

GARDENAL-WILLIAMS v. THE QUEEN

1989. Court of Criminal Appeal: Green C.J., Neasey, Nettlefold, Underwood and Wright JJ.

May 31, Nov. 8-11, 1988, June 9, 1989.

Precedents — Decisions of particular courts — Full Court and Court of Criminal Appeal — Review of previous decisions — Practice — Leave to argue — To be granted once only and by three judges — Hearing before five.

Appeal — Practice and procedure — Jurisdiction of Full Court and Court of Criminal Appeal — Submission that previous decision wrong — Constitution of court — Leave so to submit.

Criminal Law — Particular offences — Offences against property — Arson — Intent — “Wilfully” setting fire to property — Setting fire to building — Setting fire to something that sets building afire — Criminal Code, ss.13, 267(3), 268.*

Criminal Law — Jurisdiction, practice and procedure — Juries — Functions of judge and jury — Evidence — Admissibility and weight — Judge to decide admissibility, not weight.

Evidence — Documentary evidence — Statutory provisions as to statements in documents where direct oral evidence admissible — Representation made by witness in document — Admissibility — Conditions of — Made while facts fresh in maker’s memory — Proof of freshness — Evidence Act 1910, s.81(1)(c)†.

Words and Phrases — “Fresh” — In the memory — Evidence Act 1910, s.81B(1)(c)†.

Words and Phrases — “Wilfully” — Criminal Code, s.268.*

[Aust. Dig., Precedents [21], Appeal (3rd edn.) [146], Criminal Law [232], [508], Evidence [86]]

The *Criminal Code* provides, by s.268, that “a person who unlawfully sets fire to any building . . . is guilty of a crime which is called arson” and, by s.267(3), that “an act causing injury to property shall not constitute a crime . . . unless it is done wilfully . . .”.

A house was substantially damaged by fires deliberately lit in several places.

To counter admissions allegedly made to police officers, the accused’s counsel, under the *Evidence Act* 1910, s.81B, tendered a written statement she made some four days after the fire, relevant to her innocence.

* *Criminal Code*, s.13—(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional, nor, except as in hereinafter expressly provided, for an event which occurs by chance.

On whether the fire was lit “wilfully”, her counsel requested that the judge give a direction not in accordance with *Reg. v. Hodgson*, 1985 Tas.R. 75, but he charged the jury in accordance with that case. On appeal,

Held, that—

- (a) although the Court of Criminal Appeal is not absolutely bound by its own decisions the court will not hear argument that a previous decision of the court should not be followed unless leave has first been obtained to do so;
- (b) notice that such leave will be sought shall be included in the written outline of submissions of the party seeking leave;
- (c) if such leave be granted, the hearing will then ordinarily be adjourned and the whole appeal will be heard and determined by a bench of five judges;
- (d) a bench of five judges hearing such an appeal may ordinarily be expected to hear the argument that the previous decision should not be followed without any further leave or persuasion being required;
- (e) this statement also applies to proceedings before a Full Court;
- (f) the judge charged the jury correctly, because—
 - (i) per Green C.J., Underwood and Wright JJ., the appellant had not shown the existence of any circumstances which would justify the court's embarking upon a consideration of *Reg. v. Hodgson (supra)*:
Arnol v. The Queen, 1981 Tas.R. 157, followed; and
 - (ii) per Neasey and Nettlefold JJ., *Reg. v. Hodgson (supra)* was correctly decided; and
- (g) in the absence of any evidence or cross-examination to contradict the appellant's assertion that the statement was written whilst it was fresh in her memory the trial judge should have been satisfied that the statutory requirements had been met to allow the admission of that statement pursuant to the *Evidence Act* 1910, s.81B.

Quaere, per Wright J., what is the *actus reus* in arson.

S.267—(3) An act causing injury to property shall not constitute a crime under this chapter unless it is done wilfully and without claim of right.

S.268 Any person who wilfully sets fire to any building, erection, or structure whatever attached to the soil, whether the same is completed or not, or to any shack or heap of cultivated vegetable produce, or of timber, or of mineral or vegetable fuel, or to any mine, or to any ship or vessel, whether completed or not, is guilty of a crime, which is called arson.

† *Evidence Act* 1910, s.81B—(1) Where direct oral evidence of a fact . . . would be admissible in a proceeding, a representation made by a person in a document tending to establish the fact . . . is, subject to this Division, admissible as evidence of the fact . . . if—

- (c) the court is satisfied in the case of a representation—
 - (i) tending to establish a fact, that the representation was made at a time when the facts stated in the document were fresh in the memory of the witness;

APPEAL AGAINST CONVICTION.

Gina Gardenal-Williams was arraigned at Launceston Criminal Sittings before Cox J. in March 1988 on a charge of arson contrary to the *Criminal Code*, s.268.

The house in which she was living caught fire and forensic evidence indicated the presence of accelerants at several ignition points. When the Fire Brigade attended the scene they found the house locked, nobody present within and no signs of forced entry. The principle evidence against the accused was confessions made to police officers. The accused disputed the fact that she was present when the fire started, that she had any knowledge of its cause and that she had confessed to police officers. At the conclusion of the evidence-in-chief her counsel sought to tender pursuant to the *Evidence Act* 1910, s.81B, a statement made by her four days after the event which was consistent with her evidence-in-chief. After hearing evidence upon a *voire dire* Cox J. ruled that he was not satisfied that the statement had been made when it was fresh in her mind and declined to admit it into evidence. Despite the fact that the defence was one of complete denial the accused's counsel requested the judge to direct the jury contrary to the law as stated in *Reg. v. Hodgson* 1985 Tas.R. 75. His Honour directed the jury in accordance with that case.

The accused was convicted and appealed on, *inter alia*, the following grounds:

"(aa) The Applicant's conviction should be set aside on the basis that the Court of Criminal Appeal was in error in The Queen —v— Hodgson No. 40/1985 in holding that a person can be convicted of arson notwithstanding that a jury was not satisfied beyond reasonable doubt that he or she did not intend to bring about the result charged in the indictment and/or alternatively that a person could be convicted of arson if an accused deliberately did a willed act aware at the time that he/she did the act that the result charged in the indictment was a likely consequence of the act and recklessly did the act regardless of the risk.

"(a) the Learned Trial Judge erred in law in failing to admit into evidence pursuant to Section 81B of the Evidence Act 1910 the Applicant's written statement of the 22nd September 1987;"

H. J. Kable and *C. N. Dockray* for the appellant.

A. G. Melick and *M. K. Chilcott* for the Crown.

The appellant's written submissions were subsequently as follows:

Since *Reg. v. Hodgson* 1985 Tas.R. 75, the High Court of Australia has decided a number of cases containing important statements of principle as to the interpretation of statutory provisions creating crimes: *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523, *Boughey v. The Queen* (1986) 161 C.L.R. 10, *Kural v. The Queen* (1987) 162 C.L.R. 502, 29 A.Crim.R. 12, *Murphy v. Farmer* (1988) 165 C.L.R. 19.

The *Criminal Code Act* 1924 should be interpreted in accordance with its natural meaning and not influenced by a presumption that it was not intended to change the common law. The word “wilfully” in s.267(3) is a word which has a natural meaning and is a word, the meaning of which is not of doubtful import — it is not a technical word or a “law” word. See *Reg. v. Vallance* (1961) 108 C.L.R. 57. The analysis of *Vallance v. The Queen* (*supra*) by Cox J. in *Reg. v. Hodgson* (*supra*) and Neasey J. in *Arnol v. The Queen* 1981 Tas.R. 157 and *Reg. v. Hodgson* (*supra*) is to be preferred to that of Nettlefold J. in *Reg. v. Hodgson* (*supra*).

“Wilfully” should mean something greater than or over and above “voluntary and intentional” as appearing in the *Criminal Code*, s.13(1). It is important to relate the word “wilfully” in s.267(3) to the verb “causing” as it appears in that section.

In interpreting ss.268 and 267(3) the approach should be to examine the external elements of the relevant crime and to follow the approach taken by Neasey J. in *Arnol v. The Queen* (*supra*). It is inappropriate to have regard to the common law crime of arson or to crime analogous thereto. Section 267 prohibits particular conduct attracting criminal responsibility only if the relevant act is “done wilfully and without claim of right”. It is the act of “setting fire to” which must be voluntary and intentional. It is the act which “cause injury to property” which is required by s.267(3) to be wilful. Section 267 sets out three general matters of law which are relevant to Ch. XXXI. The first two subsections extend the type of conduct which will attract criminal responsibility and the third one limits such conduct.

The trial judge fell into error in ruling that he was not satisfied that the statement written by the appellant was made at a time when the facts were fresh in the memory of the appellant. The evidence establishes that:

- A. The facts contained in the document are consistent with the oral evidence given by the appellant.
- B. The facts contained in the document are consistent with the version told by the appellant to a Dr. Poole.
- C. Neither her solicitor or any of the doctors seen by the appellant had any input to or influence upon the contents of the document prepared by the appellant.

