EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF EVIDENCE AND SUBMISSIONS CONTAINED IN THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2016-085-001348
[2017] NZDC 25043

THE QUEEN

v

[KAREN WHITE]

Hearing: 6 November 2017

Appearances: RH De Silva for the Crown
S Gill for the Defendant

Judgment: 8 November 2017

RESERVED JUDGMENT OF JUDGE S M HARROP AS TO VERDICT

Introduction

[1] On [date deleted] 2016 Ms [White] and her partner [Travis][1] had an argument after which [Travis] locked himself in the spare bedroom of the house where they

[1] During the trial I made an order supressing the name of Ms [White]'s partner, a Crown witness, pursuant to s 202 of the Criminal Procedure Act 2011 on the ground that publication of his name would cause undue hardship to him. The reasons are discussed later in this judgment.

lived. Ms [White] had rented this house, at [address deleted] from [the landlord] for about 8 years.

[2] In an attempt to force [Travis] to leave the property, Ms [White] caused a fire by setting alight some junk mail using a toaster and placing it on the floor beside the closed, locked, bedroom door. When [Travis] saw the smoke under the door he called the fire brigade then jumped out the bedroom window. He was unharmed. By the time he was outside Ms [White] had left the property. The fire caused substantial damage to the porch and front entry area outside the bedroom door, and the rest of the house was badly smoke-damaged.

[3] Ms [White] is charged under s 267(1)(a) of the Crimes Act 1961 with intending to damage by fire [the landlords]' property knowing that danger to life was likely to ensue. Ms [White] denies both that she intended to damage the house and that she knew that her actions put[Travis'] life in danger.

[4] In this judgment I will determine whether or not the Crown has proved that charge beyond reasonable doubt.

The evidence in more detail

[5] Much of the evidence about what happened at [address deleted] on [date deleted] 2016 was not disputed. An admission of facts was filed, attaching a fire investigation report. As a result the Crown called only two witnesses, [Travis] and the officer in charge of the case [the Detective Constable]. Ms [White] exercised her right not to give or call evidence. She did however undertake an interview recorded on DVD with [the Detective Constable] the morning after the fire and clearly explained what had occurred and what led up to it. She is the only person who knows how the fire started; [Travis] was locked in the bedroom at the relevant time.

[6] Ms [White] explained that she has suffered from psychological abuse at the hands of [Travis] during their lengthy relationship, they have been together for some 16 years. She explained that [Travis] regularly brings home a substance, which I took to be a reference to methamphetamine, and that they both consume it. Consumption

of methamphetamine aggravates their problems in the relationship because as she put it "it makes him horny". [details deleted]. She said that his attitude made her feel "like a piece of trash" and described having felt like that over a ten- year period.

[7] Ms [White] explained that she had rented the house at [address deleted] some years previously [number of years of long-term tenancy deleted].

[8] The fire occurred at about [time and day deleted] but Ms [White] said that the argument which led up to it had begun on the [day deleted – two days earlier]. As a result of the argument [Travis] decided to move himself into the spare bedroom. He set up a bed on the floor and put his computer on a table. Ms [White] said that this was "so [details deleted]".

[9] None of the internal doors in the house had locks but [Travis] set about installing one on the spare bedroom door. Ms [White] objected but he continued. There was a scuffle between them over the keys to that lock and he suffered a minor hand injury. Ms [White] said that after [Travis] locked himself in the bedroom she got more and more angry and just wanted him to go. She thinks that she yelled at him through the door that she would get a chainsaw and chainsaw the door down. She told the Detective Constable: "and I don't know where I got the idea from but I just says to myself, 'I, will get you out' ". She then said "I lit a little fire and put it right by the door, I thought he would see the smoke and I knocked and I yelled". She confirmed that when she knocked and yelled she was telling him that there was a fire and that he needed to get out. She explained that she wanted to scare him but when he didn't come out she went out into the backyard.

