SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sparks* [2004] QCA 454
PARTIES:	**R** v **SPARKS, Diane Faye** (appellant/applicant)
FILE NO/S:	CA No 157 of 2004 CA No 243 of 2004 DC No 396 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	26 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2004
JUDGES:	Davies and McPherson JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence allowed** **3. Appeal against sentence allowed only to the extent of adding a declaration that a period of 73 days from 4 May 2004 to 15 July 2004 be imprisonment already served under the sentence**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - IMPROPER ADMISSION OR REJECTION OF EVIDENCE - GENERAL PRINCIPLES - where the appellant was convicted of arson and fraud - where the appellant counselled and procured another to set fire to a residence in order to claim insurance - where the appellant submitted that evidence of conversations between herself and others in which she made references to starting fires were inadmissible and prejudicial - whether the learned trial judge erred in allowing the evidence to be admitted at trial 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 the appellant submitted that the directions given by the learned trial judge with respect to the evidence of conversations by the appellant about starting fires invited the jury to consider the evidence as showing that the appellant had a propensity to burn houses - whether the learned trial judge erred in directing the jury on this evidence

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where the appellant was sentenced to four years imprisonment for the offences of arson and fraud - where the appellant submitted that there was a lack of parity between the sentences imposed upon her and her accomplice - whether the sentence imposed is manifestly excessive in all the circumstances

Pfennig v The Queen (1995) 182 CLR 461, cited
R v O'Keefe [2000] 1 QdR 564, cited
TKWJ v The Queen (2002) 212 CLR 124, cited

COUNSEL: G P Long for appellant/applicant
R G Martin for respondent

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

[1] **DAVIES JA:** After a trial in the District Court the appellant was convicted on 4 May 2004 of two offences, arson and fraud. She was sentenced on 15 July to four years imprisonment for the arson offence and two years imprisonment in respect of the fraud offence, those sentences to be served concurrently. She appeals against those convictions and seeks leave to appeal against the effective sentence of four years imprisonment.

1. The conviction appeal

[2] The case against the appellant, which the jury found proved, was that she had counselled or procured M to set fire, on 27 October 2001, to the residence in which they were then living as tenants so that each of them could claim insurance in respect of their respective contents destroyed or damaged in the fire. M pleaded guilty to the offences of arson and attempted fraud arising out of the fire which he admitted lighting and he was the principal witness against the appellant in her trial.

[3] The appellant's appeal against her conviction was originally only on the ground that it was unsafe and unsatisfactory and contrary to law. We were informed in advance that that ground would not be pursued and it was not. However at the hearing of this appeal leave was granted to add and argue the following ground of appeal:

"That a miscarriage of justice occurred because:

> (a) evidence was admitted at the trial which was irrelevant and/or inadmissible and prejudicial to the Appellant because of its capacity to disparage the Appellant and/or to establish her propensity to burn houses; and
> (b) the directions of the trial judge in respect of an aspect of this evidence effectively and wrongly, invited the jury to reason and use this evidence as indicating a propensity in the Appellant to commit the offence of arson."

[4] Quite apart from the evidence to which these grounds relate, the case against the appellant was a strong one notwithstanding that the principal witness against her, M, was an accomplice and that there were a number of discrepancies in his account of what occurred. Supporting his evidence was other evidence to the following effect: that shortly before the fire the appellant had substantially increased her contents insurance in circumstances in which she had moved from a larger house to a smaller one; that she had stored some of her furniture and personal goods in other locations and that, shortly before the fire, she had removed some personal property to the Gold Coast; that she had been asked by her landlady Mrs Hughes, a few days before the fire, to leave the premises; that, shortly before the fire, she had exchanged the SIM card on her mobile phone with that on M's phone and that there was a telephone record of a phone call from M to her shortly after the fire; and that she had caused M to write a letter to police denying that he was involved in setting the fire.

[5] The evidence the subject of the grounds of appeal involved two events, the first a few weeks before the fire, the second about three or four weeks after the fire. Evidence about the first of these events was given by Terry Jones and his daughter Samantha Jones. Terry Jones and the appellant were, for an apparently short time, in a relationship. After it ceased Mr Jones permitted the appellant to live in a house which he owned at 57 Bertha Street, Goodna. Whilst she was living there the appellant had an argument with Samantha which descended into physical contact and resulted in Samantha being charged and convicted of assault. Shortly after that Mr Jones asked the appellant to leave the premises.

[6] When asked to leave by Mr Jones the appellant, he said, did not take it very well. When she left, he said she took some of his property as well as hers. The place was left in a mess. Holes had been kicked in the walls, carpet ripped up and, on an inside wall of a shed on the premises had been spray painted the words "burn motherfucker burn". The driveway was full of rubbish and there was a tin with petrol in it next to the rubbish.

