



SUPREME COURT OF CANADA

CITATION: R. v. Tatton, 2015 SCC 33

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BETWEEN:

Her Majesty The Queen

Appellant

and

Paul Francis Tatton

Respondent

- and -

Criminal Lawyers' Association (Ontario)

Intervener

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

REASONS FOR JUDGMENT:

(paras. 1 to 65)

Moldaver J. (McLachlin C.J. and Abella, Rothstein, Cromwell, Wagner and Gascon JJ. concurring)

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R. v. TATTON

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v.

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Indexed as: R. v. Tatton

2015 SCC 33

File No.: 35866.

2014: December 9; 2015: June 4.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Arson — Defences — Intoxication — Accused relying on self-induced intoxication as excuse for committing arson — Self-induced intoxication short of automatism cannot be relied upon as excuse for general intent offence — Whether arson is general or specific intent offence — If arson is general intent offence, whether trial judge's classification of arson as specific intent offence had material bearing on verdict of acquittal — Criminal Code, R.S.C. 1985, c. C-46, s. 434.

T caused a fire that destroyed the contents of his ex-girlfriend's home. In a highly intoxicated state, he placed a pan with oil on a stove, set the burner to high, and left the house to get a coffee. When he returned approximately 20 minutes later, the house was on fire. T was charged with arson contrary to s. 434 of the *Criminal Code*. At trial, T claimed that the fire was an accident. The trial judge determined that s. 434 was a specific intent offence, meaning that T could rely on self-induced intoxication as a defence. T was acquitted. A majority of the Court of Appeal upheld the acquittal.

Held: The appeal should be allowed, the acquittal set aside and a new trial ordered.

The classification of an offence as one involving general or specific intent has important consequences for the accused because the law does not allow offenders to rely on self-induced intoxication falling short of automatism as an excuse for general intent offences. The analysis of whether an offence is one of general intent or

specific intent must start with a determination of the mental element of the offence. This is an exercise in statutory interpretation and should not be turned into a factual assessment. The next question is whether the crime is one of general or specific intent. Where the jurisprudence has already determined the appropriate classification of the offence in a satisfactory manner, the task is straightforward. Otherwise, there are two main considerations — the importance of the mental element and the social policy underlying the offence.

The importance of the mental element refers to the complexity of the thought and reasoning processes that are required for any given offence. For general intent offences, the mental element simply relates to the performance of the illegal act. Such crimes do not require an intent to bring about certain consequences that are external to the *actus reus*. Nor do they require actual knowledge of certain circumstances or consequences, to the extent that such knowledge is the product of complex thought and reasoning processes. General intent crimes involve such minimal mental acuity that it is difficult to see how intoxication short of automatism could deprive the accused of the low level of intent required. In contrast, specific intent offences involve a heightened mental element. That element may take the form of an ulterior purpose or it may entail actual knowledge of certain circumstances or consequences, where the knowledge is the product of more complex thought and reasoning processes. Alternatively, it may involve intent to bring about certain consequences, if the formation of that intent involves more complex thought and reasoning processes. Because of the more complicated thought and reasoning

processes required for specific intent crimes, one can more readily understand how intoxication short of automatism may negate the required mental element.

When this analysis fails to yield a clear answer, one should turn to policy considerations. In the main, the policy assessment will focus on whether alcohol consumption is habitually associated with the crime in question. If it is, then allowing an accused to rely on intoxication as a defence would seem counterintuitive. But, where self-induced intoxication rarely, if ever, plays a role in the commission of a particular crime, preventing an accused from relying on it makes less sense from a policy perspective. Without setting out a general rule, alcohol habitually plays a role in crimes involving violent or unruly conduct and in crimes involving damage to property. Although there are exceptions to this general proposition, the prevalence of alcohol in these crimes means that there are likely to be strong policy reasons militating against an intoxication-based defence. Other residual policy considerations may also come into play. The presence of a lesser included general intent offence in the main offence may be relevant. The presence of judicial sentencing discretion may also be a factor to consider.

The offence of arson in s. 434 of the *Criminal Code* is a general intent offence for which intoxication falling short of automatism is not available as a defence. The *actus reus* is the damaging of property by fire. The mental element is the intentional or reckless performance of the illegal act. No additional knowledge or purpose is needed. No complex thought or reasoning processes are required. It is

difficult to see how intoxication short of automatism would prevent an accused from foreseeing the risk of causing damage to someone else's property by fire. There is no need to resort to policy considerations to determine the appropriate classification of the offence. Had it been necessary to do so, the same conclusion would have been reached. Damage to property is often associated with alcohol consumption and it would erode the policy underlying the offence of causing damage to property by fire if an accused could rely on self-induced intoxication as a defence.

