[2002] QCA 291

COURT OF APPEAL

McPHERSON JA
WILLIAMS JA
HOLMES J

CA No 360 of 2001

THE QUEEN

v.

HARRY BEHRENDS

BRISBANE

..DATE 08/08/2002

JUDGMENT

McPHERSON JA: The appellant in this appeal was convicted after a trial in the District Court on an indictment charging one count of attempted arson of which he was found guilty by the verdict of the jury. He was sentenced to probation for a period of three years and a conviction was recorded at the direction of the Judge. He now appeals against that conviction.

The scene of the crime was an unoccupied two or three level building at the corner of Kurilpa and Duncan Streets, West End. At about 4.50 p.m. on 13th May 2000, Constables Pekaj and Richter were patrolling in a police car in the area with the intention of visiting the building in question in which homeless people were in the habit of congregating. After they stopped the vehicle and approached the building they saw inside it the silhouette or figure or a person and either then or immediately afterwards saw flames inside the building.

They approached the person they saw, who was the appellant, and who was seen to be carrying a bag over his shoulder. When later questioned about his presence there, the appellant said he was looking for a friend whom he had not found. He was in due course arrested and charged with the offence of which he was convicted.

The two police officers found several fires, some five in all, had been started in the building, three of them upstairs and two downstairs, one of those being a fire in a quilt, which was surrounded by newspapers or polystyrene boxes which were

obviously combustible material. They extinguished the fires downstairs by stamping on them. About that time, or a little later, the fire alarm sounded, and they realised that it was beyond their capacity to put out the fires upstairs without assistance, and the fire services were summoned.

A number of circumstances went to show that the fires had been recently started. They included the following matters. The fires had not progressed very far at all when the police arrived and found them alight, together with the appellant, in the building. The flames were, as I have indicated, easy to put out downstairs shortly after they arrived. The fires had not progressed far enough, it would appear, to char the building; hence no doubt the reason why the charge of attempt rather than arson was laid in this case.

The fire was seen by Mr Jacob, a next door neighbour, shortly after he saw the police arriving in their vehicle and parking outside. Forensic tests conducted on the quilt suggested it would have taken only about 28 or 30 seconds to register the burns found on it, which was consistent with the time of the police arrival and their observations of the fire at the building.

There are also circumstances that suggested strongly that it was the appellant who caused the fires to be started. They included that he was seen by Mr Edwards earlier in the afternoon in the vicinity of the building or on a path that would have taken him there. At that stage the applicant was

inspecting the contents of a rubbish bin. This was some time before the police arrived. No one else was seen either going in or coming out of the building at or immediately before the time the police arrived and saw the fire. It was suggested by the appellant in the course of his submissions that the true fire-setter might have hidden in a cupboard in the building while the police were there, or that he had managed perhaps to jump out of a window. For obvious reasons, including the height of the windows above the ground and the fact that they were screened, it seems unlikely that either of those explanations would have made an impression on a reasonable jury.

A box of Redhead matches was later found on what was described as a shelf or a window ledge in the building close to where the appellant was left standing while the police were engaged in putting out the fire. The appellant ridiculed the description, given of the place where the matches were said to be found, as a window ledge or a shelf and it is true that that description is not a particularly accurate one; however, it would seem not to go very seriously, if at all, to the credibility of the police if there was a mistake about calling it that. Plainly, of course, the assertion was, expressly or impliedly, that the police had placed the matches there as a means of incriminating the appellant. That, if a suggestion was being made to that effect, was quite plainly a matter for the jury, and they were evidently not impressed by it. The appellant himself, who was legally represented by counsel at the trial, gave evidence denying he had lit the fires. He,

however, agreed in evidence that he saw no one else in the building at that time who could have carried out the lighting of the fires. It is also true that there were no incriminating fingerprints on the matchbox or other objects near to the seat of the fire that were capable of connecting him with it. There was, however, and the jury must, one would think, have acted on this, such a coincidence in times of the arrival of the police, the discovery of the fire and the presence of the appellant as to persuade the jury beyond reasonable doubt that the appellant had started the fires.

In this state of the evidence, it was essentially a matter for the jury to decide if the appellant was guilty of the offence charged Having found him guilty, as they did, it is extremely difficult, according to the legal principles on which this Court is required to act, to have that verdict set aside on an appeal.

Essentially, what the appellant has sought to do on this appeal is to scrutinise the evidence of the police officers who came on the scene in order to show by reference to photographic exhibits and otherwise that there were discrepancies in their testimony at the trial. These discrepancies were, on any view of them, minor matters that were tested in cross-examination in front of the jury and were no doubt also the subject of final addresses by counsel to the jury.

In addition, the appellant arranged for the preparation of a

forensic report on the subject of the combustion properties of the quilt. It was carried out by a private firm that specialises in forensic research. It was sought to tender this report on the appeal. It was evidently not tendered or admitted at the trial and so, in the circumstances, is not admissible on appeal. Why it was not tendered at trial one does not know; but, having read it, it is a reasonable conclusion that it did nothing to help the appellant at the trial but instead rather tended to confirm the prosecution forensic evidence that was admitted at the trial. The result is that nothing could be gained by the appellant by tendering it now, even if it were admissible according to the ordinary tests that are applied in the adduction of fresh evidence on appeal.

In addition, the appellant sought to tender the statement of one of the police constables. It had been in the possession of defence counsel at the trial. There is a passage in the cross-examination of the police witness, in which counsel for the appellant quotes from that police statement. It was, therefore, quite clearly available to the defence at the trial and they chose not to put it in for reasons of prudence. However that may be, it is not a document which we would now accept and act upon on appeal for the purpose of questioning the verdict in this case.

All matters considered, this was a case which it was well within the province of the jury to decide. They decided it against the appellant, and there is no reason of any kind for

upsetting that verdict on appeal. The result is, in my view, that the appeal should be dismissed.

WILLIAMS JA: There was a strong circumstantial case against the appellant who admitted his presence at the scene at the material time. The verdict of the jury is not unsafe and unsatisfactory. I agree with what has been said by the presiding Judge. The appeal should be dismissed.

HOLMES J: I agree with what has been said by the presiding Judge and by Justice Williams and I agree with the order.

McPHERSON JA: The appeal against conviction is dismissed.
