SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cormack* [2013] QCA 342
PARTIES:	**R** **v** **CORMACK, Scott Bradley** **aka BRACKIN** (appellant)
FILE NO/S:	CA No 184 of 2013 DC No 160 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	15 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2013
JUDGES:	Margaret McMurdo P, Gotterson JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed.** **2. The guilty verdict is set aside.** **3. A verdict of acquittal is entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of arson of a St Vincent de Paul Society store – where the appellant had been working as a volunteer at the store during the day – where the appellant left at approximately 4.30 pm and came back at around 11.00 pm, purportedly to collect some electrical goods he had left at the store – where the appellant called 000 to report a fire in the store – where fire fighters arrived to find the shop engulfed in smoke and the right hand side front door of the store broken – where the appellant identified himself, spoke to police and provided a key to the store – where police seized a metal bar from the appellant's car and the appellant's clothes – where the appellant told police that the metal bar had been used for, *inter alia*, carrying bulk bags used to transport recyclable material including glass – where the appellant's trial counsel did not make admissions under s 644 *Criminal Code* 1899 (Qld) in respect of the continuity of the handling of the metal

bar and the appellant's clothing – where glass fragments with the same refractive index as the broken front door of the store were found on the appellant's metal bar and the appellant's clothing – where no evidence was led as to the incidence of the type of glass used in the front door of the store – where the police did not investigate the appellant's claim to have used the metal bar in handling bulk bags which may have contained broken glass – where nearby CCTV footage showed an unidentified male who was not the appellant in the vicinity of the store about 50 minutes prior to the store's alarm activating – where the appellant contends that the verdict was unsafe and unsatisfactory in that it was not reasonably open on the evidence – whether verdict unreasonable or cannot be supported having regard to the evidence in terms of s 668E(1) *Criminal Code* 1899 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – REVIEW OF EVIDENCE – where a forensic scientist from the Queensland Police Fire and Explosion Unit gave evidence that the fire was the result of human involvement, either accidental or deliberate – where the appellant contends that this raised the issue of the fire being caused unintentionally – where the appellant contends that the trial judge erred in failing to direct the jury as to s 23 *Criminal Code* or at least, when directing the jury as to the elements of arson, in failing to convey that a critical issue was whether the appellant deliberately set fire to the premises – whether trial judge erred

Criminal Code 1899 (Qld), s 23, s 644, s 688E(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, cited
R v Joinbee [2013] QCA 246, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited

COUNSEL: T Ryan for the appellant
G P Cash for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, Scott Cormack, was convicted on 21 June 2013 after a two day trial of the arson of the St Vincent de Paul Society store at Fernvale on 30 December 2010. He appeals against his conviction on three grounds. The first is that the verdict was unsafe and unsatisfactory in that it was not

reasonably open on the evidence. The second is that the trial judge erred in failing to direct the jury as to the excuse of accident under s 23 *Criminal Code* 1899 (Qld) and/or in failing to emphasise to the jury that it was not enough that the appellant caused the fire but that he had done so wilfully.

[2] A further ground of appeal concerning the hearsay evidence of forensic scientist Megan Richards was abandoned when the respondent filed affidavit material annexing pre-trial emails between counsel. Defence counsel indicated she would take no issue over the continuity of the forensic exhibits and agreed that Ms Richards could give evidence about the results of tests conducted by forensic scientist Celeste Huraki, who was unavailable at trial.

[3] A consideration of these grounds of appeal requires this Court to review the evidence at trial.

The evidence at trial

[4] At 11.05.56 pm on 30 December 2010, Ms Lauren Fowler, a communications supervisor for Queensland Fire and Rescue Service, answered a 000 emergency call from a Telstra pay phone. The caller was a man who said that the St Vinnie's store on Main Street, Fernvale was on fire. He also said something about a silver Commodore. She recorded his name as "Scott Asis"[1] but did not know if she had the correct spelling. At the time of the call, fire trucks were already on their way as an automatic alarm at the Fernvale Shopping Centre was activated at 11.04 pm. The recording of the 000 call was unable to be retrieved. In cross-examination, she stated that she believed she had recorded the name and phone number correctly but conceded that she could not rule out error.