The criminal act in s. 434 of the *Criminal Code* is the causing of damage to property. The fire is simply the mechanism by which the damage must be caused. In assessing the issue of intent, the trier of fact must consider all of the surrounding circumstances. The manner in which the fire started is likely to be an important consideration. Specifically, was the fire set accidentally, negligently, recklessly, or intentionally? However, the determinative question is not how the fire was started. Rather, the end game involves looking at all of the surrounding circumstances to determine whether it can be inferred that the accused intended to damage someone else's property or was reckless whether damage ensued or not.

In this case, it is apparent that T's intoxication played a material role in the acquittal. In his reasons, the trial judge concentrated on the cause of the fire and he stated that to resolve this issue, he must determine whether T's intoxication could be considered. His decision to acquit was influenced by his erroneous belief that he could take into account T's state of intoxication. A new trial is required because the

trial judge's critical findings of fact were tainted by his belief that self-induced intoxication was relevant to the issue of intent.

Cases Cited

Considered: *R. v. Daviault*, [1994] 3 S.C.R. 63; **referred to:** *R. v. Bernard*, [1988] 2 S.C.R. 833; *Leary v. The Queen*, [1978] 1 S.C.R. 29; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. George*, [1960] S.C.R. 871; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. Swanson* (1989), 48 C.C.C. (3d) 316; *R. v. Hudson* (1993), 88 Man. R. (2d) 150; *R. v. Muma* (1989), 51 C.C.C. (3d) 85; *R. v. Schmidtke* (1985), 19 C.C.C. (3d) 390; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. S.D.D.*, 2002 NFCA 18, 211 Nfld. & P.E.I.R. 157; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609.

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APPEAL from a judgment of the Ontario Court of Appeal (Goudge, Rensburg and Pardu JJ.A.), 2014 ONCA 273, 10 C.R. (7th) 108, 319 O.A.C. 10, [2014] O.J. No. 1683 (QL), 2014 CarswellOnt 4373 (WL Can.), upholding the acquittal on a charge of arson entered by Tausendfreund J. Appeal allowed.

Randy Schwartz, for the appellant.

J. Douglas Grenkie, Q.C., and *William James Webber*, for the respondent.

Anil K. Kapoor and *Lindsay E. Trevelyan*, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of the Court was delivered by

MOLDAVER J. —

I. Introduction

[1] This case requires the Court to determine whether self-induced intoxication is a defence to a charge of arson under s. 434 of the *Criminal Code*, R.S.C. 1985, c. C-46. The charge against the respondent, Mr. Tatton, arose out of a fire that destroyed the contents of his ex-girlfriend's home. The fire began after Mr. Tatton, in a highly intoxicated state, placed a pan with oil on the stove, set the burner to "high", and left the house to get a coffee at a nearby Tim Hortons. When he returned approximately 20 minutes later, the house was on fire.

[2] At trial, Mr. Tatton sought to rely on the defence of accident based on his drunkenness to rebut the intent required for the offence of arson. The trial judge found that he could do so, and a majority of the Court of Appeal agreed. For reasons that follow, I am respectfully of the view that the trial judge and the majority of the Court of Appeal erred. Intoxication short of automatism is not a defence to a charge of arson under s. 434 of the *Code*.

II. Background

[3] In September 2010, Mr. Tatton was living in a guest room at a home owned by his ex-girlfriend, Ms. Spencer. He and Ms. Spencer had broken off their relationship, but Mr. Tatton remained hopeful that they would reconcile.

[4] Mr. Tatton was an alcoholic. He had a tendency to binge drink. There was evidence that in the past he had come home drunk, started to cook food, and then passed out, only to awake to a house filled with smoke. His history with alcoholism included periods of blackouts. He would sometimes have no recollection of events that had transpired while he was under the influence of alcohol.

[5] On September 24, 2010, Ms. Spencer went to Kingston to visit friends. Mr. Tatton was not happy about this and became jealous and upset. He drank heavily throughout the day and evening, consuming approximately 52 ounces of alcohol. Over the course of the evening, he left Ms. Spencer a series of agitated voice messages on her cell phone, two of which referred to her home being on fire. Eventually, Mr. Tatton passed out.

[6] When Mr. Tatton awoke, he decided to cook some bacon. He put some vegetable oil in a pan on the stove and set the temperature to "high". He then drove to a nearby Tim Hortons to get a coffee. When he returned 15-20 minutes later, the house was on fire. Mr. Tatton called 911 from a neighbouring house. The firefighters were able to save the home, but not its contents. The next day, Mr. Tatton left Ms. Spencer a message apologizing for the incident and stating that it was an accident.