[10] Ms [White] explained that she used the toaster to light the junk mail because she had been using it to light a cigarette and because [Travis] would not let her have the cigarette lighter.

[11] When she was in the backyard and saw the fire had started to take hold she said she started to get a bit worried and supposes that she was in shock by then. She heard [Travis] closing windows but did not see him leave through the bedroom

window. She went down the drive to a nearby school where she was found by the police about 20 minutes later.

[12] Ms [White] said she did not believe that [Travis] was stuck in the spare room because she had heard him closing other windows.

[13] When asked what she was trying to achieve by lighting the fire she said it was to scare [Travis] and to get him out of the house. She said she did not think the fire would get as bad as it did. She thought he would come out of the bedroom when he saw the smoke and say "you crazy bitch" as he usually calls her and put the fire out. She said he was hoping he would think that she was really serious about wanting him to leave and that he should give her some space.

[14] When asked for details about the psychological abuse C had inflicted on her over a period of time she described [suppressed details deleted].

[15] [The Detective Constable]ended the interview by offering assistance with obtaining a protection order against [Travis].

[16] When the police spoke to Ms [White] between about [time deleted] at the school, [the Constable] noted that she became increasingly distressed and erratic. She told him that she needed to go to the hospital for her [medication details deleted]. He noted that she was also showing signs of paranoia including, saying that people were filming and watching her. He handed her over to [the Detective Constable] who described her as very distressed and preferring to be dealt with by a female officer. She confirmed that it was initially very difficult to talk to Ms [White] who seemed to be having trouble understanding some aspects of what was being discussed; she repeated that she felt that she was being watched. Overall she found Ms [White] to be distressed and somewhat irrational to talk to.

[17] Back at the Wellington police station [the Detective Constable]called the CAT team to assess Ms [White]'s mental health because she was concerned about some of the things being said and the way she was presenting. She did not want to speak to her further in case she required any medication or assistance. The

Detective Constable produced in evidence a document entitled "Health and Safety Management Plan for person in custody" which contained some notes made by her and another officer. Their assessment was that she was in need of care and frequent monitoring. Information obtained from Ms [White] indicated recent methamphetamine use, alcohol use, [medical details deleted].

[18] Once Ms [White] had calmed down she explained to [the Detective Constable] what had occurred and what had led up to it. This was repeated in the interview the following day. The Detective Constable confirmed that she felt that Ms [White] was a victim of family violence and accordingly offered her assistance by way of obtaining a protection order.

[19] [Travis] said in evidence that he could not remember what the argument on [date deleted] was about but he could remember Ms [White] yelling out once he was locked in the room, though not what she was saying. He called 111 when he saw the smoke coming under the door. The call was played in evidence and he appeared to be calmly stating his position confirming that he was stuck in the room at the moment but could get out the window. [Travis] confirmed that he and Ms [White] did argue a good deal generally and that there had been a fight over the key for the room.

[20] [Travis] was asked how he felt in respect of his safety when he saw the smoke coming through the door. He said that he did not feel like he was in danger and he was able to get out of the window without difficulty.

[21] In cross-examination following my giving him a self-incrimination warning [Travis] declined to answer any questions about purchasing or using methamphetamine and, despite it being doubtful whether self-incrimination would necessarily be involved, he said he would rather not answer questions about [suppressed details deleted] and his conduct towards Ms [White]. He confirmed that he had constructed a lock for the bedroom door just before the fire was lit and that this was on the inside of the door. He was asked why, when he saw the smoke, he did not open the door and get some water to put the fire out. He said there was quite a lot of smoke and he was aware one should not open the door or touch the door

handle which would likely be hot. He rang the brigade before getting out of the house because he thought the sooner they got there the less damage there would be. He denied going back into the house after he got out through the window and he denied closing any windows after the fire had started. He did recall the threat Ms [White] had made to chainsaw the door down because she just wanted him gone. [Travis] could not recall whether Ms [White] was smoking anything on that day but he described her behaviour as "a bit erratic".