[5] Mr Raymond Bruckner, a fire fighter, responded to the alarm and went to the store. A police officer gave him a key to the front door. The right hand side of the door was broken and smoke was coming out. He unlocked and opened the door a little. The building was full of smoke. There were no visible flames. The sprinkler system within the store was activated and had extinguished the fire. Fire fighters put on breathing apparatus, turned off the sprinkler system and broke a front glass window of the store to allow a ventilation fan to extrude smoke. Tendered photographs showed two areas of damaged glass near the front door. The damage to the window near the front door was caused by fire fighters and the damage to the front glass door was present when they arrived.

[6] Police officer Simon Carter was one of the first police officers at the scene, arriving shortly after 11.00 pm. The appellant identified himself as the assistant manager of the store. He said he had been playing poker at nearby premises. He realised he had forgotten to collect a video player and a cooking device from the store. When he returned to collect them, he saw a hole in the glass door and noticed that the store was black. He phoned 000 from a nearby public phone box. Police officer Carter also said the appellant gave his store key to the fire fighters to allow them access. In cross-examination, he conceded the appellant may have said he gave the key to another police officer.

[7] Police officer Thomas Armitt arrived at the scene at 12.30 am. He digitally recorded his conversation with the appellant. The recording was tendered[2] and

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1 T1-15.3.

2 Ex 3.

played to the jury. The appellant said he was a volunteer assistant manager. His manager was Sheryl Sue. Her manager was Sharon and she had "been telling a lot of lies lately".[3] The store had been open for about two and a half weeks and he had been working there for about two weeks. He was working in the store until about 4.30 pm that day. Contrary to store policy, a worker had accepted a large quantity of electrical goods, including a DVD player and two or three hot plates. He decided to make a $5 donation in return for the Blu-ray DVD player which he put in a rack near the counter out the back of the store beside a hot plate which he had also decided to keep. There was $150 in the safe and he explained where the key to the safe would be found.

[8] He explained that, after leaving the store, he went to Laidley with his fiancée, Kristy, to visit his step-brother and then returned to play poker at the Fernvale Hotel. After finishing poker, he went home and then remembered he had left the goods at the store. He was going to a dairy farm in a few days and decided to return and collect them. He had a store key which he had since given to police. When he arrived at the store at about 11.00 pm, the alarm was activated. He saw a hole in the door, smelled smoke, quickly jumped in his car, went to the phone box and rang the fire brigade and police. He had left his mobile phone at home with his fiancée. On two or three occasions, he stood on the broken glass on the footpath as he walked through the water.

[9] Police took possession of a metal bar lying across the back seat of the appellant's car which was parked about 100 metres from the store.[4] The appellant told police that he had recently used the bar to knock tyre rims which had been damaged in potholes back onto vehicles. He had owned it for about four years and also used it to pull chains and to carry bulk bags used to transport recyclable material including glass. Police asked if there would be any minute fragments of glass on the bar. He responded, "There could be from when I was doing loads for trucks"[5] but he denied that the bar could have glass from the store door on it. He denied using the bar to break the glass. He told police that he spent no money at poker as it was "free"[6] and he drank two beers during the evening. He explained that Sharon did not know he had a store key but he had signed for it in the key register after Sheryl told him to have a key cut. The police could confirm this with Sheryl.

[10] In cross-examination, police officer Armitt accepted that CCTV footage taken by a security camera from the newsagency adjoining the store recorded a man, not the appellant, near the store at about 10.10 pm, 50 minutes before the alarm was activated. Police did not attempt to identify this man and the footage was not tendered. No security cameras filmed the front of the store. The police did not undertake an investigation to confirm or disprove the appellant's explanation as to why there may be glass fragments on the metal bar and did not interview Sheryl.

