

THE NATURE OF THE CRIME OF ARSON IN SOUTH AFRICAN LAW

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1 Introduction

Deliberate fire-setting has always been regarded as conduct of a particularly heinous nature, due to the fire's great potential for causing damage to life and property.¹ It follows that fire-setting is a common-law crime of antiquity, dating back to Roman law antecedents.

The reasons for deliberate fire-setting include vandalism, concealment of crime, revenge, fraud and mental illness.² With regard to mental illness, arson has always been of special interest to psychiatrists.³ Medical interest in fire-setting behaviour or pyromania dates back to the nineteenth century, particularly amongst continental European writers.⁴ Various categories of arson (or deliberate fire-setting) have been identified, including profitable arson;⁵ political arson;⁶

1 JRL Milton *South African Criminal Law and Procedure: Common-law Crimes* vol 2, 3 ed (Cape Town, 1996) at 777; JM Burchell *Principles of Criminal Law* 3 ed (Cape Town, 2005) at 853.

2 Milton (n 1) at 777 n 2; Burchell (n 1) at 853. JA Inciardi "Arson: Behavioral and economic aspects" in SH Kadish (ed) *Encyclopedia of Crime and Justice* vol 1 (New York, 1983) 76-82 at 77.

3 J Gunn & PJ Taylor *Forensic Psychiatry Clinical, Legal & Ethical Issues* (Oxford, 1993) at 587.

4 *Idem* at 588.

5 Examples include the destruction of one's own property to facilitate insurance fraud; destruction of evidence of other crimes; fire set by extortionists in order to punish a property owner who refuses to pay the dues demanded for "protection" (Inciardi (n 2) at 77; Gunn & Taylor (n 3) at 591; JMT Labuschagne "Die strafregtelike begrensing van vuuraanwending" (1977) 10 *De Jure* 48-71 at 66-67).

6 Gunn & Taylor (n 3) at 592.

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revenge fire-setting;⁷ fire-setting for pleasure and excitement;⁸ psychotic fire-setters;⁹ and vandalism arsonists.¹⁰

In the context of South African law, deliberate fire-setting has been punished as arson in a number of contexts. As in other jurisdictions it has provided the means for insurance fraud,¹¹ as well as being employed in order to commit murder.¹² It is interesting to note instances of arson which are perhaps a little more revealing of the particular nature of South African society. Arson has been closely associated with the killing of suspected witches.¹³ It has further been linked with instances of faction-fighting, involving warring groups.¹⁴ Deliberate fire-setting has been used as a means of political violence.¹⁵ Tellingly, arson has also been used in the context of domestic violence and violence arising out of romantic relationships which have disintegrated.¹⁶

As a basis for discussion, regard may be had to Snyman's definition of the crime of arson as being committed where a person unlawfully and intentionally sets fire to (i) immovable property belonging to another or (ii) to his own immovable insured property, in order to claim the value from the insurer.¹⁷

- 7 Examples of this form of fire-setting include revenge against society in general, revenge against employers, or jealous revenge – usually in a sexual context (Gunn & Taylor (n 3) at 592-593). Inciardi (n 2) at 77 states that these arsonists appear to be the most dangerous of all the types.
- 8 These forms of fire-setting include hero-fire-setters, who create the scene for their own heroism; fire-bugs, who derive intense satisfaction or relief from setting fires; and erotic fire-setters, who are sexually aroused by fire (Gunn & Taylor (n 3) at 593-595; see, also, JMT Labuschagne “Monomanieë, determinisme en strafregtelike toerekening” (1991) 16 *Tydskrif vir Regswetenskap* 82-91 at 83-84).
- 9 Gunn & Taylor (n 3) at 595 note that such fire-setters usually suffer from schizophrenia.
- 10 Inciardi (n 2) at 77 indicates that the motivation for such fire-setting may overlap with both fire-setting for pleasure and revenge motives.
- 11 *R v Medley* 1951 (4) SA 241 (C).
- 12 *S v Sethoga* 1990 (1) SA 270 (A); *S v Ramba* 1990 (2) SACR 334 (A); *S v Ngidi* 1991 (1) SACR 589 (A); *S v Khanyile* 1991 (2) SACR 595 (A); *S v Baloyi* 1994 (1) SACR 430 (A).
- 13 See, eg, *R v Tsungwana* 1919 EDL 25; *R v Bungweni* 1959 (3) SA 142 (E); *S v Lukhwa* 1994 (1) SACR 53 (A); *S v Magoro* 1996 (2) SACR 359 (A). See, also, *S v Ringani* 2008 JDR 1538 (T), where the accused burnt down the structure in which his mother carried out ancestor-worship rituals anathema to his own Christian beliefs.
- 14 *Cishbina Tshesi v R* 1933 NPD 322; *S v Mzwempi* 2011 (2) SACR 237 (ECM).
- 15 *R v Mashami* 1967 (1) SA 94 (RA); *S v Lushozi* 1993 (1) SACR 1 (A).
- 16 *S v Baloyi* 2000 (1) SACR 81 (CC), citing Fedler (“Lawyering domestic violence through the Prevention of Family Violence Act 1993. An evaluation after a year in operation” (1995) 112 *SALJ* 231-251 at 243) in par [12]; *S v Ramosuny* 2000 (2) SACR 257 (T); *Dikana v S* (2008) 2 All SA 182 (E).
- 17 CR Snyman *Criminal Law* 5 ed (Durban, 2008) at 548.