[22] [Travis] denied he had gone into the room to [details deleted][2].

[23] Overall, I have no reason to doubt, and accept, Ms [White]'s account of what happened and her motivation for her conduct. [Travis] either could not recall aspects of her account and mostly did not disagree with it where he could recall it and was prepared to answer questions about it.

Issues

[24] There is no dispute that Ms [White] damaged[the landlord's] property by fire. The Crown however must prove two other elements: that she intentionally damaged [the landlord's] property and that she did so knowing that danger to life was likely to ensue. Ms [White] denies both of those elements.

Ground rules

[25] Before discussing the critical elements further, I record the fundamental basis on which the issues must be considered. The onus is on the Crown to prove each of these elements beyond reasonable doubt. Ms [White] has no onus to prove anything, in particular in this case she has no obligation to prove that she did not intend to cause the fire or that she did not know danger to life was likely to ensue. She elected not to give evidence which was absolutely her right and her decision does not in any way assist the Crown. She retains the presumption of innocence regardless.

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[2] Because [Travis] was a witness and was not on trial for any of the conduct which Ms [White] alleges he engaged in and because he denies the relevant conduct I decided there would be undue hardship to him were his name published; hence the suppression order referred to earlier.

Has the Crown proved beyond reasonable doubt that Ms [White] intentionally damaged the property by fire?

[26] I reiterate that I have no reason to doubt, and accept, Ms [White]'s evidence through the police interview as to how she started the fire and as to her overall purpose in doing so. On the face of it as Mr Gill submitted she intended to light the junk mail with a view to scaring [Travis] and trying to get him out of the house. The question is whether that was accompanied by an intention to damage the house. Any reasonable person in her position would have realised that at least some damage to the house was inevitable but did she subjectively intend to cause it?. It is not necessary that the Crown prove that Ms [White] intentionally damaged the property in the way that she ultimately did damage it, it is only necessary that the Crown prove that she intentionally damaged at least a part of [the landlord's] property. There is no doubt that minor damage by fire, such as scorching or charring amounts to damage[3].

[27] Proof of intention is of course a matter of inference from the surrounding circumstances and clearly the test is a subjective one. This requires consideration of the defendant's state of mind, which in turn includes consideration of the possible effects of substance abuse, the impact of the psychological abuse from [Travis] and her mental health at the time she lit the fire.

[28] Mr Gill submitted that Ms [White] had lacked normal capacity to form intention by reason the consumption of methamphetamine over three days, sleep deprivation, significant prolonged psychological abuse leading to paranoia and intense distress. In this he referred to *R v Can*[4] . However, as Ms De Silva submitted, there is no expert evidence as to the defendant's state of mind at the critical time. While there was a suggestion she may have used methamphetamine in the days leading up to the incident in her interview, even she did not expressly tell the police there was. Clearly there was self-reporting to the police about her mental state and her prescription medication and there is evidence from three police officers of her being somewhat irrational and presenting as rather paranoid.

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[3] See *R v Archer* [2009] NZCA 543
[4] [2007] NZCA 291 at [43] to [50]

[29] Ms [White] did however calm down considerably after a period of time at the police station and clearly could recall the relevant events in some detail. Undoubtedly she was shocked by the extent of the fire she caused but it is very difficult to say whether she lacked normal capacity to form intention at the time when she lit the fire, as opposed to (at least primarily) being very distressed as a result of causing the fire. While the very act of lighting junk mail outside a door may be seen as irrational and perhaps the product of prolonged abuse and anxiety, it appears she was sufficiently in control of her faculties to think of obtaining the junk mail and then to use the toaster to light it. She acted purposefully in doing this after her shouting at [Travis] and threatening to chainsaw the door down did not work. She said that she thought that [Travis] would react when he saw the smoke by opening the door, putting the fire out, and realising she was serious, leave the property. That indicates a degree of planning and purpose inconsistent with an absence of normal capacity to form intention. Accordingly, while I accept that her capacity to form intention may have been affected in some way, I have no doubt that she deliberately lit the junk mail and that she did so with a clear purpose of scaring [Travis] and trying to force him to leave.