[11] Police officer Cunningham arrived at the scene at about 11.20 pm. He took possession of the appellant's clothing. A sample of glass from the door was taken. In cross-examination, he agreed that he entered the store which was damaged by smoke, fire and water and saw items in the back office-storeroom. He did not recall their nature, but when shown two photographs (ex 7) he agreed there could have

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3 Transcript of ex 3, 2.

4 A photograph of the metal bar was tendered as ex 4.

5 Transcript of ex 3, 17.

6 Above, 18.

been a DVD player in a cardboard box and that there was a portable cook top. He conceded that the position of these items was consistent with the appellant's account to police. While police officer Armitt was speaking with the appellant, police officer Cunningham left to find a bag to hold the appellant's metal bar. He sent the bar for scientific testing. No scientific testing was done to compare the dimensions of the bar with the hole in the glass of the front door. The person depicted in the newsagency CCTV footage earlier that evening was wearing a white shirt whereas the appellant was wearing a black shirt. The CCTV camera did not capture the front of the store but pointed towards Woolworths where there were people working.

[12] Sharon McDonnell, the retail operations supervisor of the Western Diocese of St Vincent de Paul, gave evidence that she supervised this store and 11 other stores. The store relieving manager was Sheryl Sue and there were six or seven volunteers. She and Sheryl each had a key and the third key was kept at the newsagent for emergencies. No-one else was authorised to have a key without recording it in the key register. Two people, whether staff or volunteers, must be present when entering or in a store and after-hours access was not permitted. The organisation did not accept donations of electrical goods for workplace health and safety reasons. The appellant was a volunteer without any position of authority within the business. When she spoke to the appellant at the scene at about 12.45 am he told her that he had come to the store to test a DVD player and wanted to give a $5 donation.

[13] Ms Megan Richards, a forensic scientist with the Queensland Police Service, gave evidence of her experience in glass analysis. She did not examine and had never seen the metal bar, the control samples of glass fragments from the broken door panel or the appellant's t-shirt, denim shorts and fabric belt. Celeste Huraki, another forensic scientist, conducted those examinations. She gave evidence from Ms Huraki's notes and statement. The usual procedure for testing garments for glass fragments was to shake the clothes over paper for several minutes, search any pockets and then transfer the debris to a petri dish. Ms Huraki found six glass fragments. They were tiny, smaller than one-quarter of a millimetre. She also found lint, used cigarettes and insects. She tested the refractive index of the glass. All six pieces had the same refractive index. This meant it was likely they came from the same source. Ten glass fragments detected on the metal bar were also examined and also had the same refractive index as each other and the glass from the clothing. Ms Huraki found that the refractive index from the control sample taken from the glass door had the same refractive index as the glass on the clothing and metal bar.

[14] In cross-examination, Ms Richards said she was Ms Huraki's technical reviewer and so had some knowledge of Ms Huraki's testing of the glass. Twenty-three glass fragments were found on the metal bar but only 10 were assessed. She could not say whether the untested 13 glass fragments found on the bar had the same refractive index as the glass taken from the door. The following questions and answers ensued:

> "Could you tell what other types of places this type of glass could be found?---I suppose, you know, in your windows and things like that. The glass was – I'm looking at her note, was a laminated glass, so you've got, like, the two pieces of glass and it's joined with a piece of laminate in between. Windows – other windows would have laminated glass – car windscreens are laminated glass.

Okay. And I understand – would there be a database or something, which tells you where all these batches of glass are coming from, that you'd have access to?---There is a database that is – that has been compiled from other, I suppose, across Australia, where other people have done tests and they put their control glass – their control glass data into this database, to give us a database so that we can, yeah, see how unique the RI is. Unfortunately the computer that the database is on has actually broken, perhaps two weeks ago.

… So I was unable to look up the refractive index.

Okay. So it could well be that the type of glass in control A is very common?---That's correct. Yes.

And it could be in, you know, 100 windscreens over South East Queensland and 30 shopfront, you just don't know?---That's correct.

Okay. And is that why the scientists that originally wrote the report [concluded] … with regard to the metal bar which she calls the tool, she says, [']I formed the opinion based on the techniques used, that the glass fragments recovered from the tool, could have originated from control glass taken from the right side front door['], which is control A?---That's correct.