Whilst the primary purpose of the crime has been the protection of the habitation of humans, it is evident that the crime also serves to protect the interests of the community, as well as assisting in combating fraudulent practices in the context of insurance.¹⁸ However the crime has been criticised for not reflecting the multiplicity of interests affected by deliberate fire-setting.¹⁹ For example, whilst the crime protects immovable property, the destruction of valuable assets such as crops or negotiable instruments is not included within its ambit. Milton states that it is anomalous that the crime should be defined in ways which selectively protect some threatened interests and not others.²⁰

Further, it is clear that arson is merely a species of the common-law crime of malicious injury to property,²¹ and that forms of fire-setting which do not fall within the ambit of the crime of arson can be punished under the head of malicious injury to property.²² Given that every instance of arson can thus be punished as malicious injury to property, the question inevitably arises whether the continued existence of the crime of arson may be logically justified.²³ The argument for the sustained existence of arson would be based on the consideration that intentional damage by fire has always been regarded with abhorrence,²⁴ and hence, being invariably regarded as a serious crime, would give rise to heavier punishment. Nevertheless, it has been argued that a solution to these apparent difficulties would be to codify the crime, splitting it into two distinct offences: one of which would be concerned with the protection of the community, and the other with protection of property.²⁵

Whilst the nomenclature of the crime is that of English law, it is clear that the South African crime is based on Roman law and Roman-Dutch law antecedents. In *R v Paizee*²⁶ Hopley J said (in 1916) that “the term ‘arson’ all through my life, and probably for generations before that,²⁷ has been adopted and used, and I think it includes all that was intended by the Dutch word ‘*brandstichting*’ and also by the Latin word ‘*incendium*’”.²⁸ Whilst in 1885 in *R v Enslin*²⁹ Lord De Villiers refused to identify “arson” with either “*incendium*” or “*brandstichting*”, some twenty years later in *R v Hoffmann; R v Saachs*

18 Burchell (n 1) at 853.

19 Milton (n 1) at 778.

20 *Ibid.*

21 It is noted in *S v Motau* 1963 (2) SA 521 (T) at 523D-E that all of the elements of the crime of malicious injury to property are contained in the crime of arson.

22 Milton (n 1) at 778.

23 Burchell (n 1) at 853.

24 Labuschagne (n 5) at 48; the Law Reform Commission of Canada in *Damage to Property Arson Working Paper 36* (1984) at 4 acknowledges “the horror inspired by fire, the tribulations of burn victims and the tragedy of needless deaths” in the context of arson.

25 Milton (n 1) at 778; Burchell (n 1) at 853.

26 *R v Paizee* 1916 SR 130.

27 Cf George McCall-Theal (ed) *Records of the Cape Colony* vol 33 (London, 1897) at 327, which reflect a number of convictions for “arson” at the Cape in the years 1814-1825.

28 *R v Paizee* (n 26) at 131.