[7] The fire investigator determined that the source of the fire was the vegetable oil on the stove. Mr. Tatton was arrested and charged with arson contrary to s. 434 of the *Criminal Code*. That section reads:

434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[8] At trial, Mr. Tatton claimed that the fire was an accident. When he put the oil on the stove, he thought he had set the temperature at “low”. He did not intend or foresee the consequences that resulted from his turning the stove on and leaving it unattended. A central question at trial was whether Mr. Tatton had the requisite intent to commit the offence of arson under s. 434, and more particularly whether the court could take his state of intoxication into account in making its assessment.

[9] The trial judge determined that s. 434 was a specific intent offence, meaning that Mr. Tatton could rely on self-induced intoxication as a defence. In the end, he acquitted Mr. Tatton because he was not convinced beyond a reasonable doubt that Mr. Tatton intentionally or recklessly left the stove on “high”. Given this conclusion, he could not be satisfied that Mr. Tatton intentionally or recklessly damaged the property. A majority of the Court of Appeal for Ontario upheld Mr. Tatton’s acquittal. The third member of the panel would have allowed the appeal and ordered a new trial.

[10] The Crown appeals to this Court as of right. It argues that arson contrary to s. 434 is a general intent offence, meaning that intoxication falling short of automatism cannot be considered. I agree. I further agree that a new trial is required because the trial judge's critical findings of fact were tainted by his belief that self-induced intoxication was relevant to the issue of intent. Accordingly, I would allow the appeal, set aside the verdict of acquittal, and order a new trial.

III. Judicial History

A. *Ontario Superior Court of Justice, No. 10-2091, July 29, 2013 (unreported)*

[11] The only live issue before the trial judge was whether Mr. Tatton had caused the fire intentionally or recklessly. If so, it could be inferred, in the circumstances, that in setting the fire he either intended to cause damage to the contents of the home or was reckless whether damage ensued or not. On the other hand, if the fire started by reason of accident or negligence, then it could not be inferred that Mr. Tatton had one of the intents required to support a conviction under s. 434.

[12] The trial judge found that Mr. Tatton was heavily under the influence of alcohol at the time of the fire. Consequently, he held that it was necessary to determine whether arson was a crime of specific or general intent. The answer to that question would dictate whether Mr. Tatton's intoxication could be considered.

[13] The trial judge concluded that the characterization of s. 434 as either an offence of general or specific intent was fact-driven. In his view, the proper characterization depended on how the fire started. If an accused started a fire with a match and combustible material, the charge of arson would likely be one of general intent. However, if the way in which the fire started was more nuanced, it could be a specific intent offence. On the facts before him, the trial judge found that the offence was one of specific intent, such that Mr. Tatton's state of intoxication could be considered. In the end, he was not "satisfied beyond a reasonable doubt that [Mr. Tatton] left the setting [on the stove] on 'high' either intentionally or recklessly" (transcript, at p. 43). Accordingly, he acquitted Mr. Tatton on the charge of arson.

B. *Court of Appeal for Ontario, 2014 ONCA 273, 319 O.A.C. 10*

[14] The Court of Appeal unanimously rejected the trial judge's conclusion that the characterization of s. 434 as an offence of general or specific intent was fact-driven and dependent on how the fire started. Rather, the court determined — correctly in my view — that the characterization of s. 434 amounted to a question of law. On that question, the court divided.

[15] Writing for the majority, Pardu J.A. characterized arson under s. 434 as a specific intent offence. In her view, s. 434 required a voluntary act, coupled with an awareness of the more distant consequences of that act, and a decision to proceed in the face of those consequences. Justice Pardu noted that many ordinary household activities cause fires; however, they do not lead inevitably to the conclusion that the

person intentionally or recklessly damaged property. Furthermore, there was no basis to conclude that intoxication played a significant role in causing household fires.

[16] Justice Pardu also maintained that if arson were to be characterized as a general intent offence, the *mens rea* for the offence would be objective, not subjective. In her view, the words “intentionally or recklessly” require consideration of an accused’s subjective state of mind, to which intoxication is relevant. Consequently, she found that s. 434 was a specific intent offence, and upheld Mr. Tatton’s acquittal.

[17] In dissent, Goudge J.A. concluded that s. 434 was a general intent offence and that intoxication short of automatism could therefore not be considered. He held that the *mens rea* for s. 434 did not extend beyond the *actus reus*, and that no ulterior purpose was required. He was also of the view that arson is the type of offence that people are apt to commit when intoxicated; therefore, there were good policy reasons for refusing to allow an accused to raise the defence of self-induced intoxication.

[18] Justice Goudge disagreed with the majority that precluding reliance on intoxication transformed the *mens rea* inquiry into an objective one. In his view, the inquiry does not ask if a reasonable person would have foreseen the risk of damage to property; rather, one asks if the particular accused, while sober, would have foreseen the risk. This approach retained the necessary subjective component of the *mens rea*. It followed that arson under s. 434 was not a specific intent offence and that the trial

judge erred in concluding otherwise. Justice Goudge held that the error had a material bearing on the outcome. Hence, he would have ordered a new trial.