- D. No other person seen by the appellant had any input to or influence upon the contents of the document prepared by the appellant.
- E. It was not suggested in cross-examination of the appellant that any other person to whom she had spoken during the intervening three days following her being interviewed by police had any input to or influence tending to corrupt or to recreate or reconstruct her memory.
- F. The document contained material facts in direct conflict with the evidence of the police of which at the time of the preparation of the document the appellant would have had no idea that such conflicting facts were to be led by the Crown against her.
- G. That no motive on the appellant's part was established.

Other than the passage of time itself there is no evidence lending support for the conclusion that the appellant's fresh memory was affected by innocent or deliberate reconstruction on the appellant's part. The *Evidence Act* 1910, s.81B, creates a statutory exception to the prohibition on prior consistent statements. It allows otherwise inadmissible statements to be admitted as proof of their contents and not merely to bolster the credit of a witness in question. The trial judge erred by analysing the admission of the document on the basis of whether the document bolstered the credit of the witness rather than as proof of the document's contents. The extent to which evidence in the document was manufactured or reconstructed is a matter which went to weight rather than admissibility. See *Cross on Evidence*, 3rd Aust. edn., par. 9.32, p.405 and *Reg. v. Cox* [1986] 2 Qd.R. 55, 24 A.Crim.R. 434, *Reg. v. England* [1978] Tas.S.R. 79, *Reg. v. Cubit* Serial No. 34/1978, *Bovill v. Lindsay* Serial No. 23/1986.

The respondent's written submissions were substantially as follows:

Section 267(3) given its ordinary construction indicates that "wilfully" relates to the "act" and not the event that follows the act. It refers to the physical act of the accused and does not include the event or consequence: *Reg. v. Vallance* [1960] Tas.S.R. 51, at pp. 67-68, 90-93, *Vallance v. The Queen* (1961) 108 C.L.R. 56, at pp. 64-66, 67-69, 71-72, *Reg. v. McCallum* [1969] Tas.S.R. 73, at pp. 80-81. The word "wilfully" in s.267(3) means "intentionally". However, "intention" is used differently to s.13(1) in that that section does not provide criminal liability for the results of all intentional acts. Section 13(1) says that criminal liability will not be found in respect of an act unless it is intentional. If one treats intent in s.13 in this way the word "wilfully" in s.267 and "intentionally" in s.182 do not become tautologous or otiose.

Many parts of our *Code* are based on Stephen's Draft Code in which the intent required for each crime was contained therein. Section 13(1) comes from Griffith's *Code* which in effect has been grafted on to several

Stephen's *Code* offences. As a matter of common sense it would appear that the draftsman has forgotten to remove such words as "intentionally" and "wilfully" from various sections of the *Code* once s.13(1) had been included in the *Code*. Realising this approach to be contrary to some tenets of statutory interpretation it is submitted that it makes more sense than artificially trying to say the word "act" includes "event" in a tortuous attempt to give some extra meaning to the word "intentionally" in s.182 or "wilfully" in s.267(3).

Quaere: Where else in the *Code* (apart from selective interpretation of s.383(2)) does "act" also incorporate "event"? See Crisp J. in *Reg. v. Vallance* (*supra*, at pp. 82-86). "Wilfully" has often been used elsewhere in the *Code* in a sense that is also perhaps otiose: see ss.99, 101, 113, 156(4)(b) and (c), 157 (1)(f) and 182, so why should it not be otiose in relation to s.267(3) (see Cosgrove J's comments in *Reg. v. Hodgson* 1985 Tas.R. 75, at pp. 96, 97)?

If the court is of the view that "wilful" must add some meaning to s.267(3) the respondent urges adoption of the reasoning of Cox J. in *Reg. v. Hodgson* (*supra*, at pp. 98-106), which is supported by the majority in *Vallance v. The Queen* (*supra*). The following is added in support of his Honour's reason: The *ratio decidendi* of *Vallance v. The Queen* (*supra*) is that for wounding the elements required are an intention to wound or recklessness. The basis of that ratio may have now fallen away but at the end of the day in *Vallance v. The Queen* (*supra*), only the minority (Dixon C.J. and Windeyer J.) held that s.13(1) meant that in every consequential crime there is an element of recklessness. Also see Burbury C.J. in *Reg. v. Vallance* (*supra*, at pp. 67, 68). Hence in s.13(1) "intent" does not incorporate recklessness and therefore Cosgrove J's reasoning in *Reg. v. Hodgson* (*supra*) is flawed. See Cox J's reasons at pp. 98-103. The appellant contends that the word "wilfully" causes all crimes in Ch. XXXI of the *Code* to be crimes of specific intent. If that were so there would be a greater mental element required for the wounding of cattle than that for wounding of a man. Cf. ss.274 and 172. This is obviously contrary to the intention of the *Code* and therefore "wilfully" must mean something less than specific intent but something more than an intent to do a basic act. The only logical "something less" is, therefore, the element of recklessness. (Bearing in mind arson is a consequential and not circumstantial crime.) *Vallance v. The Queen* (*supra*) decided that the "act" is the physical act of the accused; that the event is the consequence; and unlawful wounding requires (at least) recklessness.

An alternative approach is as follows: "Wilful" is a concept or a word of doubtful import. An examination of the common law and relevant legislative history supports the meaning of "wilful" contended for by the respondent: submissions of the Crown reported in *Reg. v.*

Hodgson (supra, at pp. 77, 78); *Reg. v. Burnell* [1966] Qd.R. 348, at p.356 per Gibbs J., *Hanway v. Boulton* (1830) 4 Carr. & P. 350; Crisp J. in *Reg. v. Vallance* (supra, at p.88); *Russell on Crime*, 12th edn., pp. 13, 16, 17 and O.E.D. — “prepared, deliberate, intentional”.

The *Evidence Act* 1910, s.81B creates a statutory exception to a prohibition on prior consistent statements. The appellant did not establish the necessary statutory foundation to invoke s.81B. The trial judge made a finding of fact that he was not satisfied as to the requirement of s.81B(1)(c)(i). The relevant standard to be applied to any challenge to that finding of fact is laid down in *Richardson v. Shipp* [1970] Tas.S.R. 105, at pp. 117, 118, and not that in *Warren v. Coombes* (1979) 142 C.L.R. 531. “Fresh” means untouched and still clear and the appellant did not establish the document was made whilst “the facts state in . . . [it] . . . were fresh in the memory of” the appellant.

Oral argument followed substantially the written submissions.

Cur. adv. vult.

JUNE 9.

GREEN C.J.: The appellant was convicted of arson contrary to the *Criminal Code*, s.268. Because of the nature of the submissions which counsel for the appellant indicated he proposed making, the court before which the hearing commenced granted an application that the hearing be adjourned so that the appeal could be heard by a court comprising five judges.

The Crown case was in essence that the appellant unlawfully set fire to the dwelling house in which she resided as a tenant by lighting a number of fires including one which resulted in a linen cupboard catching fire which in turn caused the house to ignite. Although the house was not burnt down it was open to the jury to find that the fabric of the house was burnt sufficiently to constitute the crime of arson. The Crown case did not establish any motive for the crime.

In addition to some direct evidence which tended to establish some elements of the crime but which did not implicate the appellant the evidence presented by the Crown comprised principally evidence of a signed record of interview and some circumstantial evidence. The appellant gave evidence in the course of which she said that she did not light the fire and was not present when it was started. She admitted that the police had interviewed her but denied that the record of interview was typed in her presence, denied that she had made the incriminating admissions attributed to her and asserted that she signed the record of interview under pressure and because of a promise made by a police officer that “she would fix up any mistakes that were in it”

after the appellant had signed it. At the trial the learned trial judge directed the jury, and the Crown virtually conceded, that if the jury entertained a reasonable doubt as to whether the record of interview was an accurate record of what was said, or as to whether the accused's admissions were true, they would be obliged to acquit the accused.

His Honour set forth the grounds of appeal (aa) and (a) and continued:

Ground (aa)

This is not a ground of appeal as it alleges no error in the conduct of the trial. However what the appellant is intending to assert in this ground is that the learned trial judge misdirected the jury when he directed them that it would be open to them to be satisfied, as required by the *Criminal Code*, s.267(3), that the act of the accused in igniting the material in the linen cupboard was done wilfully if they were satisfied either that she "intended the house to be set on fire, or she recklessly set fire to the contents of the cupboard, knowing that there was a high degree of likelihood that the fire would spread to the fabric of the house and set it on fire, but choosing to accept the risk of this happening". That direction was in accordance with the decision of this Court in *Reg. v. Hodgson* 1985 Tas.R. 75 but the appellant submits that that decision was incorrectly decided and should be overruled by this Court.