29 *R v Enslin* (1885) 2 Buch AC 69 at 70.

and Hoffmann³⁰ he equated arson with “*brandstichting*”. In 1921, in *R v Mavros*,³¹ the Appellate Division expressed itself in favour of Hopley J’s dictum, thus conclusively establishing that the crime of arson in South African law is not equivalent to the analogous English crime. Apart from the use of “arson” as a convenient translation for the word “*brandstichting*”, English law has had little direct developmental influence on the South African crime. It may however be noted that Anglo-American authority concerning just when a property is set on fire and just when mere acts of preparation become an attempt have proved useful and have been followed.³²

2 The nature of the crime in Roman law

Whilst there are a number of Roman-law texts dealing with fire-setting (*incendium*), these do not reflect a systematic approach to this problem.³³ De Wet rightly states that it is doubtful whether arson (whatever the nomenclature by which it was described) was regarded as an independent crime, with its own characteristics.³⁴ As early as the Twelve Tables, it was held that a person who wilfully burns down a building or a pile of corn set beside a dwelling house must be bound, flogged and put to death by fire.³⁵ Commenting on this text in an earlier edition of *Strafreg*, Swanepoel notes that it is unclear whether the crime was punished as a form of damage to property or as a dangerous act – the requirement that damages be paid indicates the former, whilst the statement that the fire must be near a dwelling house emphasises the creation of danger.³⁶ Milton states that arson was considered as an offence against both property and the safety of the community, and was punished especially severely when it endangered the community.³⁷ This conclusion is borne out by the texts. In D 48 8 1*pr* it seems that intentional fire-setting which falls into the category of either the creation of danger to others or danger to property is described as falling under the punishment of the *lex Cornelia de sicariis*.³⁸ Texts which provide for more severe punishment for fire-setting in a city or town include

30 *R v Hoffmann; R v Saachs and Hoffmann* (1906) 2 Buch AC 342.

31 *R v Mavros* 1921 AD 19 at 23-24.

32 Milton (n 1) at 781.

33 See Labuschagne (n 5) at 48. Milton (n 1) at 779 comments that the Digest and the Codex “are rather haphazardly peppered with numerous texts penalizing various forms of arson relating to houses, crops, vines, and other types of property”. For a detailed discussion of the Roman law relating to criminal liability for fire, see G MacCormack “Criminal liability for fire in early and classical Roman law” (1972) 3 *International Survey of Roman Law* 382-396.

34 JC de Wet *Strafreg* 4 ed (Durban, 1985) at 290.

35 D 47 9 9, *Gaius libro quarto ad legem duodecim tabularum*. Mere negligent burning requires the person causing the damage to pay compensation for damages (or to be lightly punished if he is unable to pay such compensation). It is interesting to note that Gaius specifies in this text that the expression “building” covers every form of edifice.

36 JC de Wet & HL Swanepoel *Strafreg* 2 ed (Durban, 1960) at 303-304.

37 Milton (n 1) at 779.

38 D 48 8 1*pr*, *Marcianus libro quarto decimo institutionum*. This is clear from C 9 1 11 (*Imperator Philippus A et Philippus C Saturnino*), where the burning of property is rendered punishable under the *lex Cornelia*.

D 47 9 12,³⁹ D 48 19 28 12⁴⁰ and D 48 8 10.⁴¹ The text in D 48 19 16 9 provides that certain forms of fire-setting are punished more severely in certain provinces, such as harvest-burners in Africa and those who set fire to the vines in Mysia.⁴² Further, D 48 6 5*pr* provides for liability in the context of public violence where a group of persons commit arson.⁴³

Negligent fire-setting could give rise to civil actions or moderate punishment⁴⁴ with punishment being linked to gross negligence.⁴⁵

3 The nature of the crime in Roman-Dutch law

Whilst the Roman-Dutch writers apparently regarded arson as both a crime against property as well as a crime against the community, these dual interests did not result in separate crimes, but rather one single crime (*brandstichting*).⁴⁶ The treatment of the crime is not always systematic amongst these writers, and the elements of the crime are not always examined in any detail. Thus writers such as Voet,⁴⁷ Leeuwen,⁴⁸ Matthaeus⁴⁹ and Van der Keessel⁵⁰ limit their treatment of the crime to the Roman-law texts, along with contemporary penalties.

39 D 47 9 12, *Ulpianus libro octavo de officio proconsulis*. Those of lower rank are usually thrown to the beasts, while those of some standing are subjected to capital punishment or deported to an island.