So the highest she puts it is, they could have?---Yes.

Okay. And we've also got the clothes and you've described how they were assessed. They were shaken and six fragments come off the clothes?---Yes.

And none are found in the pockets?---That's correct.

And that's a shirt and some shorts and a belt?---Yes.

And the same sort of reasoning then, would apply here as well, wouldn't it, in relation to the common type of glass?---Yes. It would. However, finding glass fragments on general people in the public is highly irregular from studies that have been done.

But firstly if I could just ask this question. If somebody had come in contact with glass through – or just come into contact with glass, with regards to these glass fragments, you can't say that they're unique to control A, is what I'm asking?---That – yeah, that's correct.

Okay. So it's the same sort of thing that this glass could really have – there could be a number of other places where this glass could have originated from. You just can't say?---Yes. And they would have had to come in contact – yeah, with the broken glass.

Okay. And that's the same reason. She makes a similar conclusion that the glass fragments recovered from the clothes, could have originated from the control glass?---That's correct.

Taken from the right side front door. Okay. And that's the highest she puts it for the clothes, as well?---Yes."[7]

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[7] T1-69.11 – T1.70.21.

[15] If a person was standing close to an area of broken glass through which smoke was billowing, in Ms Richards' opinion it was not possible for glass to be transported to the person's clothing or other items by the smoke. She then conceded that she did not have the expertise to give that opinion.

[16] In re-examination, the following discussion occurred:

> "You said something about, you wouldn't expect glass fragments to be on general members of the public. What was that? I didn't get it written down?---Oh. Okay. [T]here's various studies have been done in Australia, New Zealand and England on glass fragments being found on members of the public and it's generally – one study has been done in New Zealand where they examined the outer clothing [and] footwear of 122 gym members and the study also examined non-matching glass present on clothing of 114 people suspected of breaking crimes and from the gym there was no glasses – no glasses found on the upper or lower clothing, only a small amount in the pockets and some on the footwear, while glass was found on 63 of the suspects in all locations and there's a couple of studies that are done like that that just basically say that it's very unlikely that glass is found on members of the general public while there's significant glass can be found on people suspected of breaking crimes."[8]

[17] Police officer Andrew Rowan, a forensic scientist from the Fire and Explosion Unit of the Brisbane Scientific Section of the Queensland Police Service with 19 years experience in determining the cause of fires, inspected the scene the following morning. He considered the point of origin of the fire was on shelving at the rear of the store near a fire extinguisher and "was the result of human involvement – either accidental or deliberate",[9] he was unable to say which. He excluded an electrical fault as a possible cause. Someone had accidentally or deliberately caused the ignition of combustible material in that location. In cross-examination, he agreed that he found no remains of ignition sources such as matches or lighters. There were no electrical appliances in the area where the fire started.

[18] The appellant did not give or call evidence. The defence case presented in cross-examination and in counsel's address was that the jury could not be satisfied beyond reasonable doubt that the appellant lit the fire.

Should the judge have directed the jury as to s 23 *Criminal Code*?

[19] The appellant contends that police officer Rowan's evidence directly raised the possibility that the fire was caused unintentionally. The trial judge should have directed the jury as to the operation of s 23 *Criminal Code* or at least, when directing as to the elements of arson, conveyed that a critical issue was whether the appellant deliberately set fire to the premises in light of police officer Rowan's evidence. This followed from Philippides J's observations in *R v Joinbee*.[10]

[20] I am unable to accept that contention. It is true that a trial judge may need to direct a jury as to s 23 even where proof of the alleged offence requires proof of a specific

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8 T1-70.38 – T1.71.3.

9 T1-75.36-37.

10 [2013] QCA 246, [27].

intent: *Murray v The Queen*;[11] *Stevens v The Queen*;[12] and *Joinbee*.[13] But in this case, as in *Joinbee*,[14] the trial judge's directions to the jury properly focused on the issues in the case. Police officer Rowan's evidence on its own did not raise s 23 although it was highly relevant to the element of wilfulness.