IV. Issues

[19] There are two issues on appeal:

1. Is arson contrary to s. 434 a general or specific intent offence?
2. If arson contrary to s. 434 is a general intent offence, did the trial judge's error have a material bearing on the verdict?

V. Analysis

A. *Is Arson Contrary to Section 434 a General or Specific Intent Offence?*

(1) The Classification of General and Specific Intent Offences

[20] The classification of an offence as one involving general or specific intent has important consequences for the accused. The law does not allow offenders to rely on self-induced intoxication falling short of automatism as an excuse for general intent offences: *R. v. Daviault*, [1994] 3 S.C.R. 63, at p. 123; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 865, 878-80.

[21] Although the labels “general intent” and “specific intent” are entrenched in Canadian law, they are not particularly helpful in describing the actual mental element required for a crime: *Daviault*, at p. 123; *Bernard*, at p. 854 (per Dickson C.J., dissenting). The mental element of specific intent crimes is no more “specific”, in the everyday sense of the word, than the mental element of general intent crimes. Rather, as we shall see, the distinction lies in the complexity of the thought and reasoning processes that make up the mental element of a particular offence, and the social policy underlying the offence.

[22] This Court’s decision in *Daviault* is the leading case on the distinction between general and specific intent crimes. Unfortunately, it has not resolved the confusion surrounding this issue. The general/specific intent dichotomy continues to perplex counsel and trial courts alike. It has been criticized as illogical and as leading to “arbitrary and inconsistent results from court to court, offence to offence and jurisdiction to jurisdiction”: G. Ferguson, “The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation” (2012), 57 *S.C.L.R.* (2d) 111, at p. 123. See also T. Quigley, “Specific and General Nonsense?” (1987), 11 *Dal. L.J.* 75; D. Stuart, *Canadian Criminal Law: A Treatise* (5th ed. 2007), at pp. 437-39; M. Manning, Q.C., and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 389; S. H. Berner, “The Defence of Drunkenness — A Reconsideration” (1971), 6 *U.B.C. L. Rev.* 309, at pp. 333-34.

[23] The confusion surrounding the general/specific intent distinction is part of a larger problem that has plagued the Canadian criminal law for decades. Regrettably, the *Criminal Code* often provides no clear direction about the required mental element for a given offence. It is therefore left to judges to attempt to divine the required mental element (also referred to as the degree of fault). As Professor Don Stuart states in *Canadian Criminal Law*, at p. vii:

Our adversary system, which requires cases to be fairly put to impartial judges or juries, and the presumption of innocence, cannot work with legitimacy where there is confusion as to the applicable tests on even basic matters such as the fault requirement

[24] Professor Stuart is not alone in this. He and other academics and law reform bodies have urged that the *Code* be amended to specify the mental element and fault requirement for each crime: see, e.g., Law Reform Commission of Canada, *Report on Recodifying Criminal Law* (1987), at pp. 17, 21-25; Canadian Bar Association's Criminal Recodification Task Force, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), at pp. 41-49; D. Stuart, "A Case for a General Part", in D. Stuart, R. J. Delisle and A. Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (1999), 95, at pp. 110-13.

[25] The shortcoming identified by Professor Stuart and other scholars is the source of the difficulty in determining whether an offence is one of general or specific intent. Legislative intervention is sorely needed to spell out the mental element of

offences and to specify when intoxication short of automatism can be considered. However, until that day comes we are left with the existing regime. Therefore, before turning to the proper classification of the offence in s. 434 of the *Code*, I propose to review the analysis in *Daviault* in the hope of shedding a bit more light on the general/specific intent distinction.

(a) *The Decision in R. v. Daviault*

[26] In *Daviault*, this Court examined whether an accused who is in a state of extreme intoxication, akin to automatism, may rely on drunkenness as a defence to a general intent crime. In analysing this issue, the distinction between general and specific intent offences was discussed at some length by Sopinka J. (dissenting, but not on this point). He held that two factors help distinguish crimes of general intent from those of specific intent: first, “[t]he nature of the mental element and its relative importance” and second, “the social policy sought to be attained by criminalizing the particular conduct” (p. 122).

[27] Justice Sopinka specified that general intent crimes involve “the minimal intent to do the act which constitutes the *actus reus*”: *Daviault*, at p. 123. Because such crimes involve minimal thought and reasoning processes, even a high degree of intoxication short of automatism is unlikely to deprive the accused of the slight degree of mental acuity required to commit them (*ibid.*). In his view, this feature alone provided a sound policy basis for precluding reliance on the defence of intoxication (*ibid.*). Bearing in mind the common sense inference that a person

intends the natural consequences of his or her actions, one can typically infer intent from the performance of the act. It is therefore logical that for crimes involving a minimal mental element, intoxication short of automatism will have no role to play. Moreover, as Sopinka J. observed, general intent crimes tend to be “offences that persons who are drunk are apt to commit” (*ibid.*). It followed, in his view, that allowing intoxication to operate as a defence would contradict the social policy underlying these crimes.

