may nevertheless be found guilty of the lesser offence of manslaughter, as was recognised in *R v Barlow* and *R v Jervis*.

[23] This leaves for consideration Mr Griffin's remaining submission that it was not competent to the jury to find the aggravating circumstance averred in the stalking count 1 of having used violence against the property of Mrs King. However, the offence of wilful damage of which the appellant was convicted on count 3 is a form of offence against property, and it was the object of the appellant that the vehicle should be taken away, its wheels removed, and that it be abandoned in the bush. This at least he counselled or procured Mrs Banks to do, and it can fairly be described as a use of violence against the property of Mrs King. As to the complaint that the jury, in considering the circumstance of aggravation in count 1, failed to follow his Honour's direction confining it to the counts of arson in the indictment, I have reached the conclusion that, read as a whole, the directions did not have that

effect. It was open to the jury to find that wilful damage to Mrs King's motor vehicle in count 3 satisfied that requirement, and indeed the form of count 1 specifically catered for the possibility that the jury might find that some lesser form of damage than arson had taken place.

[24] The result in my opinion, is that the appeal against conviction must fail. On the matter of sentence, I have formed the clear opinion that the sentence should not be disturbed. Given the conviction on count 3 and on the aggravating circumstance in count 1, the sentence of imprisonment for 18 months was, in the whole context of the appellant's conduct, not only justified but well merited. Not only did he set out to harass Mrs King, but he unnecessarily and needlessly involved other individuals in his campaign against her, with the evident purpose of concealing his own part in it. In the course of doing so, he affected their and their families' lives and peace of mind. In this, I am referring not only to Mrs Banks, Hoskin and Pearce, on whose weaknesses he preyed, but also to Mrs Lambie to whom he arranged for the poison pen letter to be sent injurious to the memory of her late son. The appellant's conduct on this occasion is consistent with some of the convictions referred to in his previous record and with his obvious predilection for manipulating others to achieve his own malicious purposes.

[25] I would therefore dismiss the application for leave to appeal against sentence, as well as the appeal against conviction.

[26] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA, and there is nothing I wish to add thereto. I agree with those reasons and with the orders proposed.

[27] **HOLMES J:** I agree with the reasons of McPherson JA and with the orders he proposes.