[21] It is also true that the judge told the jury that the defence case was that they could not be satisfied that the appellant lit the fire so that this was the only element really in dispute. That was how the defence case was conducted at trial. But importantly, the judge also directed the jury as to the element of wilfulness, namely:

> "that is that either he had an actual intention to set fire to the property or he deliberately did an act, being aware at the time he did it, that the property's catching fire was the likely consequence of his act and that he did the act regardless of that risk."[15]

[22] The judge explained to the jury that the case turned on circumstantial evidence so that, if they were to bring in a verdict of guilty, they must be satisfied that guilt should not only be a rational inference but the only rational inference to be drawn from the evidence and circumstances. If there was any reasonable possibility consistent with the appellant's innocence, they must find him not guilty.

[23] Shortly before the jury retired to consider their verdict, her Honour told them:

> "… at the end of the day, you can only convict [the appellant] if you're satisfied beyond reasonable doubt that he deliberately lit that fire.
>
> If you're not so satisfied, then you must return a verdict of not guilty."[16]

[24] These directions sufficiently highlighted for the jury the real issues in the case, namely, that they had to be satisfied not only that the appellant lit the fire but also that he did so wilfully, that is, deliberately. I do not consider police officer Rowan's evidence on its own was sufficient to raise s 23, although it was relevant to the element of wilfulness. The judge's directions properly instructed the jury as to that element. This ground of appeal is not made out.

Was the jury verdict unreasonable?

[25] In determining whether the guilty verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence under s 668E(1) *Criminal Code*, this Court must consider whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt: *M v The Queen*;[17] and *SKA v The Queen*.[18]

[26] There was no doubt that the evidence against the appellant made him a prime suspect. But, as the judge directed the jury, the case against him was entirely circumstantial so that the jury could convict him only if there was no reasonable

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11 (2002) 211 CLR 193.
12 (2005) 227 CLR 319.
13 [2013] QCA 246, [27] (Philippides J) and [86] (Boddice J).
14 Above.
15 Transcript of summing up, 5.40-43.
16 Above, 11.16-17.
17 (1994) 181 CLR 487, 493-495.
18 (2011) 243 CLR 400, [11].

hypothesis open on the evidence consistent with his innocence. The appellant was in the vicinity at the time of the fire but gave an account to police denying any involvement. Ms Fowler, who recorded the name of the person who made the 000 call and his phone number conceded she could have wrongly recorded these details in an emergency situation. This seems probable as the appellant stayed at the scene and admitted to police that he had made the 000 call. His claim that he returned to the store to collect some electrical items was consistent with the finding of those items in the area he described. His claim that the manager of the store, Sheryl Sue, had arranged for him to have a key to the premises was not disproved by Ms McDonnell's evidence as Ms Sue did not give evidence and none was led about the key register. There was no evidence that the appellant's clothing smelled of smoke or that he had suffered any burns or singeing to his hair or clothing. His 000 call immediately after the fire alarm was activated, his remaining at the scene, his cooperation with the authorities, his explanation for being at the store and his lack of motive to deliberately set fire to the store where he seemed happy to be volunteering were all consistent with his innocence.

[27] Counsel for the respondent conceded that without Ms Richards' evidence that tiny glass fragments found in his clothing and glass fragments from the metal bar taken from his car had the same refractive index as the smashed glass in the store front door, the prosecution case would fail. But there were concerning aspects to this evidence. Defence counsel did not make admissions under s 644 *Criminal Code* about the continuity of the handling of the metal bar and the appellant's clothing from when police took possession of them until their scientific testing. Unusually, Ms Richards' expert evidence about the glass, which was critical to the prosecution case, was hearsay and ordinarily would not be admitted.