In *Arnol v. The Queen* 1981 Tas.R. 157 this Court held that it had the power to overrule its own decisions. At p.164 I made the following observations, with which Cosgrove J. concurred, about the circumstances under which that power should be exercised:

"I do not propose attempting to exhaustively state the circumstances under which it might be appropriate for this Court to review its own decisions, but I think that the Court would be justified in doing so when the earlier decision is shown to have been arrived at without regard to an applicable statutory provision or binding authority, when the chain of reasoning employed in the earlier decision contains a manifest — as opposed to a merely arguable — contradiction or flaw which vitiates the conclusion reached, or when in the meantime legislation, case law, or other material circumstances have undergone changes which have had the effect of altering the basis upon which the earlier decision was reached. However, it would be wrong for this Court to review an earlier authority merely because it preferred a different view of the law than that which was taken in the earlier case."

Counsel in this case did not submit that we should not follow *Arnol v. The Queen*. I adhere to what I said in that case.

Counsel for the appellant submitted that since *Reg. v. Hodgson* 1985 Tas.R. 75 was decided the law governing the principles applicable to the interpretation of penal statutes has undergone a significant change and he cited *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 and the following passage from the joint judgment of Deane, Dawson and Gaudron JJ. in *Murphy v. Farmer* (1988) 165 C.L.R. 19, at pp. 28, 29, 79 A.L.R. 1, at p.7:

"The provision is, in our view, properly to be seen as penal or quasi-penal in character and as attracting the rule that 'those who contend that [a] penalty may be inflicted, must shew that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty': *Dickenson v. Fletcher* (1873) L.R. 9 C.P. 1, at p.7. In *Lyons v. Smart* (1908) 6 C.L.R. 143 at 157-158, Barton J quoted the above words of Lord Esher (then Brett J) in *Dickenson v. Fletcher* with approval and continued:

"It is as true now as when Blackstone wrote it, that "The law of England does not allow of offences by construction". To these expressive authorities I may add, for the sake of the clear way in which it is put, a quotation from the American case of *United States v. Lacher* (1890) 134 U.S. 624, at p.628. The words are those of Fuller C.J. delivering the opinion of the court. He said: "As contended on behalf of the defendant, there can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the Statute.""

That passage may be contrasted with the following observations of Gibbs J. in *Beckwith v. The Queen* (1976) 135 C.L.R. 569, at p.576:

"The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences: see *R. v. Adams* (1935) 53 C.L.R. 563, at pp. 567-568; *Craies on Statute Law*, 7th ed. (1971), pp. 529-534. The rule is perhaps one of last resort."

I am quite unpersuaded that the observations made in *Murphy v. Farmer* (*supra*) could possibly be regarded as reflecting a change in the law: at the highest they might be regarded as presenting a modest change of emphasis. Nothing put to me persuades me that there has been any change in the law which has had the effect of altering the basis upon which the decision in *Reg. v. Hodgson* 1985 Tas.R. 75 was reached.

Counsel also argued that *Reg. v. Hodgson (supra)* should be overruled on the ground that it was incorrectly decided. However in my view counsel's submissions amounted to no more than an attempt to re-argue the questions which were considered in that case and did not demonstrate the existence of a manifest defect in the reasoning employed in *Reg. v. Hodgson (supra)* such that this Court would be justified in reconsidering it.

I am not persuaded that the appellant has shown that any circumstances exist which would justify this Court embarking upon a reconsideration of the decision in *Reg. v. Hodgson (supra)*.

In my view this Court should make a declaration of the position it proposes to adopt in the future in the event of a party seeking to argue that it should review or overrule one of its own decisions. To that end I make the following statement with the authority of all the members of this court:

1. Although the Court of Criminal Appeal is not absolutely bound by its own decisions the Court will not hear argument that a previous decision of the Court should not be followed unless leave has first been obtained to do so.
2. Notice that such leave will be sought shall be included in the written outline of submissions of the party seeking leave.
3. In the event of such leave being granted, the hearing will then ordinarily be adjourned and the whole appeal will be heard and determined by a bench of five judges.
4. A bench of five judges hearing such an appeal may ordinarily be expected to hear the argument that the previous decision should not be followed without any further leave or persuasion being required.
5. This statement also applies to proceedings before a Full Court.

Ground (a)

The crime was alleged to have been committed in the evening of Friday 18 September 1987 and the interview with the police which it was claimed was recorded took place in the morning of Saturday 19 September 1987. At the end of her examination-in-chief the appellant sought to tender, pursuant to the *Evidence Act* 1910, s.81B, a statement recording *inter alia* her version of what had occurred on Friday 18 and Saturday 19 September which she had written out on Tuesday 22 September 1987. Counsel for the Crown objected to its admission and the appellant gave evidence on the *voire dire*. She said that on Tuesday 22 September her solicitor told her "to go home straight away and write down my version of what had happened

while it was still fresh in my mind" and that she did "exactly that". In cross-examination she agreed that she had talked to other people about what had occurred on the Saturday on two or three occasions on the Saturday, on one occasion on the Sunday and once on the Tuesday morning when she saw her solicitor.

The learned trial judge refused to admit the document on the ground that he was not satisfied that the representation was made at a time when the facts stated in the document were fresh in the memory of the appellant as required by s.81B(1)(c)(i). His Honour said that he was not so satisfied:

"... for a number of reasons. One is that a number of days had gone by. Secondly, there has been evidence of discussions with other people. And that the fact that the passage of time, the discussions with other people and the very predicament in which the accused was, all raise the possibility, indeed, it may be categorised as more than a possibility, that the representations made on that Tuesday were not truly the products of fresh memory but may have been affected by innocent or conceivably by deliberate reconstruction on her part. I do not regard, in the circumstances, in this case, the evidence as establishing that the representation was made at a time when the facts stated in the document were fresh in her memory. For that reason I rule that s.81B does not avail her."

It should be noted at the outset that his Honour did not reject the evidence in the exercise of his discretion but because he was not satisfied that the statutory requirements had been met.

For the following reasons I have reached the conclusion with respect that his Honour's reasons for arriving at the conclusion he did cannot be supported:

1. Although the length of time which elapsed between the police interview and the time when the statement was made was relevant to his Honour's determination it was not so great as to give rise of itself to the inference that the facts were not fresh in the appellant's memory, particularly in the absence of cross-examination or other evidence about what effect if any that that lapse of time had had upon the appellant's mind.
2. In the absence of cross-examination upon the matter there was no evidence from which an inference could have been drawn that the conversations which took place between the appellant and others on the Saturday, Sunday or Tuesday had affected the freshness of her memory of the relevant facts.
3. The appellant's evidence-in-chief was tantamount to an assertion that when she wrote the statement the facts were still "fresh in [her] mind". As that assertion was not inherently incredible and was not contradicted by other evidence and as the appellant was

not cross-examined upon it there does not appear to have been any reasonable basis for rejecting it: see *Precision Plastics Pty. Ltd. v. Dennis* (1975) 132 C.L.R. 362, at p. 370, 371.

Although I share the learned trial judge's view that the probative value of a self-serving statement of this kind is slight, I could not say that I am persuaded that the evidence was of so little weight that no miscarriage of justice actually occurred as a result of its exclusion.

I would allow the appeal, quash the conviction and sentence and order that a new trial be had.

NEASEY J.: I agree with the treatment by Wright J. in his reasons for judgment, which I have had the advantage of seeing in draft, of the approach which the Court of Criminal Appeal of this State should take when asked to review and overturn one of its previous decisions. I accept the principles stated by Green C.J. and concurred in by Cosgrove J. in *Arnol v. The Queen* 1981 Tas.R. 157. I think that it should remain exceptional for a court of five judges to be convened for any purpose, but that where leave is given to argue that a previous decision should be reviewed, the review should ordinarily be undertaken by a bench of five. Once leave is given by a court of three, the larger court should in my view proceed immediately to the review. It would be unnecessary and unwieldy for a sort of double leave to be required, as would be the case if a bench of five judges should expect to have a veto of the decision by a court of three giving leave for the review to be argued.

These proposed rules have in effect been followed in the present appeal. Learned counsel for the appellants was able to persuade the original court of three to propose that a court of five judges be convened, and counsel was permitted to proceed immediately to argue before the latter the case for review. Although I agree with Wright J. that in the result no sufficient reason was advanced before the court of five for reviewing *Reg. v. Hodgson* 1985 Tas.R. 75, nevertheless, since the question of its correctness was fully argued and I am of the view that the majority decision in that case was right, I think it would be desirable to state my reasons for reaching that conclusion.

The previous decision of the Full Court in *Reg. v. Hodgson* (*supra*) which the appellant asked this court to review was, by a majority, Nettlefold and Cox JJ., Cosgrove J. dissenting, that the effect of the *Criminal Code*, s.267(3), as applied to the crime of arson is that the crime may be committed by a person acting recklessly in the sense that it is a likely consequence of his conduct that the setting on fire will occur, but proceeds with his conduct regardless of that risk. Section 267(3) provides that:

"An act causing injury to property shall not constitute a crime under this chapter unless it is done wilfully and without claim of right."

I agree with that part of the judgment of Cox J. in *Reg. v. Hodgson* (*supra*), which relates to this aspect, but wish to add the following observations in relation to the meaning of the word "wilfully" in s.267(3).