40 D 48 19 28 12, *Callistratus libro sexto de cognitionibus*. This text also provides for capital punishment – usually in the form of being burnt alive – for those who start fires in a built-up area, whether for enmity or for gain. The text further provides that those who burn a cottage or a farm will be punished somewhat more lightly.

41 D 48 8 10, *Ulpianus libro octavo decimo ad edictum*. This text provides for capital punishment where a block of flats is set alight, as De Wet ((n 34) at 290) notes, presumably under the *lex Cornelia*.

42 D 48 19 16 9, *Claudius Saturninus libro singulari de poenis paganorum*. These fire-setters are referred to in the text as *incensores* and not *incendarii*.

43 D 48 6 5*pr*, *Marcianus libro quarto decimo institutionum*.

44 D 1 15 3 1, *Paulus libro singulari de officio praefecti vigilum*; D 48 19 28 12, *Callistratus libro sexto de cognitionibus*.

45 D 47 9 11, *Marcianus libro quarto decimo institutionum*.

46 Milton (n 1) at 779.

47 Johannes Voet *Commentarius ad Pandectas* vol 7 (tr Percival Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet* London, 1955) ad 47 9 5.

48 Simon van Leeuwen *Rooms-Hollands Reg 4 38 10* (tr Sir Alexander Johnston *Commentaries on the Roman-Dutch Law*, London, 1820) at 492, who does not explain what *incendarii* are, although he indicates that they are subject to capital punishment. See, also, S Groenewegen van der Made *Tractatus de legibus abrogatis* (tr B Beinart *A Treatise on the Laws Abrogated and no Longer in Use in Holland and Neighbouring Regions* 3 ed vol 2, Johannesburg, 1975) ad D 48 19 28 12 whose explanation is in similar terms.

49 A Matthaeus II *De criminibus ad libros XLVII et XLVIII Digestorium commentarius* (tr ML Hewett & BC Stoop *On Crimes A Commentary on Books XLVII and XLVIII of the Digest* vol 2 Cape Town, 1987) ad 48 5 6, 48 5 7 14.

50 DG van der Keessel *Praelectiones ad jus criminale* (ed and tr B Beinart & P van Warmelo *Lectures on Criminal Law* vol 3 Cape Town, 1969) ad 48 8 25, 48 8 26.

Carpzovius deals with *brandstichting* in more detail, indicating that there is no distinction between the locality or the type of building for the purposes of liability.⁵¹ Moreover, he states that the damage caused by burning need not be extensive to trigger liability,⁵² the motive for the burning is irrelevant⁵³ and that the crime is committed by someone who sets his own house alight with the intention to prejudice another.⁵⁴ Following Carpzovius, Moorman also discusses *brandstichting* in some detail, apparently regarding the crime as being directed against property.⁵⁵ The crime is complete as soon as the fire causes damage to the building, and even minimal damage suffices for liability.⁵⁶ Moorman further states that the crime is committed by someone who sets fire to his own house in order to prejudice another.⁵⁷

Perhaps the most authoritative Roman-Dutch writer in the context of arson is Van der Linden.⁵⁸ It is significant that he classifies the crime of *brandstichting* as a crime against the State, thus indicating that the basis of the crime goes beyond mere damage to property to the safety of the community. The crime is defined as follows:⁵⁹

This crime is committed when a person with the wilful intention of injuring others, has set fire to buildings or other immovable property, whereby such property has caught fire and damage has been occasioned.

The severity of the crime is determined by the locality in which it occurs and the danger which results from it.⁶⁰

In summary of the views of the Roman-Dutch writers, Milton's synopsis is very useful:⁶¹ that in respect of the crime of *brandstichting* there had to be intentional fire-setting with the intent to injure another,⁶² that there had to be some damage caused by the fire,⁶³ and that the burning of one's own house suffices for liability where such burning

51 D van Hogendorp *Verhandeling der Lyfstraffelyke Misdaden ... getrokken uyt de schriften van den heer Benedictus Carpzovius ...* 2 ed (Amsterdam, 1772) ch 35.

52 *Idem* ch 35 10, indicating that even minimal damage ("zeer geringe schade") will suffice.

53 *Idem* ch 35 15.

54 *Idem* ch 35 11-12.

55 J Moorman *Verhandeling over de misdaden* rev by JJ van Hasselt (Arnhem, 1764) at 3 1 7 states that the crime can be committed in respect of "Huizen, Pakhuizen, Schuren, Wynperssen en diergelyk gebouw".

