Braslin v Tasmania **[2011] TASCCA 14 (13 October 2011) – Court of Criminal Appeal of Tasmania**

'Admission of guilt' – 'Arson' – 'Circumstantial evidence' – 'Directions and warnings for/to jury' – 'Physical violence and harm' – 'Risk factor - separation'

Charge: Arson

Appeal type: Appeal against conviction

Facts: The appellant was tried by jury and found guilty of arson purely on the basis of circumstantial evidence. It was alleged that he unlawfully set fire to the house of his former female partner. She gave evidence that the night before the fire the appellant slept over at her place. She and the appellant argued the next morning as she was leaving the property. He called her a 'leg-opening slut' and said that if she left he was going to burn the house down. She left and not long after received a phone call from the appellant who asked whether she was 'warm enough'. She returned home to find the house on fire. Evidence was also given by a neighbour that he heard the appellant and his former partner arguing that morning for 10 minutes. He ignored the argument and did not claim to have seen the appellant on the morning of the fire.

Before trial, the appellant pleaded guilty to breaching a family violence order on the day of the fire by approaching his former partner and calling her a 'leg-opening cunt'. The Crown alleged that this amounted to an admission of guilt. At trial, the appellant asserted that he did not realise the significance of this date and that he had used those words but not on the day of the fire. The appellant's younger sister provided the appellant with an alibi. She said he was asleep at their mother's place on the morning of the fire.

Issues: Some of the grounds of appeal were:

1. Whether the trial judge failed to correct the prosecution's lack of adherence to the 'rule' in *Browne v Dunn.*
2. Whether the trial judge failed to give an adequate warning in relation to the neighbour's voice identification evidence.

Decision and Reasoning: The appeal was upheld and the conviction set aside.

1. 'In the context of a criminal trial, the "rule" in *Browne v Dunn* (1893) 6 R 67 requires defence counsel to put to a Crown witness in cross-examination the case upon which the accused proposes to rely, to the extent that it is proposed to contradict the evidence of the Crown witness. Similarly, if it is proposed, as part of the defence case, to lead evidence of a fact which, if true, would be within the knowledge of a Crown witness, it is usually expected, at least in this State, that defence counsel will put that part of the defence case to the Crown witness in cross-examination' ([21]). Here, the Crown did not do this and sought to rely on such evidence in summing up. The trial judge did not correct this mistake in her

directions to the jury and further she incorrectly directed the jury that they should be careful about the appellant's sister's evidence.

2. The direction that the jury had 'to clearly be careful' about the identification evidence from the neighbour fell short of informing the jury that there was a 'special need for caution.' The trial judge said nothing about the reasons for that caution namely, the conviction of innocent persons as a result of mistaken identification by an apparently honest witness ([34]-[35]).