"Wilful" and "wilfully" have been used in a variety of legal contexts, criminal, quasi-criminal and civil — see, e.g., *Words and Phrases Legally Defined*, 2nd edn., vol. 5, pp. 333-340. In the great majority of cases involving conduct which is criminal or constitutes a statutory offence it will be found that the word (I treat them here as one) implies something blameworthy in the state of mind accompanying the conduct which is to be "wilful" — for example, wilfully, meaning intentionally ("that is, not by accident or inadvertence, but so that the mind of the person who does the act goes with it") neglecting a child, as in *R. v. Senior* [1899] 1 Q.B. 283, at pp. 290-291; acting wantonly or without cause — *Smith v. Barnham* (1876) 1 Ex.D. 419, at pp. 422,423, where the offence was wilfully throwing rubbish into a water-course; "wilfully" injuring a dog by using excessive force in defending against its attack — *Hanway v. Boulton* (1830) 1 M. & Rob. 18; or intentionally doing something knowing one has no right to do it, as in wilful neglect to pay maintenance or the like — *National Assistance Board v. Prisk* [1954] 1 W.L.R. 443, at p. 444, [1954] 1 All E.R. 400, at p. 401; *Cooper v. Cooper* (1941) 65 C.L.R. 162; or insisting on staying on as a tenant knowing there is no right to do so — *French v. Elliott* [1960] 1 W.L.R. 40, at p.51, [1959] 3 All E.R. 866, at p.874. Those are just a few examples from a very large number which are to a similar effect. Even in a civil context, "wilful" will be found often used in respect of conduct which is unreasonable or captious — for example, in the field of contract law, *Bennett v. Stone* [1903] 1 Ch. 509, at pp. 514-515 — "wilful default"; or acquisition of land, *Re East End Docks & Birmingham Junction Railway Act, Ex p. Bradshaw* (1848) 16 Sim. 174, at pp. 175-176 — "wilful refusal".

This usage accords with the most appropriate of the dictionary definitions. The word is capable in ordinary speech of a wide range of meaning. Thus, the *Shorter Oxford English Dictionary* (vol. 2, p.2549) gives the following for "wilfully":

"1. willingly, readily; patiently, submissively. 2. Of one's own free will, of one's own accord, voluntarily. According to one's own will; at will, freely. 3. Purposely, on purpose, intentionally, deliberately. Chiefly, now always, in bad sense; occasionally implying maliciously. 4. In a self-willed manner; perversely, obstinately, stubbornly."

Of these meanings, the third is the nearest to being appropriate for the present purpose.

The expression in s.267(3), "an act causing injury to property", is only a gerundial way of saying, "an act which causes injury to property". The "act" is that to which s.13(1) refers; namely, the physical act or conduct — i.e. that which is done — *Vallance's Case* (1961) 108 C.L.R. 56. Arson is one of the crimes of causing injury to property under Ch. XXXI. The crime consists of the physical act or conduct and its consequence. In arson, the "act" is, for example, holding a lighted match so that the flame comes in contact with combustible material, or throwing a lighted brand into such material, or any other such act which can have the effect of setting fire to something. The consequence, of course, is that something is set on fire; in the case of arson, a building, erection or structure attached to the soil, or a stack of timber etc. The act must cause the setting on fire in arson, or other proscribed injury to property in other sections of Ch. XXXI.

Such act which causes injury to property, in order to incur criminal liability at all, must be done voluntarily and intentionally, to satisfy s.13(1). But in addition, if it is to constitute a crime under Ch. XXXI, s.267(3) requires *inter alia* that the act be done wilfully; which means that its intentional performance must be accompanied and qualified by a blameworthy state of mind. This is equivalent to saying that the intention itself may be characterised as blameworthy. In the case of arson the accompanying state of mind, plainly, must be orientated in some way to the proscribed consequence of the act; namely the setting on fire. If the actor, holding a lighted match to a bundle of dry grass set beside a wooden house, long enough to set the grass alight, desired the consequence that the house be set on fire, or foresaw that consequence as a certainty, clearly his act would have been done with required blameworthy or culpable intention, that is "wilfully", in relation to that result.

But desire of the consequence, or foresight of it as a certainty, are not the only states of mind accompanying the intentional act which make the intention blameworthy in the context of arson. In *Reg. v. Hodgson* 1985 Tas.R. 75 when directing the jury I placed too narrow an interpretation upon the word "wilfully". Windeyer J.'s apt and elegant metaphor of the palimpsest is applicable here (see *Vallance's Case* (*supra*, at p.76)); and also *Murray v. The Queen* [1962] Tas.S.R. 170, per Burbury C.J. at p.172, and *Reg. v. Hodgson* (*supra*, per Cox J. at p.104)). The precise application of the word "wilfully" in a criminal setting depends upon the context, so we can legitimately in the case of this ancient crime look for guidance to legal history and the relevant law in other jurisdictions.

Professor Kenny, in relation to arson as a common law felony and the statutory extensions of it writes:

"In early English law attacks upon property which were not made for purposes of gain to the offender but which were inspired by feelings of vindictiveness, or even by a reckless impulse to do damage, were almost entirely left to be remedied by the civil action of trespass. So that, at common law, the only kind of damage to property to rank as a criminal offence was arson, which consisted of the wilful and malicious burning of a dwelling-house. This crime was extended by early statutes to the burning of other buildings and things, and thereafter the legislature by a series of enactments steadily widened the protection which the criminal law would give to property of a great variety of kinds. During this development the draftsmen of the statutes in question formed the practice of describing the criminal damage mostly as having been done 'unlawfully and maliciously', but sometimes 'wilfully or maliciously'. It is necessary therefore, if possible, to ascertain what precise meaning is to be attached to these words." — *Kenny's Outlines of Criminal Law*, 19th edn., ed. Turner, p.239.

And later in the same work, in explanation of the term, "maliciously":

"Burning a house by negligence is no crime. Even the fact that this negligence occurred in the course of the commission of a felonious act will not suffice to render the consequent burning-down indictable as an arson. For in any statutory definition of a crime, 'malice' must, as we have already seen, be taken, not in its vague common-law sense as 'wickedness' in general, but as requiring an actual intention to do the particular kind of harm that in fact was done (or a recklessness as to doing it). Consequently, if a criminal, when engaged in committing some burglary or other felony, negligently sets fire to a house, he usually will not be guilty of arson. He would, however, be so in those rarer cases where the original crime he was engaged in was itself an act of burning, such as he would know to be likely to result in producing an arson; for he had foreseen the possibility.

. . . .

For if a man mischievously tries to burn some chattels inside a house, and sets fire to the house thereby, this is not an arson of the *house* if (as will, of course, rarely be the case) it appears from the evidence that he neither intended nor foresaw the possibility of the house's catching fire. For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so. The cases emphasise that this test of liability is subjective." (*Ibid.*, pars. 200-207).

As illustrative of these passages, *Reg. v. Child* [1871] L.R. 1 C.C.R. 307; *Reg. v. Nattrass* (1882) 15 Cox C.C. 73; *Reg. v. Batstone* (1864) 10 Cox C.C. 20; and *Reg. v. Harris & Atkins* (1882) 15 Cox C.C. 75, are cited.

The law as to arson remained so in England in relation to reckless conduct until the *Criminal Damage Act* 1971 was passed, in response to a Law Commission Report (Law Commission, Report on Offences of Damage to Property, Law Com. No. 29 of 1970; see Glanville Williams, *Textbook of Criminal Law*, 2nd edn., p.908; Smith and Hogan, *Criminal Law*, 5th edn., p.649). That is to say, under ss. 2 and 3 of the *Malicious Damage Act* 1861, unlawfully and maliciously setting fire to a house, stable, office or shop, and a number of other named buildings and structures which would ordinarily come within the scope of our crime of arson was a felony. *Reg. v. Cunningham* [1957] 2 Q.B. 396 authoritatively re-stated the law as to the states of mind essential to commission of this and similar crimes in which malice was an ingredient in the following terms:

"We have considered those cases, and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C. S. Kenny in the first edition of his *Outlines of Criminal Law* published in 1902 and repeated at p.186 of the 16th edition edited by Mr. J. W. Cecil Turner and published in 1952: 'In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured.' The same principle [said the Court of Appeal] is repeated by Mr. Turner in his 10th edition of *Russell on Crime* at p.1592.

We think that this is an accurate statement of the law. It derives some support from the judgments of Lord Coleridge C.J. and Blackburn J. in *Pemberton's* case, L.R. 2 C.C.R. 119, 122. In our opinion the word 'maliciously' in a statutory crime postulates foresight of consequence." (*Ibid.*, pp. 399-400).