[30] I have no doubt that Ms [White]'s dominant intention and focus was not on damaging the house, but on getting [Travis] out of it. I am also sure she had no intention of causing anything like the extent of the damage which the fire and smoke ultimately caused. But did she intend to cause some damage to the property in the immediate vicinity of the pile of junk mail which she lit?

[31] In *R v Wentworth*[5] Fisher J held that[6]:

> "In a legal context "intention" is normally taken to embrace both ultimate (desired) consequences and incidental (undesired but foreseen) consequences so long as the later are foreseen with sufficient certainty when the course of action is deliberately embarked upon. "Direct intention" may be used to refer to the former and "oblique intention" the latter. There is room for argument as to the degree of certainty with which the accused must be predict the indirect consequence (Orchard, "Criminal Intention" [1986] NZLJ 208: "virtual" or moral certainty is sufficient; query anything less) but in principle both types of intention qualify. Contract killers usually want money, not the death of their victims per se. Receipt of money is the

[5] [1993] 2 NZLR 450 also reported as *R v Richards* (1992) 9 CRNZ 355 Fisher J
[6] At 456

> ultimate, desired, consequence. Death of the victim is the incidental, perhaps regretted, consequence. If it is clear that the intended course of action will result in both, both are said to be intended."

[32] This approach was upheld by the Court of Appeal in *New Zealand Police v K*[7]. It noted that Fisher J's observations were consistent with a number of decisions of the English courts[8].

[33] I am in no doubt that Ms [White] had no direct intention to damage the landlord's property. She had no "beef" with them, she was a long-standing tenant and I infer in a good landlord-tenant relationship prior to the fire. No accelerant was used and her purpose was to produce smoke sufficient to extract [Travis] from the bedroom not to produce flames. However, the circumstances in which she lit the junk mail inevitably and inexorably led to at least scorching and charring damage in the vicinity of the seat of the fire. While there is no evidence as to the amount of junk mail which was lit, the resulting fire was substantial which implies that the pile of junk mail might not have been as small as she suggested. Ms [White] was also aware, as she confirmed in interview, that [Travis] had removed a number of items from the spare bedroom and placed them in the hallway.

[34] I consider that the consequences for the landlord's property while not expressly intended or sought by Ms [White] were much too close to the directly intended effects of her actions to be separated off as mere side effects. As the saying goes, there is "no smoke without fire"; she could not produce smoke in the way she chose without starting a fire. Ms[White] did not wait for some smoke to be generated then put the fire out, but instead left the premises. In these circumstances fire damage was (at the least) virtually certain to occur. I therefore conclude that Ms [White], at the time she lit the junk mail, intended in the collateral or oblique sense, to cause damage to [the landlord's] property by fire, albeit certainly not to the extent that ultimately ensued.

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[7] [2011] NZCA 533

[8] See also the discussion in Simester and Brookbanks *Principles of Criminal Law* (Thomson Reuters, Wellington 4th Edition 2012) at paragraph 4.2.4 under the heading "Virtually certain consequences: the second category of intention". These are described as "some consequences which are not themselves sought (as either means or end) but nevertheless much too close to the intended effects to be separated off as mere side-effects."

[35] If I am wrong in that conclusion there is an alternative in s 267(1)(a) that she caused the damage by fire recklessly. Again this is a subjective test and requires the Crown to prove conscious appreciation of risk and the deliberate taking of that risk. Given that I have found there was oblique intention it is not necessary to consider this alternative. In the circumstances of this case, there does not appear to be a material difference between conscious appreciation of (the obvious) risk and oblique intention. If she had the latter then she had the former. If she did not have the former then she did not have the latter either.