56 *Idem* 3 1 8.

57 *Idem* 3 1 10.

58 J van der Linden 4 ed (tr Sir Henry Juta *Institutes of Holland or Manual of Law, Practice, and Mercantile Law ...* by Johannes van der Linden Cape Town, 1904).

59 *Idem* 2 4 7.

60 *Ibid.*

61 Milton (n 1) at 779.

62 Van der Linden (n 58) 2 4 7, Van der Keessel (n 50) *ad* 48 8 25. As Labuschagne (n 5) at 50-51 has ably shown, a number of writers stated that liability could also follow for negligent fire-setting – see, eg, Hogendorp (n 51) ch 36; Moorman (n 55) 3 1 18-20. However, Van der Linden (n 58) 2 4 7 states that negligent causing of a fire is not arson, although it may be otherwise punished, along with damages.

63 Moorman (n 55) 3 1 1, 3 1 7, 3 1 8; see, also, Hogendorp (n 51) ch 35 10.

was accompanied by the intention to harm another.⁶⁴ Whilst there was no uniformity amongst the writers regarding the nature of the property which was protected by *brandstichting*, Van der Linden's statement that it was required that the burning occur in respect of "buildings or other immovable property"⁶⁵ was authoritatively adopted by the Appellate Division.⁶⁶

4 The nature of the crime in South African law

As indicated earlier, in *R v Enslin*⁶⁷ the court refused to entertain the notion that "arson" was equivalent to the Roman law crime of *incendium* or the Roman-Dutch law crime of *brandstichting*. It was argued before the court that the "malicious burning of the barley stacks of another" constituted arson, given that "arson" in essence shared the content of its common-law antecedents, which would include such conduct as burning movables such as barley stacks. Given the lack of unanimity between the common-law sources regarding the type of property included in the crime of arson, the court's reluctance to include the conduct in question under the head of arson is understandable. The adherence to the English law conception of "arson" by the court⁶⁸ had the consequence of effectively excluding reliance on the Roman and Roman-Dutch authorities. However, two decades later, in *R v Hoffmann*; *R v Saachs and Hoffmann*, De Villiers CJ described "arson" and *brandstichting* as equivalent terms, and having done so, effectively applied the Roman-Dutch antecedents rather than the English law, which held that the setting on fire of one's own property was not a crime, in the following terms:⁶⁹

Where a person attempts to set fire to the house of another person he is guilty of an attempt to commit arson, whether there is any intent to fraudulently obtain insurance money or not. Where a person burns his own house, the question whether he is guilty of "*brandstichting*", or arson, must, under our law, depend upon the further question whether the deed was done with the object of injuring others ... If the object be to defraud an insurance company the intent would certainly be to injure another so as to bring the offence within the definition.

The authority for this proposition cited by the court was Van der Linden.⁷⁰ This judgment effectively marked a sea change in the law of arson, by aligning with Roman-Dutch rather than English authority, and by opening the door for the South African crime to be broadened to include the burning of one's own building in certain circumstances.

64 Moorman (n 55) 3 1 10; Hogendorp (n 51) ch 35 11-12.

65 Van der Linden (n 58) 2 4 7.

66 In *R v Mavros* (n 31) at 21-22.

67 *R v Enslin* (n 29).

68 The English law in this area protected buildings only, both in terms of the common law and the Malicious Damage Act, 1861 (24 & 25 Vict c 97) – see discussion in Milton (n 1) at 780.

69 *R v Hoffmann*; *R v Saachs and Hoffmann* (n 30) at 346-347.

70 Van der Linden (n 58) 2 4 7.

De Wet has argued that this new approach, which he describes as an aberration,⁷¹ and which was later to be accepted by the Appellate Division in *R v Mavros*,⁷² was influenced by English law, even if there was no reference to English law in the judgment.⁷³

Nevertheless, where an accused was charged with burning down his own building with intent to defraud an insurance company in *R v Paizee*,⁷⁴ it was held by the court that he was properly charged with arson. Citing with approval the dictum in *Hoffmann*, the court stated:⁷⁵

If a person has a dislike to his house, he has the right to burn it down if he chooses, but there is one other condition before he can claim to be perfectly guiltless of any crime, and that is in doing so he is doing no damage or harm to anyone else. The moment he does wilful damage to any other person by such act, then he commits the crime of arson.