[28] In contrast, Sopinka J. held that specific intent crimes require a heightened mental element. For example, they often require “the formation of further ulterior motives and purposes”: *Daviault*, at p. 123, citing *Bernard*, at p. 880, per McIntyre J. Because such crimes require more complicated thought and reasoning processes, one can readily understand how intoxication short of automatism may negate the required mental element. As such, specific intent offences are less likely to be the type of offences that intoxicated people are apt to commit. For that reason, policy considerations that might otherwise militate against a defence of intoxication are less pressing.

[29] Justice Sopinka noted another policy reason for permitting the defence of intoxication in respect of specific intent offences, namely, specific intent offences often include lesser offences that only require general intent. In such cases, an intoxicated offender will not escape punishment altogether: *Daviault*, at p. 124.

(b) *The Appropriate Approach to Classifying Specific and General Intent Offences*

[30] The analysis of whether an offence is one of specific or general intent must start with a determination of the mental element of the offence in question. This is an exercise in statutory interpretation. Care should be taken not to turn it into a factual assessment based on the circumstances of the particular case.

[31] After the mental element of the provision has been determined, the next question is whether the crime is one of general or specific intent. The distinction between general and specific intent offences is not a precise science. Logic, intuition, and policy all play a part. The task has proved formidable to those who have been schooled in criminal law, and daunting to those who have not.

[32] Be that as it may, the place to begin in determining the appropriate classification of the offence is to look to existing jurisprudence. Where the jurisprudence has already determined the appropriate classification of the offence in a satisfactory manner, the task is straightforward. For example, this Court has established that sexual assault is a general intent offence, whereas robbery and murder are specific intent offences: see *Leary v. The Queen*, [1978] 1 S.C.R. 29, and *R. v. Chase*, [1987] 2 S.C.R. 293 (sexual assault); *R. v. George*, [1960] S.C.R. 871 (robbery); and *R. v. Cooper*, [1993] 1 S.C.R. 146 (murder). For these offences and for others that have been satisfactorily addressed by existing jurisprudence, there is no need to examine the question again. The framework that follows is meant to clarify,

not change the law as set out in *Daviault*. However, if the jurisprudence is unclear, courts must examine the factors outlined in *Daviault*, as clarified below, to resolve the question.

[33] While *Daviault* made clear that there are two main considerations when determining if intoxication short of automatism can be considered — the “importance” of the mental element, and the social policy underlying the offence — it left certain questions unanswered. First, it provided no clear explanation of what is meant by the “importance” of the mental element. Second, it did not specify whether policy considerations should always play a role in the analysis or whether they should only come into play if an examination of the mental element left unclear how the offence should be characterized. I turn to these questions in the hope of bringing some added clarity to an area of the law that continues to perplex and confound.

(i) The “Importance” of the Mental Element

[34] *Daviault* specified that the nature of the mental element and its “relative importance” form the basis for the analysis. Although Sopinka J. did not explain what he meant by the “importance” of the mental element, it is clear that he was referring to the complexity of the thought and reasoning processes that make up the mental element of a particular offence. The thought and reasoning processes for general intent crimes are relatively straightforward. In contrast, specific intent crimes — those crimes with a more “important” mental element — require a more sophisticated reasoning process.

[35] For general intent crimes, the mental element simply relates to the performance of an illegal act. Such crimes do not require an intent to bring about certain consequences that are external to the *actus reus*: *Bernard*, at p. 863; *George*, at p. 877 (per Fauteux J.). Assault is a classic example. The accused must intentionally apply force; however, there is no requirement that he intend to cause injury. Likewise, crimes of general intent do not require actual knowledge of certain circumstances or consequences, to the extent that such knowledge is the product of complex thought and reasoning processes. In each instance, the mental element is straightforward and requires little mental acuity.

[36] To be clear, when I refer to a mental element that is “straightforward” and involving “little mental acuity”, I am not creating a new legal standard for general intent offences. Rather, I am using these phrases synonymously with the descriptors used in *Daviault*: “minimal intent” and “minimal degree of consciousness” (p. 123).

[37] In contrast, specific intent offences involve a heightened mental element. In *Daviault*, Sopinka J. limited his discussion of specific intent offences to crimes involving an ulterior purpose. For such crimes, the accused must not only intend to do the act that constitutes the *actus reus*, he must also act with an ulterior purpose in mind: Manning and Sankoff, at p. 386. For example, assault with intent to resist arrest is an offence containing an ulterior purpose. The accused must not only commit the assault, he must also act with the ulterior purpose of resisting arrest. It is irrelevant

whether he actually succeeds in resisting arrest; the offence simply requires that he act with that purpose in mind.