Has the Crown proved beyond reasonable doubt that Ms [White] knew that danger to life was likely to ensue (from her intentional damage of [the landlord's] property by fire)?

[36] The first point is that danger to life must mean danger to the life of someone other than the defendant[9]. Obviously here there was some potential for danger to [Travis]'s life. The real question is whether it was at a level amounting to proof of this element.

[37] Again, the question of knowledge of danger to life being likely to ensue is a subjective one and dependent on inference from the evidence about Ms [White]'s state of mind at the time she lit the fire. I am satisfied that she did not intend to cause any harm to [Travis] let alone put his life at risk. Her focus was on getting him out of the property. She yelled at him to get out, so it indeed could be said she acted to minimise or avoid such risk as there was, albeit she may primarily have said that for a selfish rather than altruistic reason, to try to achieve her overall purpose of getting him out.

[38] While proof of actual harm is not required, and the focus is on Ms [White]'s knowledge of the risk to life created, it is highly relevant that [Travis] himself did not see his life as being in any way at risk as a result of the fire she lit. He was able calmly to call the fire brigade and easily to get out of the bedroom window. I note too, he denied opening the door once the fire started (as she believed he had in order to close other windows in the house) but [Travis] accepted that the lock was on the

[9] See *R v Arthur* [1968] 1 QB810, applied in *R v Smith* [1995] DCR 379 by Judge Thorburn

inside of the door so he had a potential means of escape through the door as well, albeit that it was clearly much more prudent to use the window.

[39] It is also relevant that the fire was lit at a time when there was communication between the two through the door, so Ms [White] was aware that [Travis] was both awake and active. The scenario and the level of risk to his life would have been very different had she lit the fire in the middle of the night when she knew he was or was likely to be asleep.

[40] That said, when a fire is lit close to a locked door, and with other flammable material nearby, there is obviously a risk of harm, including death, to the person inside the room. But I consider it was, in the particular circumstances of this case, no more than a possibility of harm and that it cannot be said that Ms [White] knew that danger to [Travis]'s life was likely to ensure ensue. In *R v Gush*[10] the Court of Appeal, when considering the meaning of "likely to cause death" in the context of culpable homicide amounting to murder, the Court of Appeal suggested that it meant" such as could well cause death". I do not consider that test is met in the circumstances here. Danger to [Travis]'s life was merely a possibility and there was no real and substantial risk of his death actually happening to the point where it can be said it could well happen. There were no adjoining premises and no other people apart from [Travis] at risk. In principle there may have been a risk to life faced by firefighters who attended the scene but given that I have found the defendant did not intend to create such a fire as would require the attendance of the brigade, I do not accept that at the time she lit the fire she knew that danger to the life of firefighters was likely to ensue.

[41] Ms De Silva submitted that, in effect, Ms [White] demonstrated that she did not care about the risk she had created by not making any effort to extinguish the fire, by not calling the brigade herself, by not checking [Travis] had got out safely and by leaving the property despite not knowing where he was. But I do not consider her conduct after the fire necessarily informs assessment of her knowledge at the time she lit it and her appreciation of the level of risk to life at that (critical) point.

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[10] [1980] 2 NZLR 92

[42] It is appropriate to consider the alternative form of knowledge set out in s 267(1)(a) namely that Ms [White] "ought to have known" that danger to life was likely to ensue. This of course is an objective standard not to be assessed based on Ms [White]'s state of mind but on assessment of whether a reasonable person in her position ought to have known that danger to [Travis]'s life was likely to ensue. In principle the Crown has an easier task in proving this because any impairment of Ms [White]'s knowledge derived from the factors mentioned earlier are irrelevant on an objective approach. But I do not consider that a reasonable person in her position would have known any more than she did that a danger to cease life was likely to ensue given all the circumstances. My decision that the Crown has not proved she knew that danger to [Travis]'s life was likely to ensue rested on the level of risk in all the circumstances rather than on her state of mind. Accordingly, in this particular case, there is no material difference between the subjective and objective approaches. A reasonable person would certainly have understood it was a dangerous thing to do and that there was the possibility of danger to life but would not have concluded that [Travis]'s death was likely to result.