The 1971 Act created offences of simple damage to property and dangerous (i.e. endangering the life of another or being reckless as to whether the life of another would be thereby endangered) damage to property, and provided that an offence committed under either provision by destroying or damaging property by fire should be charged as arson. Therefore, under that Act there is now simple arson and dangerous arson. Later, in *Reg. v. Caldwell* [1982] A.C. 341, [1981]

1 All E.R. 961, the House of Lords by a majority held that the statutory definition of recklessness there is to be interpreted more broadly than the traditional concept of sentient recklessness, as per *Reg. v. Cunningham* (*supra*), and includes conduct which in fact creates an obvious risk that property will be destroyed or damaged and the actor either gives no thought to the possibility of there being any such risk, or has recognised that there was some risk involved but has nonetheless gone on to do it — see Smith and Hogan, *op.cit.*, p.634. The state of the law in Tasmania does not require us to consider these refinements.

The applicable law for us is that recklessness of the kind described in *Reg. v. Cunningham* (*supra*) is conduct which satisfies in respect of arson the meaning of "wilfully" in s.267(3). We are not, of course, troubled with any reference in the *Criminal Code* to the concept of malice, nor with the old law of *mens rea*. Instead, we have the s.13(1) "act", which in this case must be done wilfully to constitute a crime. The point of considering the line of authority in the United Kingdom is that it is consistent with the proposition that the blameworthy intention required by s.267(3) is to be regarded as satisfied by recklessly incurring the risk of setting property on fire. This interpretation of "wilfully" in s.267(3) is strongly supported by the fact that, as study of the collection of relevant statutory provisions concerning arson in other jurisdictions, cited to us by learned counsel for the appellant, Mr. Kable, shows (*viz.* Victoria, *Crimes Act* 1958, s.197; New South Wales, *Crimes Act* 1900, ss. 5, 194, 198; Queensland, *Criminal Code*, s.461, *Reg. v. Lockwood, ex p. Attorney-General* [1981] Qd.R. 209; Canada, *Criminal Code*, s.386(1); New Zealand, *Crimes Act* 1961, s.293(1)), inclusion in those provisions of reckless conduct within the *Cunningham* description is uniform.

The main ground of appeal therefore fails; but for the reasons stated by Wright J., with which I agree, I would allow the appeal and order a re-trial, on the ground related to the *Evidence Act* 1910, s.81B.

NETTLEFOLD J.: I have read the discussion by Neasey J. in his draft reasons in this matter of the meaning of the word "wilfully" in the *Criminal Code*, s.267(3). With respect, subject to one exception, I agree with the views he has expressed. The exception is that I adhere to what I said in *Reg. v. Hodgson* 1985 Tas.R. 75 concerning the meaning of the phrase in s.267(3) "an act causing injury to property".

In relation to the second ground of appeal I agree with the reasons for judgment prepared by Wright J.

The appeal should be allowed, the conviction quashed and there should be an order for a new trial.

UNDERWOOD J.: The appellant was convicted of one count of arson contrary to the *Criminal Code*, s.268. An appeal against conviction came on for hearing before a bench of three judges. The notice of appeal was then amended by adding a new ground which could only succeed if the appellant established that *Reg. v. Hodgson* 1985 Tas.R. 75 had been wrongly decided. The hearing of the appeal was adjourned for determination by a court constituted by five judges.

The amended ground requires a consideration of the doctrine of *stare decisis* and its application to this court. It is widely accepted that an intermediate appellate court has the power to overrule one of its decisions but the circumstances in which that power will be exercised differs from jurisdiction to jurisdiction.

In *Young v. Bristol Aeroplane Co. Ltd.* [1944] 1 K.B. 718 the following passage appears at p. 729 in the joint judgment of six judges of the Court of Appeal:

"On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*."

Subsequently, several unsuccessful attempts were made by the English Court of Appeal to escape these self-imposed fetters. In *Gallie v. Lee* [1969] 2 Ch. 17 Lord Denning M.R. dissented from the other two members of the court when he said at p.37:

"We are, of course, bound by the decisions of the House, but I do not think we are bound by prior decisions of our own, or at any rate, not absolutely bound. We are not fettered as it was once thought. It was a self-imposed limitation: and we who imposed it can also remove it. The House of Lords have done it. So why should not we do likewise? We should be just as free, no more and no less, to depart from a prior precedent of our own, as in like case is the House of Lords or a judge of first instance. It is very, very rarely that we will go against a previous decision of our own, but if it is clearly shown to be erroneous, we should be able to put it right."

See also *Farrell v. Alexander* [1976] Q.B. 345 and the judgment of Lord Russell of Killowen on appeal, [1977] A.C. 59, at pp. 104. 105.

Notwithstanding Lord Denning's vigorous dissent, the views expressed by the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.* (*supra*) have prevailed although a move to slightly extend the occasions on which the English Court of Appeal will decline to follow its own decisions can perhaps be discerned in *Williams v. Fawcett* [1985] 1 W.L.R. 501, [1985] 1 All E.R. 787. In that case the court held that it could overrule a prior decision in an exceptional case where there was demonstrable manifest error. The court relied upon a passage in the judgment in *Young v. Bristol Aeroplane Co. Ltd.* (*supra*, at p. 729) which left open the category of cases that could be described as having been decided *per incuriam* and the following passage from the judgment of the court in *Morelle Ltd. v. Wakeling* [1955] 2 Q.B. 379, at p. 406:

"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence."

Donaldson M.R. (with whose judgment the other members of the court agreed), having found the existence of manifest error in the judgment sought to be impugned, said at p.795:

"I remind myself of the dangers of treating a decision as given *per incuriam* on the ground that it can be demonstrated to be wrong, even if the error is fairly clear on an examination of the authorities."

Relaxation of the doctrine of *stare decisis* as expounded in *Young v. Bristol Aeroplane Co. Ltd.* [1944] 1 K.B. 718 was not further advanced by Donaldson M.R. two years later in his judgment in *Duke v. Reliance Systems Ltd.* [1988] Q.B. 108, [1987] 2 All E.R. 858, when he said at p.113 (Q.B.), p.860 (All E.R.):

"I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that, had the court had this material it *must* have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it *might* have reached a different conclusion."

However, it appears that in England a different approach to the doctrine of *stare decisis* has been taken by the Court of Criminal Appeal. In *R. v. Taylor* [1950] 2 K.B. 368, Lord Goddard C.J. delivering the judgment of a court comprising seven judges said, at p.371, after referring to the rule of *stare decisis* in the Court of Appeal in its civil division:

"This court, however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of the court to reconsider the early decision with a view to seeing whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present and in this particular instance the full court of seven judges is unanimously of opinion that the decision of *Rex v. Treanor* 27 Crim. A.R. 35 was wrong for a reason which I will indicate in a moment."

This proposition was subsequently adopted by the Court of Criminal Appeal in *Reg. v. Gould* [1968] 2 Q.B. 65, [1968] 1 All E.R. 849 where Lord Diplock said at pp. 68, 69 (Q.B.), p.851 (All E.R.):

"In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If on due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court, or its predecessor the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718, as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case (*Rex v. Taylor* [1950] 2 K.B. 368)."

In *Bridges v. Bridges and Hooper* (1945) 45 S.R. (N.S.W.) 164, the New South Wales Court of Appeal declined to follow *Young v. Bristol Aeroplane Co. Ltd.* (*supra*), Davidson J. said at p.172:

"I recognise that a considered judgment of the Full Court should not be lightly disregarded; but there is no principle in force in New South Wales which constrains us, as the Court of Appeal has recently held itself to be constrained in England (*Young v. Bristol Aeroplane Co. Ltd.*) to follow an earlier decision if we are satisfied that it is wrong; and I do not think that we should tie our hands by the introduction of such a principle."

That approach has been subsequently endorsed by the New South Wales Court of Appeal on several occasions. See for example *Proctor v. Jetway Aviation Pty. Ltd.* [1984] 1 N.S.W.L.R. 166, at p.171; *Connor v. Sankey* [1976] 2 N.S.W.L.R. 570, at pp. 588, 618, 629. In *Bennett and Wood Ltd. v. Council of the City of Orange* (1967) 67 S.R. (N.S.W.) 426 Walsh J.A. said at p.432:

"Unless it appears to me that the decision was manifestly wrong, I am of opinion that I should follow it without making an independent examination of its correctness."

Wallace and Holmes J.J.A. disagreed and declined to be constrained by the need for proof that an earlier decision was manifestly or demonstrably wrong.

In *Reg. v. Johns* [1978] 2 N.S.W.L.R. 259 Street C.J. affirmed the correctness of the earlier New South Wales decisions, cited the dissenting judgment of Lord Denning M.R. in *Gallie v. Lee* [1969] 2 Ch. 17, and said at p.262:

"The approach taken by Jordan C.J. in *Bridges v. Bridges* is that which is appropriate to be applied in the Court of Criminal Appeal. This approach is in line with the conclusion of the majority in *Bennett and Wood Ltd. v. Orange City Council* that an earlier decision should not be allowed to stand where justice seems to require otherwise. It is in line, also, with the conclusion reached by Lord Denning in *Gallie v. Lee* and with the conclusion which Salmon L.J. would have liked to have been free to reach in the same case. It should, perhaps, be added that the freedom of the Court of Criminal Appeal to regard itself as not bound by its earlier decisions was assumed, without question, in two comparatively recent decisions: *R. v. Sperotto* (1970) 71 S.R. (N.S.W.) 334 and *R. v. Rawcliffe* [1977] 1 N.S.W.L.R. 219."