[28] It is now common ground that defence counsel agreed to this course as Ms Huraki was unavailable at trial. It may be that defence counsel had instructions to conduct the trial in this way to ensure the trial was not adjourned, the appellant being in custody. With hindsight, this seems to have been an unsatisfactory course. The possibility of contamination of the clothing and metal bar with glass fragments at the scene was not explored because of the concession made by defence counsel prior to trial. Not only did Ms Richards give hearsay evidence from Ms Huraki's notes and statement, but, as members of this Court noted at the hearing, she added some surprising and highly prejudicial details about an unnamed study comparing glass fragments found on clothing of members of the general public and on those charged with criminal offences involving the breaking of glass. There is no discrete ground of appeal concerning this aspect of her evidence but the appellant now relies upon it in this ground of appeal. In light of the way Ms Richards volunteered this evidence, it was unable to be fairly tested by defence counsel and was likely to have been very prejudicial. The judge was not asked and gave no directions to the jury about it. Had the evidence been properly explored it may be that it would have been of such slight weight that it should not have been admitted. As it was, very little weight could have been properly placed on it. If the continuity and the effect of Ms Huraki's statements of evidence were not in dispute at trial, the better course was for counsel to make admissions under s 644.

[29] In the end, Ms Richards' evidence established only that the glass fragments on the appellant's clothing and metal bar had the same refractive index as the broken glass from the store front door. No evidence was led as to the incidence of glass with this refractive index. Evidence from a database which may have assisted in this regard

was not led. Ms Richards conceded that glass with this refractive index could be "very common". The appellant told police that he had used the bar in handling bulk bags which may have contained broken glass. The police did not investigate the appellant's claim. He was not asked when he most recently did this or what clothing he was wearing at the time. Ms Richards was not asked whether glass fragments might remain in clothing after washing.

[30] The circumstantial case against the appellant made him a prime suspect. But after a careful review of the evidence at trial, I am not persuaded that the prosecution evidence established, to the criminal standard of proof, that the glass fragments in his clothing and on his metal bar were from the glass in the store front door. It follows, consistent with the respondent's concession, that it was not open to the jury to be satisfied beyond reasonable doubt that the glass came to be on the appellant's clothing and metal bar by smashing the glass front door of the store rather than in some innocent way.

[31] The appellant's counsel put forward an alternative hypothesis, not put forward at trial, which he contended was also consistent with innocence. It was that, even if the appellant was responsible for the fire and in a panic broke the store front glass door to cover his tracks, the jury could not be satisfied beyond reasonable doubt that he lit the fire deliberately rather than inadvertently. This followed from police officer Rowan's uncontested evidence that he was unable to say whether the fire had been lit accidentally or deliberately. Given my conclusion as to the effect of the expert evidence as to the glass fragments, it is unnecessary to deal with this contention but it is not without substance.

[32] For the reasons given, I would allow the appeal, set aside the guilty verdict and instead direct a verdict of acquittal.

ORDERS:

1. The appeal against conviction is allowed.

2. The guilty verdict is set aside.

3. A verdict of acquittal is entered.

[33] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

[34] **McMEEKIN J:** I have had the advantage of reading the reasons of the President. It has assisted me greatly in clarifying my thoughts on the matter. I agree with the President's reasons in relation to the complaint about s 23 of the Criminal Code.

[35] As to the unsafe and unsatisfactory ground I wish to say a few words of my own. As the President has said the approach of this Court is governed by the principles explained in *MFA v The Queen* (2002) 213 CLR 606 at 623.

[36] There were two live issues – did the appellant set the fire? And, if so, did he do so wilfully?

[37] By way of background I mention that it is unknown how the fire was started but the evidence was that it could not have started without human intervention. It was not due to electrical fault or chemical reaction. It was probably started using an ignition

source such as a match or lighter on paper, cardboard or cloth. As the scientific officer could offer no opinion as to the mode of ignition he could not exclude the possibility of an accidental commencement.

[38] If the appellant set fire to the building there was sufficient reason to think that he did so wilfully. A finding that he had set the fire would mean that he lied to the police in his denial of having anything to do with the fire; and that he deliberately smashed a glass door to make it appear that the person who set the fire had no legitimate means of entry. That would lead suspicion away from him as he had a key to the building. Those are not the actions of an innocent man caught up in an accidental fire.

[39] The making of the 000 call is explicable as again leading suspicion away from him.