[38] Although Sopinka J. restricted his discussion of specific intent offences to crimes involving an ulterior purpose, it would be a mistake to assume that an ulterior purpose is always required. To the contrary, a heightened mental element could take the form of a requirement that the accused intend and bring about certain consequences, if the formation of that intent involves more complex thought and reasoning processes. Murder provides a classic example. Equally, a heightened mental element could take the form of a requirement that the accused have actual knowledge of certain circumstances or consequences, where the knowledge is the product of more complex thought and reasoning processes: see, e.g., M. T. Thornton, "Making Sense of Majewski" (1981) 23 *Crim. L.Q.* 464, at p. 482. Possession of stolen property is one such crime. The accused must actually know or be willfully blind to the fact that the goods he or she possesses are stolen. Although this offence contains no ulterior purpose, the knowledge component renders the mental element more acute. Intoxication is therefore available as a defence for such crimes.

[39] To summarize, specific intent offences contain a heightened mental element. That element may take the form of an ulterior purpose or it may entail actual knowledge of certain circumstances or consequences, where the knowledge is the product of more complex thought and reasoning processes. Alternatively, it may involve intent to bring about certain consequences, if the formation of that intent

involves more complex thought and reasoning processes. General intent offences, on the other hand, require very little mental acuity.

(ii) The Role of Policy

[40] The second question that *Daviault* left unanswered is the stage at which policy ought to be considered. Confusion remains about whether policy should be considered in every case or whether it should only come into play if an examination of the mental element leaves it unclear how the offence should be characterized.

[41] In my view, the most logical approach is to first examine the nature of the mental element. Only when this analysis fails to yield a clear answer should one turn to policy considerations. As *Daviault* explains, policy considerations are closely tied to the nature of the mental element. General intent crimes involve such minimal mental acuity that it is difficult to see how intoxication short of automatism could deprive the accused of the low level of intent required. This provides a strong policy reason for precluding reliance on intoxication for these offences: *Daviault*, at p. 123. It also explains why it is constitutionally permissible to render the intoxication defence unavailable for general intent offences: *ibid.*, at pp. 99-100. In contrast, one can more readily understand how the more complex thought and reasoning processes required for specific intent crimes may be negated by an accused's intoxication. For that reason, policy suggests that intoxication can be considered for specific intent crimes. The nature of the mental element is already intertwined with policy considerations. Thus, if an examination of the mental element clearly indicates how

the offence should be characterized, there is little reason to resort to policy considerations.

[42] However, if an examination of the mental element does not provide a clear answer, policy considerations may help resolve the question. In the main, the policy assessment will focus on whether alcohol consumption is habitually associated with the crime in question. If it is, then allowing an accused to rely on intoxication as a defence would seem counterintuitive. For example, intoxication is often associated with the crime of sexual assault. Allowing self-induced intoxication to provide an accused with a defence would be to endorse, if not promote, the very behaviour that has historically proved to be a root cause of the problem.¹ And while the law and common sense may not always coincide, we should not be looking for ways to send them scurrying in opposite directions. By the same token, where self-induced intoxication rarely, if ever, plays a role in the commission of a particular crime, preventing an accused from relying on it makes less sense from a policy perspective.

[43] As a general observation, and without setting out a general rule, alcohol habitually plays a role in crimes involving violent or unruly conduct: *Bernard*, at p. 880. It also tends to be prevalent in crimes involving damage to property. As such, it makes little sense from a policy perspective that it should provide a defence for crimes in which people or property are harmed or endangered: *Daviault*, at p. 123. Of course, there are well-established exceptions to this general proposition. Murder, for

¹ The *Criminal Code* now explicitly states that an accused may not rely on intoxication to support his mistaken belief in the complainant's consent: see s. 273.2. However, this was the position at common law long before s. 273.2 was enacted (S.C. 1992, c. 38, s. 1): see *Leary*.

example, has long been considered a crime of specific intent for which the defence of intoxication is available. As *Daviault* explains, at p. 124, this is a function of the heightened thought and reasoning processes required, the gravity of the offence, the serious fixed punishment upon conviction, and the availability of the lesser included offence of manslaughter. It is therefore incorrect to state that intoxication may never be considered in crimes involving violence against people or damage to property. However, given the prevalence of alcohol in these crimes, there are likely to be strong policy reasons militating against an intoxication-based defence.