It should be noted however that the New South Wales Appellate Courts have adopted a policy that the court will not review its own considered decisions in the absence of cogent reasons and without leave. A case for review must be made out. See *Neptune Oil Co. Pty. Ltd. v. Fowler* (1963) 80 W.N. (N.S.W.) 971, at p.975; *Richardson v. Mayer* (1964) 64 S.R. (N.S.W.) 502, at p. 507; *Rankin v. Baldi* [1985] 1 N.S.W.L.R. 274.

In South Australia the conservative approach adopted by Walsh J.A. in *Bennett & Wood Ltd. v. Council of City of Orange* (1967) 67 S.R. (N.S.W.) 426 was taken by Hogarth J. in *Reg. v. White* [1967] S.A.S.R. 184, at p.201. His Honour maintained that approach in *Reg. v. Barnes* (1979) 20 S.A.S.R. 1 and drew no distinction between the function of the Full Court and the Court of Criminal Appeal on this question. In the same case at p.9, Wells J. considered that the Court of Criminal Appeal must be satisfied that its earlier decision was "plainly wrong"

before it could refuse to follow that decision. In *Jenerce Pty. Ltd. v. Pope* (1971) 1 S.A.S.R. 204 Bray C.J. said that it was unnecessary to consider the question in the circumstances of the case but Mitchell J. said at p.214:

"I would respectfully adopt the approach of Walsh J.A. (as he then was) in *Bennett & Wood Ltd. v. Orange City Council* that 'unless it appears to me that that decision was manifestly wrong, I am of opinion that I should follow it without making an independent examination of its correctness.'"

A more flexible approach has apparently long been adopted by the Full Court of Victoria by reserving to itself the right to reconsider prior decisions in what are seen to be appropriate cases. See *Forster v. Forster* [1907] V.L.R. 159; *McKinnon v. Gange* [1910] V.L.R. 32, at p.35.

The Queensland Court of Criminal Appeal comprising Stanley, Mack and Stable JJ. considered the application of the *stare decisis* rule in *Reg. v. Gassman* 1961 Qd.R. 381. Stanley J. said at p. 382:

"I am not prepared to hold at this stage that this court cannot reverse a previous decision of its own interpreting the Criminal Code, when satisfied that such decision is clearly wrong, but such a reversal would clearly be a step of a most unusual kind and not to be made lightly by any three judges. I think this court should only over-rule its previous decisions after proper consideration by a Full Bench of a majority of the judges. If we did otherwise, it is obvious that much confusion might be caused from time to time in the administration of the law, depending on who was the trial judge and who happened to be the judges constituting the Court of Criminal Appeal."

However, in a later case, *Reg. v. Johnson* 1964 Qd.R. 1 his Honour said at p.14:

"I have already intimated my view that this court should not set up a rigid principle that it is bound by its earlier decisions. This principle is not adopted by the English Court of Criminal Appeal. . . . The reversal of a prior decision by a specially constituted court of five or more judges on a matter of exceptional gravity is no cause for alarm."

In *Reg. v. Gassman* (*supra*), Stable J. said at p.387 that, assuming the court had a power to overrule an earlier decision, it should only do so "upon clear satisfaction that the earlier decision was wrong". Mack J. preferred to confine the occasions on which an earlier decision should be overruled to those enunciated by the English Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.* (*supra*). His Honour referred to *R. v. Taylor* [1950] 2 K.B. 368 but declined to follow it noting that it had not been followed in England (cf. *Reg. v. Gould* [1968] 2 Q.B. 65, [1968] 1 All E.R. 849) and drew attention to the provisions of the *Supreme Court Act* 1921 (Qd), s.5.

In *Reg. v. Lockwood, ex p. Attorney-General* [1981] Qd.R. 209 a specially constituted court of five judges overruled a decision of the same court constituted by three judges. No discussion of the doctrine of *stare decisis* appears in the judgments. However it is significant that the provisions of the Queensland *Supreme Court Act* 1921, s.5, differ from the *Criminal Code*, s.400. The former provides that the Court of Criminal Appeal shall consist of three judges unless, in a particular case, the Governor-in-Council on the recommendation of the Chief Justice otherwise orders by Order in Council. The latter provides that the Court of Criminal Appeal is duly constituted if it consists of three or more judges. Subsection (1) also makes provision that, in the circumstances set out in the subsection, it may be duly constituted by only two judges.

In *Bradley v. Armstrong* (1981) 39 A.L.R. 118 the Full Court of the Federal Court was of the opinion that it ought not overrule a prior decision in the absence of exceptional circumstances. The Full Court of the Family Court of Australia in *In the Marriage of Mullane* (1980) 43 F.L.R. 201 held that the court should follow its own decisions unless they were shown to be manifestly wrong or contrary to a decision of another court which the Full Court is bound to follow.

From the foregoing brief survey of decisions in some other jurisdictions there appears common acceptance of the proposition that maintenance of the doctrine of *stare decisis* is essential to the orderly development of the common law but that an intermediate appellate court has the power, exercisable only in compelling circumstances, to overrule a prior decision. There is a considerable divergence of opinion with respect to what constitutes such compelling circumstances.

The question was considered by this court in *Arnol v. The Queen* 1981 Tas.R. 157. The learned Chief Justice held that this court had power to overrule a prior decision and expounded the rationale for the maintenance of the doctrine of *stare decisis*. He said at p.164:

"I do not propose attempting to exhaustively state the circumstances under which it might be appropriate for this court to review its own decisions, but I think that the court would be justified in doing so when the earlier decision is shown to have been arrived at without regard to an applicable statutory provision or binding authority, when the chain of reasoning employed in the earlier decision contains a manifest — as opposed to a merely arguable — contradiction or flaw which vitiates the conclusion reached, or when in the meantime legislation, case law, or other material circumstances have undergone changes which have had the effect of altering the basis upon which the earlier decision was reached. However, it would be wrong for this court to review an earlier authority merely because it preferred a different view of the law than that which was taken in the earlier case."

In my respectful opinion the foregoing passage correctly sets out the law in the State. It is consistent with the maintenance of the rule of *stare decisis* and consistent with the preponderance of judicial opinion in the other jurisdictions I have referred to.

In my opinion it is desirable that this court adopt a rule of practice that leave is necessary before the Court of Criminal Appeal or the Full Court will entertain an argument that an earlier decision of the court should be overruled. The application should be on notice specifying the grounds relied upon and heard by a bench of three judges. If leave is granted the appeal should be referred to a bench of five judges for determination on the merits.

With respect to the present appeal no ground has been made out for this court overruling its decision in *Reg. v. Hodgson* 1985 Tas.R. 75. It was not submitted that the decision was reached *per incuriam* or that there have been material changes to the law since *Reg. v. Hodgson* which vitiate the basis upon which the majority reached its decision. There is nothing to suggest that the *ratio decidendi* is manifestly wrong, or that its application has caused, or is likely to cause, injustice. Counsel for the appellant relied upon *He Kaw Teh v. The Queen* (1984) 157 C.L.R. 523 and other decisions of the High Court handed down since *Reg. v. Hodgson* but there is nothing in any of those decisions to impugn the correctness of the majority decision in *Reg. v. Hodgson*.

Accordingly, the first ground of appeal fails.

With respect to the second ground of appeal relating to the learned trial judge's failure to admit the appellant's statement of 22 September 1987 into evidence I have had the advantage of reading in draft the reasons for judgment of Wright J. I agree with those reasons and his conclusion that, on this ground, the appeal should be allowed, the conviction quashed and a new trial ordered.

WRIGHT J.: The first ground of appeal seeks to challenge the correctness of the decision of this Court in *Reg. v. Hodgson* 1985 Tas.R. 75.

Whilst it is plain that the Court of Criminal Appeal in Tasmania has no existing rule of practice of the kind recognised by the High Court in *Evda Nominees Pty. Ltd. v. Victoria* (1984) 154 C.L.R. 311 requiring the leave of the Court to challenge a previous case, there is nonetheless a threshold problem that the appellant must overcome before this Court will embark on a re-examination of one of its earlier

decisions. Merely because the Court is now constituted by five judges rather than the normal three, does not mean that its decision will have any greater authority in a legal sense than a Bench comprised of three judges but sometimes the convening of a five member court has been seen, in itself, as a sufficient reason for reconsidering an earlier decision (e.g. *Reg. v. Lockwood, ex p. Attorney-General* [1981] Qd.R. 209, at p.209 per Lucas A.C.J., and *Sola Optical Aust. Pty. Ltd. v. Mills* (1987) 46 S.A.S.R. 364, at p.377 per White J., and *R. v. Bonner* [1957] V.R. 227). However this is a view which I think is hard to justify. From a practical point of view, of course, the difficulties inherent in a bench of three judges overruling a decision of a court similarly constituted which were adverted to in *Reg. v. Gassman* 1961 Qd.R. 381 by Stanley J. at p.382 and Mack J. at p.383, would be avoided by a decision of the Court in which a majority of the judges in the State have participated. But it seems to me that there is a serious matter of principle which prevents any court, however constituted, from embarking on a review of an earlier case without compelling reason.