A few years later, the question of the ambit of the crime of arson came before the Appellate Division in *R v Mavros*.⁷⁶ The facts were similar to *Paizee*, where a shopkeeper was charged with arson in that he set fire to his store with the intention to defraud an insurance company. Innes CJ noted that the English common law crime of arson would not be applicable to this scenario, albeit that this was a statutory offence in England.⁷⁷ It is however interesting to note that even in terms of the English common law crime, if someone burnt his own house and the flames spread to his neighbour's house, this would constitute a felony.⁷⁸

71 De Wet (n 34) at 294. De Wet states that it is more than doubtful that this result is what Van der Linden had in mind.

72 *R v Mavros* (n 31).

73 De Wet (n 34) at 294. De Villiers CJ firmly expressed his preference for English law rules, which strongly influenced the South African criminal law in the latter part of the nineteenth century (see JM Burchell, J Milton & EM Burchell *South African Criminal Law and Procedure General Principles of Criminal Law* vol 1, 2 ed (Cape Town, 1983) at 34-40) on the Roman-Dutch precedents: "Considering the uncertainty and want of precision which characterise the Criminal Law of Holland, this Court has always deemed it its duty to adhere firmly to any rule of criminal law practice once established, and I see no reason for acting differently in the present case" (*R v Kaplan* (1893) 10 SC 259 at 262-263).

74 *R v Paizee* (n 26). Hopley J's view of the nature of the crime of arson, as including within its ambit the Roman law crime of *incendium* and the Roman-Dutch crime of *brandstichting* is referred to in n 28 above. It is only when one is required to distinguish a movable from an immovable, as liability only attaches for arson in the case of the latter, that the court must be careful to draw a distinction between the contemporary crime and its antecedents, according to Hopley J (at 131).

75 *R v Paizee* (n 26) at 131.

76 *R v Mavros* (n 31).

77 *Idem* at 21. Section 3 of the Malicious Damage Act, 1861 (24 & 24 Vict c 97) provided that setting fire to a building (the section lists a number of types of buildings), whether the building was in the possession of the offender or anyone else, with intent to injure or defraud any person, constituted a felony.

78 JWC Turner *Kenny's Outlines of Criminal Law* 18 ed (Cambridge, 1962) at 240, citing W Blackstone *Commentaries on the Laws of England* vol 4, 17 ed by E Christian (London, 1830) at 221. Furthermore, in terms of M Hale *Pleas of the Crown* vol 1 (London, 1682) at 568 and EH East *A Treatise of the Pleas of the Crown* vol 2 (London, 1803) at 1027, it was a misdemeanour to burn one's own house where the house was in a town, or so near to other houses that its burning might endanger them.

On a perusal of the Roman-Dutch authorities, Innes CJ noted that the writers were “neither as definite nor as unanimous as one would wish” regarding the question whether *brandstichting* would cover intentionally burning a building with intent to injure or defraud another.⁷⁹ However, as Innes CJ points out, this was “hardly to be wondered at”, since these writers preceded the advent of fire insurance.⁸⁰ Two writers are however cited⁸¹ as authority for the view that *brandstichting* includes the setting on fire of one’s own house with intent to burn one’s neighbour’s house: Carpzovius⁸² and Moorman.⁸³ The key incriminating element for these writers, according to Innes CJ, is the intention to injure or destroy the building of another.⁸⁴ It was consequently concluded:⁸⁵

Now the essence of crime is the intent with which the act is committed; and it is a very short step from the conclusion reached by Carpzovius and Moorman to the position that the owner of a house who sets fire to it wrongfully, maliciously and with intent to injure or defraud an insurer, commits the crime of *brandstichting*.