[7] On several occasions after this, when Samantha saw the appellant at the local shopping centre, the appellant told her that she was going to burn Samantha's house down and that her father would not have to worry about anything any more because the appellant was going to burn his house down and he would then have nothing to worry about.

[8] The appellant moved into the subject house at Braeside Road, Bundamba on 6 October 2001. The fire occurred on 27 October. After she and M had moved in, according to M, she suggested to him that they do "an insurance job" on the house by which he understood her to mean doing something which would enable each of them to make false claims on their respective insurance contracts. According to him

she first suggested getting the house broken into but decided not to go on with that because of the alarm system in the house.

[9] The appellant then suggested that they burn it down to which he agreed after the appellant promised him a car and $10,000. She also suggested that he obtain insurance cover for his property with Suncorp which he did. They also agreed that the burning down would be done by soaking the stumps of the house in kerosene. They decided they would do it on Christmas Eve when the house would be lit with many Christmas lights. However the appellant "had a fight" with the owner of the house and was asked to leave. They then accelerated the plan to the date on which it occurred. It was eventually lit with a two litre bottle filled with petrol, lit with a lighter and thrown in. Both the appellant and M later claimed on their respective insurance policies and the appellant recovered on hers.

[10] The other evidence the subject of the grounds of appeal occurred, as I have already mentioned, three or four weeks after the fire. At the time of the fire the appellant had a substantial quantity of furniture and other goods stored at another house owned by the Hughes'. On a number of occasions prior to the fire Mrs Hughes had asked the appellant if she would remove this furniture. No rent was being paid for its storage. However when, after the fire, the appellant's son came to collect the furniture Mrs Hughes was reluctant to let him take it from the house, then occupied by her son, in the absence of her son who, she said, would be able to identify what was property belonging to the appellant or her son and what belonged to him. She explained this to the appellant's son.

[11] However shortly afterwards the appellant arrived and told Mrs Hughes that she was going to break into the house to take the furniture out. An argument ensued in which, according to Mrs Hughes, the appellant started screaming and yelling at her. It apparently ended with the appellant saying "I'd be very careful if I was you, because, I know how to - how to start an electrical fire". The appellant then laughed in a way which, according to Mrs Hughes, sent chills up her spine. Mr Hughes generally supported his wife's evidence.

[12] The admission of the evidence the subject of the grounds of appeal was not objected to at the trial. For the first time before this Court it was submitted that this evidence could only be relevant to establishing merely that the appellant was a person who had a propensity to burn houses and that therefore it was not admissible. Reliance was placed on *Pfennig v The Queen*.[1] It was submitted also that the learned trial judge's directions invited the jury to consider this evidence in that way. In order to determine those questions it is convenient to start by reference to what the learned trial judge told the jury about these events.

[13] Her Honour directed the jury in the following way:

> "Now, those threats, particularly the one before the fire, can be used by you in this way. The Crown says that it shows - particularly the one to Jones - that burning property was something that she had in her mind so it wasn't something that's completely foreign to her so it makes it more likely that she might have suggested to [M] that he could burn the house down so that she could make the claim on the insurance. You shouldn't use it, for example, to say well, she's

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1 (1995) 182 CLR 461. See also *R v O'Keefe* [2000] 1 QdR 564 at [27].

> threatened to do that before, she's obviously got a big thing about fires and she's likely to have done it or got involved with it at this house because she's the sort of person who might be a fire bug. You can't use it that way because firstly there's no suggestion that she is a fire bug, no suggestion that she's actually lit a fire before and no suggestion that she lit this fire. And it would be wrong to use the evidence in that way in any case because we're not - we don't want you to make assumptions based on assumptions about her character that you don't really know. The point is really just that if she was saying that to Samantha Jones, it may have been something that was in her mind and therefore something that she might have suggested to [M].
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> The other thing, of course, is that you remember that these were made to two people who were hostile to Mrs Sparks and, in particular, in relation to Mrs Hughes, it was in the course of what Mrs Hughes described as a screaming match. So whether that was actually meant or not is not particularly relevant to this case. Whether it was a serious threat isn't relevant to this case. It's really just the Crown says to show that lighting fires was something that she had in her mind. If you accept that she said it at all, of course, you remember that her evidence - or the suggestion was that she didn't say that and you wouldn't accept the evidence of Jones or Hughes that she said it at all."

Her Honour went on to tell the jury that they should ignore the evidence of the graffiti on the shed as there was no satisfactory evidence that it was the appellant who had written those words.