The central problem in adopting this course arises from the application of the principle of *stare decisis*. Whilst this Court is not absolutely bound by previous decisions of the same Court (see *Arnol v. The Queen* 1981 Tas.R. 157, at p.161 per Green C.J.), it is so bound unless and until an earlier decision is specifically overruled, either directly or as a result of necessary implication by a later decision. As Green C.J. said in *Arnol v. The Queen* at p.162:

"The real question is under what circumstances should the power be exercised? There are two strong and obvious reasons why its exercise should be regarded as exceptional. First, the doctrine of precedent is entrenched as a fundamental characteristic of our legal system. Secondly, the need for certainty and predictability in a legal system is not derived merely from considerations of convenience. The *raison d'être* of any value system, including in particular a legal system, is that it is capable of guiding human conduct. A legal system which contains rules which cannot be ascertained because they are frequently changed, or which is such that rational predictions cannot be made as to the law which a court will apply to a particular situation, loses that capacity and thus destroys its foundations. But nevertheless, although they might be exceptional, there are occasions when other considerations must prevail."

I respectfully agree with these views.

In the absence of a special reason of the kind mentioned in the following paragraph which of itself may justify a re-examination of an earlier case, the burden that an appellant assumes in attacking a previous decision is to demonstrate that it is plainly or manifestly

wrong. This, in substance, was the view expressed by Green C.J. and Cosgrove J. in *Arnol v. The Queen* (*supra*) and it is a view which I respectfully share. It also seems to be the predominant view taken by the judges of appellate courts in other Australian States. See for example *Gassman v. The Queen* 1961 Qd.R. 38, (*supra*); *Nguyen v. Nguyen* (Unreported, Supme. Ct. of Qd., 24/11/88); *Reg. v. White* [1967] S.A.S.R. 184; *Reg. v. Barnes* (1978) 20 S.A.S.R. 1; *Reg. v. Rawcliffe* [1977] 1 N.S.W.L.R. 219 and *Flanagan v. H. C. Buckman & Son Pty. Ltd.* [1972] 2 N.S.W.L.R. 761. It is consistent with the English decisions reviewed by C. K. Allen, *Law in the Making*, 7th edn., ch. IV, and accords, I think, with the provisional opinions in the New Zealand Court of Appeal expressed by Cooke P. and McMullin J. in *Arataki Properties Ltd. v. Craig* [1986] 2 N.Z.L.R. 294, at p.298, 299 respectively. A similar view has also been taken by Bowen C.J. and Foster J. in the Federal Court (see *Chamberlain v. The Queen* (1983) 72 F.L.R. 1, at pp. 8, 9, 46 A.L.R. 493, at p.498). The High Court of Australia as the ultimate court of appeal in this country understandably adopts a somewhat more flexible approach. See *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd.* (1952) 85 C.L.R. 237, at p.243 per Dixon J., and *John v. Commissioner of Taxation* (1989) 63 A.L.J.R. 166, 83 A.L.R. 606.

Whilst the categories of cases in which a later court may overrule an earlier decision are not closed, it seems to me that unless the first ground in the present appeal succeeds on the basis that *Reg. v. Hodgson* 1985 Tas.R. 75 is shown to be clearly wrong, the present matter falls into none of the previously recognised categories acknowledged by earlier cases as in themselves warranting a review of the law. It has not been suggested that the decision in *Reg. v. Hodgson* was pronounced *per incuriam* in that a binding authority of a superior court or a relevant statutory provision was overlooked or ignored. It is not suggested that there are decisions of other Australian appellate courts, or of this Court, with which *Reg. v. Hodgson* is in conflict. It is not suggested that *Reg. v. Hodgson* has caused difficulties or injustices in the administration of the criminal law or has given rise to undesirable practices.

True it may be that the majority of the court in *Reg. v. Hodgson* (*supra*), comprising Nettlefold and Cox JJ., assigned differing reasons for the ultimate conclusion to which they both came. Nonetheless, the decision of the Court is plain and its effect is that the provisions of the *Criminal Code* require proof by the Crown in a case of arson that the accused either intended to cause damage by fire to property or, being aware of the likelihood of such result, nonetheless in reckless disregard thereof ignited the fire which caused the damage. The consequence of this decision is that the law in Tasmania as to arson is interpreted identically to or very similarly to comparable laws in

other States and Territories. Although it was submitted by the appellant that Nettlefold J. was not correct when he advanced this as a reason in itself for interpreting "wilful" in the way which he did in *Reg. v. Hodgson (supra)*, it is, I think, a powerful consideration for this Court to have in mind when it considers whether or not it will undertake a review of that decision.

I turn now to consider whether *Reg. v. Hodgson* 1985 Tas.R. 75 has been shown to be manifestly incorrect. It was suggested by the Crown that, in any event, this case is an inappropriate vehicle for undertaking such an exercise because in the present case the real issue for the jury was the identity of the arsonist and not whether arson had been committed. It is true that this was how the case finally reached the jury, but of course by that time it was plain to all that the trial judge, bound as he was to follow *Reg. v. Hodgson (supra)*, would not be directing the jury in terms which would permit an acquittal if recklessness rather than specific intent to damage property was the sole mental ingredient established by the evidence. I am therefore unable to say that this submission by the Crown is entitled to any weight. If *Reg. v. Hodgson (supra)* were to be overruled and the case goes for retrial it is easy to see that the emphasis by the defence could well shift, at least in part, to the mental element of the alleged crime.

Has the appellant shown that there are demonstrable flaws in the logic, methodology or conclusions of the judges forming the majority in *Reg. v. Hodgson (supra)* which so fundamentally affect the decision as to enable this Court to say it was manifestly erroneous? It is legitimate, I think, in pursuing this enquiry to consider the Crown submission that Cosgrove J. who was the dissenting judge used as the basis for his dissent the assumption that as "wilful" was provided as a specific ingredient by the *Criminal Code*, s.267(3), this must of necessity add something to the requisite state of mind of the accused which was not provided by s.13. The Crown submitted in effect that in making this assumption Cosgrove J. fell into error which vitiated his conclusions. Without, I think, needing to reach a firm conclusion on this submission it is sufficient for me to say that it is an argument which *prima facie* has merit and derives a certain amount of support from the way in which the majority of the High Court approached the construction of the *Customs Act* 1901 (Cth.), s.229(1)(i), in *Murphy v. Farmer* (1988) 165 C.L.R. 19, 62 A.L.J.R. 420 to which counsel for the appellant made reference. In construing the phrase "false or wilfully misleading" as meaning "purposely or deliberately or intentionally untrue or wilfully misleading" (see p.424) the High Court has come close to recognizing that, as Lord Simon of Glaisdale said in *Farrell v. Alexander* [1977] A.C. 59, at p.87, "a tautology, unlike a contradiction does not necessarily call for any modification of meaning".

Consequently it cannot be said that the dissenting judgment in *Reg. v. Hodgson (supra)* is obviously correct. Conversely, having read them with some care, I cannot say that the majority judgments are plainly incorrect, either because of patent flaws in their formation or for the more general reason submitted by Mr. Kable that since *Reg. v. Hodgson (supra)* the High Court has adopted a much stricter approach to the construction of penal provisions resulting in criminal liability of the subject. He referred specifically to *Murphy v. Farmer (supra)*, *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 and *Bouhey v. The Queen* (1986) 161 C.L.R. 10. This latter submission is one which I cannot accept, as it seems to me that all the High Court has been doing in the cases cited, is re-affirming or re-enunciating well entrenched principles. Therefore, without expressing my reasons at length and without foreclosing the possibility that after more detailed and persuasive argument on a subsequent occasion I may be compelled to a contrary view, I think it appropriate to say that, at the present time, I am of the view that the decision in *Reg. v. Hodgson (supra)* was correct and should not be disturbed. It seems to me that whether one follows the Cox J. or Nettlefold J. path to the final conclusion, it is inevitable, unless arson is a crime of specific (or "ulterior") intent, as that term was used by Lord Simon in *D.P.P. v. Morgan* [1976] A.C. 182, at pp.216,217 and by some modern writers (see *Some Simple Thoughts on Intention* [1988] Crim. L.R. 484), that the element of recklessness accompanying the accused's deliberate and allegedly unlawful conduct is sufficient in law to provide the requisite *mens rea*. In my opinion it is not possible to spell out of the requirement that the accused's act causing injury to property (whether that be the purely physical action produced by a muscular contraction or the physical act plus its consequences) be "wilful", a further requirement that a specific intent must be proved before the prosecution can succeed.