The court concluded that given that “*brandstichting*” and “arson” are synonymous terms the accused was correctly convicted of arson.⁸⁶ This judgment has been criticised by De Wet as unacceptably imposing a forced and unjustified interpretation on the writers, perpetrated simply to bring South African law in line with the Malicious Damage Act 1861 (24 & 25 Vict c 97), and that the conduct concerned should simply be prosecuted as fraud.⁸⁷

This matter arose for consideration once again some years later, in the 1987 case of *S v Van Zyl*.⁸⁸ The appellant, a builder, had been convicted of arson after having burnt down a house which belonged to him, but which had been inhabited by the complainant. The conviction was contested on the basis that the common-law crime of arson did not extend to a person burning down his own immovable property, and the views of De Wet and Snyman, canvassed above, were marshalled in support of this argument. The court carefully examined the legal position, first considering whether De Wet’s comment, in the context of the *Hoffmann* case, that it was more than doubtful that Van der Linden intended that his views should be used to support the proposition that the crime could consist of a person setting fire to his own house. In this regard it was concluded that Van der Linden neither explicitly denied nor supported this proposition, but held that the

79 *R v Mavros* (n 31) at 22. Rose-Innes CJ notes that a number of writers only deal with the matter in general terms, referring *inter alia* to Matthaeus, Kersteman and, notably, Van der Linden.

80 *Ibid.*

81 *Ibid.*

82 Hogendorp (n 51) ch 36.

83 Moorman (n 55) 3 1 10.

84 *R v Mavros* (n 31) at 22.

85 *Idem* at 22-23.

86 *Idem* at 23. This point was further affirmed in *R v Mabula* 1927 AD 159 at 161; and *R v Mataung* 1953 (4) SA 35 (O) at 36.

87 See De Wet (n 34) at 294. Snyman (n 17) agrees that this approach is unfounded, but states that it is unlikely that this approach will now be departed from (at 548).

88 *S v Van Zyl* 1987 (1) SA 497 (O).

passage cited from Van der Linden was nevertheless amenable to the interpretation that *brandstichting* could also be committed where a person, with intent to cause damage to another, sets fire to his own building.⁸⁹ The court then proceeded to examine the judgment in *Mavros*, noting the reliance on Carpzovius and Moorman, as well as the judgment in *Paizee*, and ultimately concluded that these cases were indeed correctly decided.⁹⁰ The court therefore confirmed that arson can be committed where a person sets fire to his own immovable property with the intention to prejudice the property interests of another person.⁹¹

A further question which has fallen to be resolved is whether the common-law sources were all applicable to the crime of arson, or whether such sources supported a separate crime of “*conflagratio*”, which penalised the setting of a fire that, instead of damage to a building, caused general damage. This latter contention received some support in 1967, when a conviction of *conflagratio* was confirmed on review without argument and without comment.⁹² A further conviction for the crime of *conflagratio* took place in 1972, although it was quashed on review on evidentiary grounds.⁹³ Finally, in 1973, it was held in *S v Solomon*,⁹⁴ correctly, it is submitted, that the crime of *conflagratio* was unknown in our law.⁹⁵ The court points out that the Roman-law crime of *incendium* protected not only the interests of life and property, but also community safety.⁹⁶ It follows that the crime of arson, which derives from the Roman-Dutch crime of *brandstichting* (and which in turn is derived from the crime of *incendium*) thus includes in its ambit the protection of these aspects.

5 Concluding remarks

Unsurprisingly the crime of arson is without exception classified as a crime against property by South African writers. Yet, if one accepts the view, based on common-law authority, that the crime protects not only property interests, but extends also to protection of the community, it is evident that the crime should include within its ambit not only the person who sets fire to the property of another, but also the person who sets fire to his or her own property with the intent to damage the property of another.

89 *Idem* at 502I-503A. Further indications in the passage at Van der Linden (n 58) 2 4 7 in support of this interpretation in the view of the court are the example relating to sentence such that where a whole town or community was placed in danger this would render the crime more serious, and the focus on the intention of the arsonist even where such intention was not achieved.

90 *S v Van Zyl* (n 88) at 503D-504J.

91 *Idem* at 505C. See JMT Labuschagne “Brandstigting van jou eie goed” (1987) 20(2) *De Jure* 340-345.

92 I.D. “*S v Kiewiet* (ongerapporteerde) (C)” (1967) 30 *THRHR* 290-291.

93 *S v Bujani* 1972 (2) PH H84 (C).

94 *S v Solomon* 1973 (4) SA 644 (C).

95 Followed in *S v Van Zyl* (n 88) at 504. See, also, FG Richings “*Conflagratio*” (1974) 91 *SALJ* 149-152; cf *De Wet* (n 34) at 295.

96 *S v Solomon* (n 94) at 649A-B.