[14] It is plain from the above directions that her Honour was telling the jury that the evidence was relevant as making it more likely that she had in mind setting fire to the Hughes' house on 27 October 2001. However in this Court Mr Martin, for the respondent, put the relevance of this evidence somewhat differently. He pointed rather to what may be said to be a striking similarity between the circumstances in which threats were made to Samantha Jones and to the Hughes', on the one hand and, on the other, the circumstances in which the fire came to be lit. On each of those occasions, it was submitted, the appellant had had a falling out with her landlord, had been told to leave the premises, or rather, on the last occasion to remove her furniture from the premises and had, in response, either threatened to burn the other person's house down or had in fact done so. However the analogy between the two occasions when threats were made and the occasion of lighting the fire is less complete than the respondent's submission would imply because the main motivation of the appellant for encouraging M to light the fire appears, on M's evidence, to have been to claim on insurance. It is true that the timing of the fire was accelerated once the appellant had been told to vacate but that does not, in my opinion, support as the only reasonable or even more reasonable inference that she caused the fire to be lit in response to the demand to vacate.

[15] Mr Long for the appellant submitted that the evidence the subject of the appeal could be relevant only as showing that the appellant was a person likely, from her conduct of character, to have committed the offence. He submitted that the evidence was disputed and that it was highly prejudicial. And he submitted that the learned trial judge had effectively invited the jury to do what she had warned them against doing, that is, to infer from the appellant's previous, and to a lesser extent

subsequent conduct that she was the kind of person who would cause the subject fire.

[16] However the effect of this evidence and her Honour's direction as to the use which could be made of it was much more than that, because the appellant had previously threatened to burn a house down, she was more likely to on this occasion. The previous threat was, it seems, only a few weeks before the fire and was made in circumstances in which, it seems, the only conduct provoking it was Mr Jones' termination of the appellant's tenancy. And it was made on a number of occasions to Samantha Jones when she met the appellant at the local shopping centre. This alone indicated a very unusual state of mind of the appellant only shortly before the fire.

[17] To have then delivered a warning to a different person, in respect of that person's house, about her capacity to start an electrical fire, which the appellant did only five or six weeks after making the threat about Mr Jones' house indicated, as her Honour explained a similar state of mind; that the appellant had in contemplation, on each occasion, the burning down of a house as a solution to a problem confronting her. There was, in my opinion, no reasonable view of the evidence of what the appellant said to Samantha taken with the evidence of what she said to Mr and Mrs Hughes than that it supported the evidence of M that the appellant proposed to him the burning down of the subject house.[2]

[18] For that reason the evidence was, in my opinion, admissible and the directions on it were adequate. The grounds of appeal must therefore fail and consequently the appeal against conviction must be dismissed.

2. The sentence application

[19] The appellant was 41 years of age at the time of these offences. She was 44 by the time she was sentenced. By contrast, M was 18 at the time of these offences. I mention this at the outset because the appellant's main complaint here is a lack of parity between the sentence imposed on her and that imposed on M.

[20] At the same time as M pleaded guilty to the offences of arson and attempted fraud arising out of this fire and his attempted insurance claim, he also pleaded guilty to 17 charges of entering premises and committing indictable offences and stealing committed between 15 July 2001 and 16 January 2002. M was sentenced to four years imprisonment in respect of the arson and two years imprisonment in respect of the attempted fraud, the same sentences as those imposed on the appellant. He was then sentenced to concurrent terms of two and a half years and two years in respect of the other offences to which he pleaded guilty.

[21] However, as already mentioned, he co-operated with police and gave evidence against the appellant. For that his sentences were suspended after eight months. It was indicated by the learned sentencing judge that, but for that, his sentence would have been suspended after 18 months.

[22] What were said to give rise to a justifiable sense of grievance in the appellant were the facts that, for those additional offences M was not sentenced to any additional term of imprisonment and that, in respect of the offence of arson, it was he, not the

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2 *Pfennig* at 481 - 482.

appellant, who had lit the fire. And it was said that he had a similar motive for lighting the fire namely his claim against his own insurer.

[23] Of major importance, however, was that the appellant was the mastermind in this venture. It was she who proposed it and, in order to persuade M to participate in it, she offered him a Commodore car and an additional sum of $10,000 though these were never paid. To this may be added the substantial discrepancy in their ages.

[24] In those circumstances I do not think that the appellant had any justifiable sense of grievance in respect of the sentence imposed on M. On the contrary it seems to me that the overall difference in the sentences imposed on each adequately reflects the different degrees of criminality between them as well as M's co-operation in pleading guilty and in giving evidence against the appellant. Subject to one minor matter, therefore, I would dismiss this application. I would only add that the sentence otherwise appears to me to be within the permissible range.