[40] However all that is premised on the initial finding that he did in fact light the fire. There was no direct evidence of that, the case being entirely circumstantial. The relevant circumstances were:

(a) the appellant was present at the scene within a minute or so of the smoke alarm bells ringing as evidenced by the timing of the 000 call made two minutes later;

(b) his account for being at the store was unconvincing – he was there he said at 11pm to collect electrical goods that he had set aside for himself and which he had forgotten to collect earlier in the day when at work;

(c) a glass front door was broken on the evening of the fire and shards of glass with the same refractive index as that glass door were found on his clothing and on a metal bar that was found in his possession;

(d) the clothing on which the glass was found was being worn by him at the time he was at the scene;

(e) the metal bar was found in the back seat of his vehicle, a vehicle that he took to the scene, the bar being one that he usually would keep in the boot of the car;

(f) for glass to have the same refractive index it must have been made in the "same batch";

(g) there was evidence of studies indicating that glass was not usually found on members of the public generally;

(h) in accessing the store after hours he was acting in breach of the employer's policy and practise;

(i) in accepting electrical goods and not cutting the electrical cord and discarding them he was again acting in breach of the employer's policy.

[41] Against those circumstances the appellant points to these:

(a) The refractive index of the glass was not shown to be necessarily special or unique – how common it was in the community was conceded to be unknown;

(b) There was an explanation for the presence of glass fragments – the appellant told police that there could be glass on the bar "from when I was doing loads for trucks" and a reference that he had done bulk loads that "perhaps" contained glass. There was no evidence that this claim was false;

(c) There was no evidence that the clothes he was dressed in that evening were not the clothes he wore when at work and so likely to be those he wore when moving loads and possibly loads containing glass;

(d) The glass fragments were very small in size and so easily transferred;

(e) There was nothing to connect the appellant to the fire - his clothes were not singed or had any evidence of smoke contamination; there was nothing about his appearance that suggested any exposure to smoke or fire; no lighters or matches were found on his person;

(f) There was no motive shown;

(g) There was an alternative suspect - a male was seen on CCTV footage near the store about 50 minutes before the alarm was activated walking from the neighbouring store to the corner and back. The male was wearing a different coloured shirt to the one the appellant was wearing when seen by police at the scene and so presumably a different person. There was no apparent reason for a person to be in the vicinity, the stores being all closed at that hour;

(h) His alleged breach of store policy was not probative of anything - the appellant's immediate manager was not called to say that the appellant had been informed of the store policy spoken of by the retail operations supervisor who was called;

(i) There was corroboration of the appellant's account - the items that the appellant claimed that he had come to the store to retrieve were present at the rear of the store as he had said they were, or at least there was some evidence consistent with the claim and the claim was not shown to be false;

(j) There was good reason for him to be there. The store policy, if implemented would have resulted in the destruction and discarding of the DVD and hot plate the next day. He had donated $5 for the items;

(k) His actions in making the 000 call, remaining at the scene, and co-operating fully with police enquiries were at least as consistent with no involvement as any other hypothesis.

[42] But for the presence of the glass it seems clear that the circumstantial case does not rise above suspicion.

[43] The real issue is whether the presence of the glass and the coincidence of glass fragments having the same refractive index being found not only on the clothes he was wearing that night but also on the metal bar is sufficient to remove any reasonable doubt. The relevant principle is plain – have all other hypotheses consistent with innocence been excluded beyond reasonable doubt?

[44] As the President has pointed out there is an alternative hypothesis not shown to be wrong. Evidence could have been called to negative the claim that glass could have come onto these clothes and the metal bar innocently, and other than by the smashing of the door on the night of the fire. The fact that the prosecution did not lead that evidence, or any evidence, to indicate the improbability of the alternative hypothesis lends force to the appellant's argument.

[45] Reversing a jury decision on such a question is a step that I am reluctant to take. Too often the common sense of the jury provides greater justice than the remote considerations of those who have not seen and heard the witnesses. But after a careful review of the evidence I too have come to the view that the verdict is unsafe.

[46] I agree with the orders that the President has proposed.