As Milton points out, the argument that the owner and occupier of a house is free to burn it down if he chooses to do so is problematic.⁹⁷

The principle, implicit in this proposition, that a person may with impunity set fire to a building, of course overlooks the fact that fire-setting creates a danger to neighbours, the wider community, and the fire-fighters who may be called to the scene. While it may be appropriate to recognize that an owner of property should be free to destroy the property by fire if he wishes to do so, policy demands, it is submitted, that setting fire to one's own property in circumstances which endanger the life or property of others, or the welfare of the community or of the natural environment, ought to be punishable as arson.

Although the act of destroying one's own property may not be unlawful in itself, it may be submitted that, as with the crime of extortion,⁹⁸ the intention with which the accused acts will serve to convert an ostensibly lawful act into an unlawful one. This fits with the assessment of Carpzovius and Moorman in the *Mavros* case regarding the centrality of the actor's intent, and that "the essence of crime is the intent with which the act is committed".⁹⁹ It may further be noted that since *dolus eventualis* would suffice for the purposes of liability, provided that the accused foresaw the possibility that in setting fire to his or her own property, damage could result to the property of another, and proceeded reckless of such possibility, liability for arson could ensue.

It is generally accepted that arson is merely a species of malicious injury to property,¹⁰⁰ which has given rise to the question whether the continued separate existence of arson can be logically justified.¹⁰¹ Although malicious injury to property may also be committed where an accused damages his own property in order to commit insurance fraud, it is unclear whether the crime includes a person who damages his or her own property foreseeing that the property of another may be damaged. Given the development of the crime of malicious injury to property,¹⁰² there do not appear to be any common-law texts which serve to clarify this position and the definitions of the crime "all emphasize that it is committed only in respect of property belonging to another or in which another has 'a special property or interest'".¹⁰³ In the nature of things, whilst not impossible, it is unlikely that there will be many cases of malicious damage to property in respect of a building which will threaten the property of another. By its very nature fire represents a different proposition, and a building set alight will invariably pose a threat to neighbouring property. Perhaps the recognition that arson can be committed by a person in respect of his own building, on the basis of the common-law authorities as approved in the case law, therefore provides a means to view arson as more than a mere species of malicious injury to property.

97 Milton (n 1) at 786.

98 Burchell (n 1) at 828.

99 *R v Mavros* (n 31) at 22.

100 *S v Motau* (n 21) at 523D-E; *Snyman* (n 17) at 548.

101 Burchell (n 1) at 853.

102 See Milton (n 1) at 766-769, who points out that the crime was not recognised in any systematic way in the Roman or Roman-Dutch law, and was developed in South Africa by the courts.

103 *Idem* at 772.

In conclusion, perhaps the only curious feature of recognising that arson also applies to the person who burns his own building is that despite the acceptance of this approach in the case law, based on the common-law sources, this has not been fully acknowledged by the writers or in practice. Thus, although some writers have included this aspect of the crime in their discussion of arson,¹⁰⁴ others have merely made mention of the possibility of liability in the context of setting fire to one's own insured property in order to commit insurance fraud.¹⁰⁵ It is therefore submitted that in the light of the approval of the views of Van der Linden, Carpzovius and Moorman in the case law, the definition offered by Snyman, cited above, is deficient, and this more inclusive definition, that of Milton, is preferable in describing the contemporary crime of arson in South African law:¹⁰⁶

Arson consists in unlawfully setting an immovable structure on fire with intent to injure another.

Abstract

The crime of arson is committed in a number of different ways in the South African context. However, what is common to all incidences of the crime is that it causes danger: either to property or persons or both. Although the crime is traditionally classified as a crime against property, this article points out that it has been recognised, in the common-law sources upon which the crime is based, that the crime also protects the community. In this regard the use of the crime to punish the fire-setter who sets his or her own property alight, foreseeing that the fire may endanger the interests of others, is highlighted. This aspect of the crime derives from common-law sources, and has been recognised in the courts, but as yet has been sporadically acknowledged and applied by academic writers and in practice. It is submitted that such intentional conduct ought to be reflected in the definition of arson.

104 Such as Milton (n 1) at 785-786; Labuschagne (n 91) *passim*.

105 De Wet (n 34) at 294; Snyman (n 17) at 548; Burchell (n 1) at 856.

106 Milton (n 1) at 777.