[25] The appellant had been on remand for these offences and for no others for a period of 73 days from 4 May 2004 to 15 July 2004. In those circumstances that period should have been taken as imprisonment already served under the sentence. I would therefore allow the application only to the extent of adding a declaration that a period of 73 days from 4 May 2004 to 15 July 2004 be imprisonment already served under the sentence.

Orders

1. Dismiss the appeal against conviction.
2. Allow the application for leave to appeal against sentence and the appeal against sentence only to the extent of adding a declaration that a period of 73 days from 4 May 2004 to 15 July 2004 be imprisonment already served under the sentence.

[26] **McPHERSON JA:** I have read the reasons of Davies JA for dismissing the appeal against conviction. I agree with what his Honour has said in those reasons. I also agree that the sentencing order should be varied in the particular respect that he proposes.

[27] **FRYBERG J**: The sole ground of appeal in this case has been set out by Davies JA. It has two limbs. The first relates to inadmissible evidence; the second to the directions of the trial judge.

[28] Counsel for the appellant summarised the alleged inadmissible evidence in these terms:

> "(a) R.133, I.40 – R.134, I.30, in the evidence of Samantha Jones to the effect that, after vacating her father's residence, the occupants (who had included the Appellant) had:
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> (i) left the premise in a damaged condition;
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> (ii) left a pile of rubbish in the driveway, with a petrol tin near it; and
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> (iii) left the following graffiti on the shed: 'Burn mother fucker burn';
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> and also to the effect that after vacating those premises, the Appellant had:
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> (iv) made a number of threats to her that she would burn down her father's house;

(b) at R.177-9 in the evidence of Terry Jones, who described having had a relationship with the Appellant and then allowing her to live at his house until there was a falling out which centred on a disagreement between the Appellant and his daughter, Samantha (which resulted in Samantha Jones being convicted of assaulting the Appellant: R.136, ll.25-35 and R.139, l.40 – R.140, l.20), at which time she was asked to vacate the premises. He also gave evidence to the effect that:

(i) the Appellant had misappropriated a boat in which he had an interest; and

(ii) after the Appellant had vacated his premises, the words 'burn mother fucker burn' were found spray painted on his shed;

(c) at R.93, ll.20-40 in the evidence of Mrs Hughes, who was the landlord of the premises which were the subject of the arson charge and who gave evidence that in the context of a conversation with the Appellant, (had after the fire at the subject premises and in respect of the Appellant's desire to remove furniture which had been left in the house occupied by Mrs Hughes' son and which adjoined her own residence and which property had been left there at about the time the Appellant left Mr Jones' residence and in the context of Mrs Hughes' reluctance to allow the Appellant and her associates to go into the house in the absence of her son to remove that furniture), to the effect that the Appellant yelled and screamed and threatened her and threaten to burn down her family home, specifically in terms: 'I'd be very careful if I was you, because, I know how to – how to start an electrical fire', at which point she laughed."

[29] For the reasons given by Davies JA I am satisfied that the evidence described in paras (a) and (b), other than that in para (b)(i), was admissible.

[30] I am unable to see the relevance of the evidence referred to in para (b)(i) and I have considerable doubt about the relevance of that referred to in para (c). However none of that evidence was objected to at the trial and there is no suggestion before us that this was due in any way to inadvertence or incompetence on the part of counsel then appearing for the appellant. It is not the function of this court to scrutinise with the benefit of hindsight every forensic decision made (or not made) at trial. In an adversarial system it is the function of counsel to decide whether to object or not to object to evidence. It is difficult to see how such a decision properly made in the ordinary course of a trial under that system could ever give rise to a miscarriage of justice. The concept of justice inherent in the system requires counsel's decisions to be respected.

[31] However that may be, in the present case the appellant has not discharged the onus which would lie upon her of showing that by the admission of the evidence she was deprived of a significant possibility of acquittal (or, if the expression is preferred, that in the absence of the evidence the jury would have been likely to have entertained a reasonable doubt).[3] The judge did not refer to the misappropriation of a boat in her summing up and (although the record does not contain the prosecutor's address to the jury) there is no suggestion that the Crown placed any particular

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3 *TKWJ v The Queen* (2002) 212 CLR 124, especially at [104].

reliance upon it. Her Honour did refer to the evidence of Mrs Hughes, but by her direction to the jury, confined the use which could be made of it. Unless the direction can be challenged there has been no miscarriage of justice.

[32] For the reasons stated by Davies JA the directions given by the judge did not give rise to a miscarriage of justice. I add that counsel for the appellant sought no redirection from her Honour.[4]

[33] I also agree with what his Honour has said about the sentence and with the orders which he proposes.

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[4] Compare *R v Glattback* [2004] QCA 356.