I must say I incline to the view that the phrase "an act causing injury to property" suggests that the act contemplated is not the physical act plus its consequences but the physical act alone. I am aided in forming this provisional view (*inter alia*) by a consideration of the very different ways in which the draughtsman of s.267 has expressed himself in subs.(1) and subs.(3). In the former the familiar formula appropriate to crimes of specific intent is used whereas in subs.(3) the word "intent" is completely avoided. I might also add that this view and the view of Cox J. in *Reg. v. Hodgson* 1985 Tas.R. 75 appear to derive support from the discussion by Lord Diplock in *Reg. v. Miller* [1983] 2 A.C. 161, [1983] 1 All. E.R. 978 in which his Lordship exposes the various pieces of conduct which may be accompanied by varying states of mind from the commencement to the completion of a "result" crime such as arson any of which pieces of conduct attract criminal liability for that crime if accompanied by the requisite state of mind and if fairly regarded as causative of the proscribed result.

However, I am able to resolve this appeal on another ground and do not find it essential to make a firm pronouncement upon this aspect of the case but, before leaving the subject, there are two additional matters which I wish to mention. Firstly, I am of the view that when fundamental questions of liability, either in criminal or civil matters, arise for determination it is a very sound practice to have such questions considered by a court of five judges. So far as I am aware this is the first time that such a course has been taken in Tasmania. Secondly, irrespective of the number of judges constituting the appellate court, it is my opinion that any parties desiring to have an earlier decision of the Full Court or the Court of Criminal Appeal overruled should apply for and be granted leave to advance argument for this purpose before being heard further on the question. I recognise that this proposal may not receive universal support, but it seems to me that there are sound practical reasons for requiring this procedure to be followed. If a rule of this kind is not applied it becomes incumbent upon any court hearing argument on the correctness of an earlier case on a ground essential to its decision, to hear full submissions and itself fully analyse the judgment in question before it can say whether that judgment is plainly erroneous or not. This is not a function which a court should be required to perform on every occasion that counsel sees fit to challenge a precedent of *prima facie* binding authority. If sound reasons exist for reviewing such a decision counsel should be able to articulate those reasons and demonstrate the need for a review to the court hearing a preliminary application. Since preparing these reasons I have had the advantage of reading the proposals by the Chief Justice as to the appropriate method of dealing with future appeals in which a previous decision of the court is challenged and, as the Chief Justice has already mentioned, I agree with those proposals.

I turn now to consider the second ground of appeal which is in the following terms:

"The learned trial judge erred in law in failing to admit into evidence pursuant to Section 81B of the Evidence Act 1910, the Applicant's written statement of 22nd September 1987."

During the course of the appellant's evidence at the trial an attempt was made to introduce into evidence a previous statement which she had made relative to the facts in issue at the trial and tending to establish the existence of those facts. This statement, according to her evidence, had been made within four days of her arrest by police. Also, according to her evidence, the statement was made at the suggestion of her solicitor when she first consulted him. He told her to go home and make a statement "whilst it was still fresh in my mind". She obeyed this direction and prepared the document entirely on her own without the aid or assistance of anyone else. When it was completed she had it witnessed by a Justice of the Peace.

The appellant sought to tender this document under the provisions of the *Evidence Act* 1910, s.81B. A *voire dire* was held in the absence of the jury to examine its admissibility. The appellant then gave the evidence to the trial judge which I have set out in compendious form above. She was cross-examined by Crown counsel and was asked (*inter alia*) whether during the period between leaving police custody and making the statement she had spoken to other people about the matters which had occurred. She agreed that she had spoken to several people about these events. It was not put to her that in consequence of her doing so the freshness of her recollection of events had been impaired or tarnished. To my mind it would be most surprising if such a consequence should result from the mere circumstance that some or all of the day's events had been retold to others, particularly if, as here, none of them had been participants in the events in question and therefore unlikely to deliberately or inadvertently cloud the speaker's mind with a contradictory recollection. Nonetheless, in the course of ruling on the appellant's application, the learned trial judge said:

"Well I'm of the opinion that s.81B does not avail the accused in the circumstances of this case in presenting this document as an exhibit. In my view the crucial aspect of s.81B is that the Court has to be satisfied that at the time of the preparation of the document, the facts and representations — or the facts rather, about which representations were made were fresh in the memory of the witness, and I'm not satisfied that that is the case in this — in the circumstances of this particular case. I'm not satisfied about that for a number of reasons. One is that a number of days had gone by. Secondly, there has been evidence of discussions with other people. And that the fact that the passage of time, the discussions with other people and the very predicament in which the accused was, all raise the possibility, indeed, it may be categorised as more than a possibility that the representations made on that Tuesday were not truly the products of fresh memory but may have been affected by innocent or conceivably by deliberate reconstruction on her part. I do not regard, in the circumstances, in this case, the evidence as establishing that the representation was made at a time when the facts stated in the document were fresh in her memory. For that reason I rule that s.81B does not avail her."

In *J. v. The Queen* 1989 Tas.R. ??, at p.???, the Court of Criminal Appeal, in discussing the admissibility of evidence under s.81B, said:

"But the representations should not have been admitted unless the learned trial judge was also satisfied that the representations were 'made at a time when the facts stated in

the document were fresh in the memory of the witness'. Facts will only be 'fresh in the memory' if the capacity to recall them remains substantially unaffected by the passage of time or by the occurrence of intervening events. No evidence other than the production of the document itself was led on this question.

. . .

It was submitted by Crown counsel that 'fresh' in this context was not synonymous with 'recent' or 'new', but was more appropriately to be equated with 'clear'. On this basis, it was argued, a witness could have a fresh memory of an event which had occurred a substantial time previously provided it was of sufficient moment to be etched indelibly within his or her recollection. In our opinion this submission is untenable or, at least, is untenable in respect of any case in which it appears that a significant time has elapsed since the occurrence of the relevant events unless the witness in question is able to positively and affirmatively satisfy the trial judge that notwithstanding the effluxion of time there are special circumstances which enable his or her memory of the events to be characterized as 'fresh'. In our view the primary meaning of 'fresh' in the context of s.81B(1)(c)(i) is 'new' or 'recent'. It thus has a plain temporal connotation and *prima facie* any memory which is derived from events occurring weeks or months before could not normally be characterized as 'fresh'."

When one examines the reasons of his Honour the trial judge in light of these principles it becomes clear in my opinion that his rejection of the appellant's document cannot be supported. I have reached this conclusion for the following reasons.

Firstly the passage of four days only since the occurrence of the relevant events could not reasonably have been regarded as a factor entailing any real possibility that the appellant's memory of those events had ceased to be fresh simply because of the effluxion of time. They were significant events in her life and in my view would almost certainly have impressed themselves upon her mind. Her consequent distress would not in my opinion be likely to confuse or dull her ability to recall those events to any substantial extent; it may even be argued that this emotion would have served rather to enhance the clarity of her memory. Secondly, as I have already said, mere repetition of those events is not *per se* a sound basis for concluding that there was any real prospect that such a process would corrupt the appellant's memory. Thirdly, it is, of course, irrelevant for present purposes to consider whether or not the appellant may have dishonestly misrepresented her true memory in the subject document, yet it is plain that his Honour strayed into this area by referring as he did to possible "deliberate

reconstruction". In my opinion the prospect of deliberate falsehood by the maker of the document was an issue for the jury only and should not have intruded into his Honour's consideration of its admissibility. Fourthly, his Honour made no adverse finding on the appellant's credibility in relation to the evidence which she gave on the *voire dire*. Indeed he appears to have accepted and acted upon that evidence.

It seems to me that although the appellant had the obligation to satisfy his Honour as to the freshness of her memory at the time she compiled the subject document, there was nothing in the evidence which she gave on the *voire dire* (and hers was the only evidence) which could reasonably have suggested that her memory was other than fresh. As I have said it was not put to the appellant that her recollection of events had become corrupted by conversations she had had with other people.

By relying on this possibility as a foundation for failing to be satisfied that her memory was fresh at the relevant time, I think that his Honour was in error. On the material before him he should have been satisfied that the document was admissible. It seems to me that this is a case where his Honour having failed to impugn the appellant's credit and having before him uncontroverted facts, this Court is at no disadvantage in assessing the evidence and drawing its own inferences therefrom (see *Voulis v. Kozary* (1975) 50 A.L.J.R. 59, 7 A.L.R. 126). Accordingly, I have little hesitation in saying that the only proper finding on the evidence was that the document came into existence at a time when the matters as to which representations were made therein were fresh in the memory of the appellant.

Many of the arguments raised by the Crown in support of his Honour's ruling were related to the weight of this evidence rather than its admissibility. Weight of course is for the jury. In my view the rejection of this document was an error which vitiated the trial and resulted therefore in a miscarriage of justice. In my opinion where evidence of this kind has been excluded from the jury's consideration there is no room for the application of the proviso. The appeal should be allowed and there should be a retrial.

Appeal allowed. Conviction and sentence quashed. New trial.

Attorneys for the appellant: *Zeeman, Kable & Page.*

A.G.M.