[44] Although the main focus of the policy inquiry will be on whether alcohol is habitually associated with the crime in question, there are other residual policy considerations that may also come into play. As noted in *Daviault*, the presence of a lesser included general intent offence in the main offence may be relevant. In such cases, an accused who successfully relies on intoxication to negate the heightened mental element of the main offence can still be convicted of the lesser included offence. Drunkenness will provide no defence to the lesser offence. For example, an accused who successfully raises intoxication as a defence to a charge of assault with intent to resist arrest may still be convicted of the lesser included offence of assault. In these situations, the intoxicated offender will not escape punishment altogether. Consequently, there is less impetus to preclude the accused from advancing intoxication as a defence to the main offence.

[45] In addition, the presence of judicial sentencing discretion may be a factor to consider. If the crime is one for which the accused will receive a heavy minimum sentence upon conviction, it may be unduly harsh to preclude consideration of intoxication. However, if the judge has discretion to tailor the sentence to the facts of the case and to consider the accused's intoxication as part of that assessment, precluding the accused from advancing a defence of intoxication is less worrisome: *Daviault*, at p. 124.

(2) The Application of the Legal Framework to the Section 434 Offence

[46] The crime of arson has existed for many years, and the *Criminal Code* provisions have gone through many iterations. Over the years, courts have been divided on whether the offence of arson in s. 434 (and its predecessors) is a crime of general or specific intent: see, e.g., *R. v. Swanson* (1989), 48 C.C.C. (3d) 316 (Y.T.C.A.) (specific intent); *R. v. Hudson* (1993), 88 Man. R. (2d) 150 (C.A.) (specific intent); and *R. v. Muma* (1989), 51 C.C.C. (3d) 85 (Ont. C.A.) (general intent), relying on *R. v. Schmidtke* (1985), 19 C.C.C. (3d) 390 (Ont. C.A.).

[47] Applying the framework outlined above to the offence of arson in s. 434, I am satisfied that s. 434 is a general intent offence for which intoxication falling short of automatism is not available as a defence. For convenience, I repeat the provision:

434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[48] The *actus reus* is the damaging of property by fire. The mental element is the intentional or reckless performance of the illegal act — the causing of damage to property. No additional knowledge or purpose is needed. No complex thought or reasoning processes are required. On its face, the level of intent required for the offence would appear to be minimal.

[49] A majority of the Court of Appeal was concerned that if s. 434 were found to be a general intent offence, so as to preclude consideration of intoxication short of automatism, that would improperly transform the examination of recklessness into an objective inquiry. With respect, I cannot agree. Recklessness describes the act of one who sees the risk and acts without regard for the consequences: *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at p. 582. It always involves a subjective inquiry — and this case is no exception. However, the offence of arson under s. 434 does not involve sophisticated reasoning. The risk of damage by fire is typically obvious, even when it involves a chain of events and not the simple application of a match to the property in question.

[50] I have difficulty seeing how intoxication short of automatism would prevent an accused from foreseeing the risk of causing damage to someone else's property by fire. Complex reasoning is not required to recognize the danger. Thus,

preventing an accused from advancing the defence of intoxication does not transform recklessness into an objective inquiry. Rather, it recognizes the fact that intoxication short of automatism will not deprive an accused of the minimal intent required for this crime.

[51] In view of this conclusion, there is no need to resort to policy considerations to determine the availability of the defence of intoxication. However, had I found it necessary to do so, I would have reached the same conclusion.

[52] Section 434 involves damage to property. Damage to property is often associated with alcohol consumption. The present case is no exception. In my view, it would erode the policy underlying the offence of causing damage to property by fire if an accused could rely on self-induced intoxication as a defence.

[53] For these reasons, I am respectfully of the view that the trial judge and the majority of the Court of Appeal erred in characterizing s. 434 as a specific intent offence for which the defence of intoxication could be raised. Properly classified, s. 434 is a general intent offence, meaning that intoxication short of automatism may not be considered.

(3) Analysing Intent Under Section 434 of the *Criminal Code*

[54] Leaving aside the question of intoxication, ascertaining whether the intent required under s. 434 has been made out in a particular case can be a tricky exercise.

As the trial judge and the majority of the Court of Appeal noted, there is a wide range of factual scenarios that may arise under s. 434 of the *Code*. Some cases may involve an accused who has set fire directly to the property in issue. Others, like this one, may involve an accused who has caused some object to catch fire, which in turn leads to damage to property. In the former, there is typically a ready-made inference that the accused intentionally or recklessly caused damage by fire. In the latter, such an inference may not be so obvious, and the assessment of intent can be obtuse. Without setting out a legal framework, I offer some suggestions that triers of fact may find helpful in deciding whether the requisite intent has been established.

[55] To begin, it must be remembered that the criminal act in s. 434 is not the setting of a fire. The conduct that has been criminalized is the causing of damage to property. The fire is simply the mechanism by which the damage must be caused. This distinction is crucial to the analysis.

