

COURT OF APPEAL

DAVIES JA
JERRARD JA
MACKENZIE J

CA No 28 of 2002

THE QUEEN

v.

SIMONE LOUISE BREWSTER

Appellant

BRISBANE

..DATE 16/08/2002

JUDGMENT

DAVIES JA: The appellant was convicted in the District Court on 12 July 2001 of arson on 30 September 1999. She appeals against that conviction. She also seeks leave to appeal against a sentence of three years imprisonment imposed for that offence.

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In her notice of appeal against conviction, which she filed personally, she stated as her ground of appeal:

"I pleaded not guilty to the charge of arson however I was found guilty by the jury on circumstantial evidence only - I am not guilty of the charge of arson that's the reason I would like to appeal."

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Upon the hearing her legal representative, Mr Callaghan, sought to substitute the following grounds of appeal:

1. The evidence of statements made by the appellant to Detective Ruston concerning Troy Massey and later Christopher Woodgate should not have been admitted into evidence;
2. The learned trial judge misdirected the jury when giving directions on evidence which indicates a consciousness of guilt.

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No objection was made to the substitution of these grounds and leave was granted to substitute them.

The appellant had been a boarder in a dwelling which was burnt on 30 September 1999. It belonged to the State Department of Housing but it was rented from the Department by the complainant Ms White. The appellant apparently became a boarder of Ms White pursuant to some arrangement about sharing costs.

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On 22 September 1999 the appellant returned to the residence to find some of her personal belongings missing and others damaged. She apparently accused the complainant of this and proceeded to assault her by punching her, pulling her hair and kicking her in the stomach; and, according to the complainant but denied by the appellant, threatening her with a knife. The police were called and apparently in their presence the appellant made threats to the complainant. It was common ground that these threats included a death threat. The complainant and a police constable also swore that it included a threat to burn the house. This was denied by the appellant.

The appellant had ceased residing in the house before the day of the fire, but was seen there on the morning of the fire. In court she admitted that. She went there, she said, to collect her belongings and put them in her car, which was unregistered, intending to have it towed away later. Shortly after she left the house it was seen to be on fire and the fire brigade was called. There was evidence that the fire started in the complainant's bedroom. The complainant had been absent from the house for some time. There was no-one in the house when it burnt.

Both grounds of appeal concern evidence of arguably inconsistent statements by the appellant that other persons had or may have started the fire.

Detective Ruston swore that, during a conversation which he had with the appellant on 2 November 2000, the appellant said

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that the person responsible for the fire was Troy Massey. He said that he spoke to her again on 6 March 2001. He told her that he had had a conversation with Troy Massey who said he did not want to be interviewed but that the allegation was rubbish. He said that the appellant then told him that the person she meant had started the fire was Chris Woodgate. When Detective Ruston told her that Woodgate had died she replied that she knew that. In fact Woodgate had died, so the evidence revealed, on 26 February 2001.

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The appellant's evidence as to these conversations was somewhat different. She said that she had three relevant conversations with the detective. In the first she told him that it could have been possible that Troy Massey or Mick Sweeney might have set light to the house. Her reason for saying that, she said, was that the complainant had some drug debts with them. In the second conversation, according to her, the detective told her what he said he had told her after speaking to Massey. But it was not in that conversation but in a third conversation that she told him that Christopher Woodgate had been the offender. She said in evidence that Woodgate had told her he had set light to the house, but she did not believe what he had done and later she said that she was in fear of him.

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The evidence of the detective with respect to these conversations was not objected to by the appellant's counsel at the trial. Nor do I think he reasonably could have done so. It was relevant in my opinion at least to the appellant's

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credit. It was open to the jury to infer that the giving of these inconsistent statements or apparently inconsistent statements about who was or might have been responsible for the fire could be viewed as an attempt to deflect attention from her thereby reflecting on her credit. I do not think therefore that there is any substance in the first ground of appeal.

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There is more substance in the second. Indeed the respondent has conceded that the learned trial judge's directions were defective. Directions with regard to lies often seem to give rise to difficulties as this Court has mentioned on more than one occasion and judges should be circumspect in giving any such direction. See, for example, R v. Brennan [1999] 2 QdR 529 at 530.

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In the learned trial judge's direction on this matter, the learned judge set out the facts with respect to these apparently inconsistent versions and went on:

"Well, the Crown submits that that indicates consciousness of guilt. And you could only use that evidence if you were satisfied that the accused was putting blame on other people in the sort of a sense of trying to point the blame away from herself knowing that she was the one concerned. Well if you thought that or if you treated that evidence on that basis then that is one further factor that you could take into account in deciding whether or not you are satisfied the accused is guilty of the charge."

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His Honour's reference in that paragraph which I have quoted to "consciousness of guilt" indicates that he had in mind the sort of matter considered by the High Court in *Edwards v. The Queen* (1993) 178 CLR 193. However, in my opinion, the

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evidence in this case did not justify an Edwards direction and his Honour's direction did not in any event comply with the requirements stated in that case.

The most concerning aspect of this case to me is the difficulty in being satisfied, without making an assumption as to the appellant's guilt, that these statements relied on were lies. The appellant certainly did not admit that they were and there was no independent evidence apart possibly from Mr Massey's denial that they were. It was, in my opinion at least, equally open to regard them merely as speculation by the appellant as to who may have committed the offence. This is particularly so in the case of Massey, for her basis for suggesting that it was he who may have committed the offence was that she was aware that the complainant owed money to him for drugs.

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This was undoubtedly a strong circumstantial case. However, in my opinion it is impossible to say that this misdirection, as the respondent concedes it was, did not have an effect on the jury's deliberations. There was a real danger that the paragraph which I have quoted may have led the jury, for the purpose of assessing those statements, to have assumed the appellant's guilt, thereby giving greater weight to them in assessing that guilt than they properly deserved. I would not be prepared to say, therefore, that if there had not been this misdirection the jury would inevitably have come to the same conclusion.

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For those reasons, in my opinion, the appeal should be allowed, the conviction set aside and a new trial ordered. I would also order that the appellant be remanded in custody pending a bail application.

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JERRARD JA: I agree with the observations of the learned presiding Judge. I am not confident that the evidence of Detective Ruston as to the statements made by the appellant regarding Mr Massey and Mr Woodgate were originally admissible, but whether they were or not I endorse the remarks of the presiding Judge as to the misdirection that was given involving the consciousness of guilt and the circularity of reasoning involved in that misdirection.

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MACKENZIE J: I agree with Justice Davies.

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DAVIES JA: The orders are as I have indicated.

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