[56] In assessing the issue of intent, the trier of fact must of course consider all of the surrounding circumstances. How the fire started is likely to be an important consideration. Specifically, was the fire set accidentally, negligently, recklessly, or intentionally? The answer to this question will not be dispositive since, as I have explained, the act of setting a fire is not the conduct that has been criminalized under s. 434. Nonetheless, it will provide important context for the intent analysis.

[57] Deciding how the fire started is only one of the factors a trier of fact may wish to consider. The end game involves looking at all of the surrounding

circumstances to determine whether it can be inferred that the accused intended to cause damage to someone else's property or was reckless whether damage ensued or not. The mere fact that the fire was set intentionally or recklessly may not be enough to establish that the accused intentionally or recklessly caused damage to the property. Context is important and will play a key role in determining whether such an inference can be drawn. Consider, for instance, a homeowner who has started a controlled fire in an outdoor fire pit. If a gust of wind picks up some burning leaves from the fire pit and blows them onto a neighbour's shed 20 metres away, it does not follow that he intentionally or recklessly damaged the shed. Notwithstanding his intentional setting of the original fire — namely, the fire in the fire pit — the surrounding circumstances may show that he did not intentionally or recklessly cause damage to the shed: see, e.g., *R. v. S.D.D.*, 2002 NFCA 18, 211 Nfld. & P.E.I.R. 157.

[58] In contrast, there are many situations in which an accused has intentionally or recklessly started a fire and the surrounding circumstances make it clear that he or she intended to cause damage to property or was reckless whether damage ensued. Take, for instance, a person who has deliberately set fire to a towel. If that person were to drop the towel on the carpet and walk away without making any effort to extinguish the fire, it may be inferred that he or she intended to cause damage to property or was reckless whether damage ensued.

[59] In summary, the determinative question is not how the fire was started, although the answer to that question may provide important context. An accused's

guilt under s. 434 hinges on whether he or she intentionally or recklessly caused damage to the property in question. So long as the trier of fact keeps this important distinction in mind and examines the relevant context and surrounding circumstances, the analysis of intent under s. 434 should be relatively straightforward.

B. *Did the Trial Judge's Error Have a Material Bearing on the Acquittal?*

[60] Although I have concluded that the trial judge erred in finding that he could consider Mr. Tatton's state of intoxication, this does not fully dispose of the appeal. To obtain a new trial, the Crown must demonstrate that the error might reasonably have had a material bearing on the acquittal. The Crown has a heavy onus. As this Court explained in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14:

It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[61] Mr. Tatton submits that the trial judge based the acquittal on the defence of accident and that intoxication had no bearing on the analysis. He therefore argues that the trial judge's error cannot reasonably be thought to have affected the verdict.

The Crown, on the other hand, argues that the trial judge's reasons make it clear that he considered Mr. Tatton's intoxication in arriving at the verdict.

[62] I accept the Crown's submission. In my view, when the trial judge's reasons are read in their entirety, it is apparent that Mr. Tatton's intoxication played a material role in the outcome.

[63] In his reasons, the trial judge concentrated on the cause of the fire. In particular, the question he posed was whether he could be satisfied that Mr. Tatton intentionally or recklessly started the fire in the frying pan. At the outset of his analysis, the trial judge stated that to resolve this issue, he must determine whether Mr. Tatton's intoxication could be considered. The trial judge's reasons focus almost exclusively on this issue. If, as Mr. Tatton argues, the trial judge concluded that the fire was accidental — separate and apart from any role alcohol may have played — all of this analysis was unnecessary. In my view, it defies logic and common sense to suggest that the trial judge's decision to acquit was not influenced by his erroneous belief that he could take into account Mr. Tatton's state of intoxication.

[64] The trial judge's concluding remarks bear this out. In finding that he was left in a state of reasonable doubt, the trial judge stated that one of the questions troubling him was whether Mr. Tatton was "mentally able to carry out such a plan, in view of his drunken condition": see A.R., vol. I, at p. 81. Plainly, Mr. Tatton's inebriation was at the forefront of the trial judge's mind. Although the trial judge noted Mr. Tatton's position that the fire was accidental, he did not explicitly make a

finding of accident. Rather, he stated that he was not satisfied beyond a reasonable doubt that Mr. Tatton had acted intentionally or recklessly. While it is arguable that the trial judge based this conclusion on the defence of accident, the clear implication from his reasons is that it was Mr. Tatton's state of intoxication that left him in a state of reasonable doubt as to whether Mr. Tatton acted with the requisite intent. That being so, I am satisfied that the test in *Graveline* has been met.

VI. Disposition

[65] For these reasons, I would allow the appeal, set aside the acquittal, and order a new trial.

Appeal allowed.

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