[43] For these reasons I am not satisfied to the high standard of proof of beyond reasonable doubt that Ms [White] knew (or that she had ought to have known) that danger to [Travis]'s life was likely to ensue when she lit the pile junk mail. Accordingly the charge not being proved, it is liable to be dismissed.

Is there an alternative charge justifying amendment of the current charge?

[44] While the Crown has laid no alternative charge to that under s 267(1)(a), nor did Ms De Silva in her submissions ask me to consider one, under s 136(2) of the Criminal Procedure Act 2011 a charge *must* be amended by substitution of one offence for another if in the court's opinion the defendant will not be or has not been misled or prejudiced in his or her defence by the amendment. This however may only be done, as s136(1) provides, during the trial (i.e. prior to verdict) if there appears to be a variance between the proof and the charge (as I have found) and the amendment will make the charge fit with the proof.

[45] I have for this reason considered alternative possibilities elsewhere within s 267 and s 269 of the Crimes Act, the latter relating to intentional damage. Given my finding that Ms [White] intentionally damaged [the landlord's] property by fire, one would think there ought to be a charge fitting the case.

[46] Section 267 of the Act provides:

> **267 Arson**
>
> (1) Every one commits arson and is liable to imprisonment for a term not exceeding 14 years who—
>
> (a) intentionally or recklessly damages by fire or by means of any explosive any property if he or she knows or ought to know that danger to life is likely to ensue; or
>
> (b) intentionally or recklessly, and without claim of right, damages by fire or by means of any explosive any immovable property, or any vehicle, ship, or aircraft, in which that person has no interest; or
>
> (c) intentionally damages by fire or by means of any explosive any immovable property, or any vehicle, ship or aircraft, with intent to obtain any benefit, or to cause loss to any other person.
>
> (2) Every one commits arson and is liable to imprisonment for a term not exceeding 7 years who—
>
> (a) intentionally or recklessly, and without claim of right, damages by fire or by means of any explosive any property in which that person has no interest (other than property referred to in subsection (1)); or
>
> (b) intentionally or recklessly damages by fire or by means of any explosive any property (other than property referred to in subsection (1)) with intent to obtain any benefit, or with intent to cause loss to any other person.
>
> (3) Every one is liable to imprisonment for a term not exceeding 5 years who intentionally damages by fire or by means of any explosive any property with reckless disregard for the safety of any other property.
>
> (4) In this section and in section 269, *benefit* means any benefit, pecuniary advantage, privilege, property, service, or valuable consideration.

[47] On the face of it, one might think that the facts in this case as proved fit within s 267(1)(a) because [the landlord's] house is immovable property which, as I have found, was intentionally damaged by fire by Ms [White]. That also must have

been done without claim of right. However it is a necessary element of that charge that she had no interest in the property so damaged. In *R v Wilson*[11] the appellant successfully appealed against conviction for arson. He was the tenant of a property damaged by a fire caused during the manufacture of methamphetamine. The Court of Appeal noted that the Crimes Act contains no definition of "interest" in property and that it is well established that a tenancy is an interest in land. With reference both to the plain meaning of s 267(1)(b) and the relevant legislative history the Court of Appeal concluded[12]: "Where, as here, the Crown alleges that damage by fire has been caused recklessly and the person charged is a tenant of the property (or holds another qualifying interest) then, in the absence of any of the aggravating features, that person cannot be convicted of arson".

[48] I take the Court of Appeal's reference to "aggravating features" to mean those set out in s 267(1)(c) namely an accompanying intention either to obtain a benefit or to cause loss to any other person.

[49] Because, as a tenant, Ms [White] did have an interest in the property, s 267(1)(b) has no application and no substitution of that charge can be justified because it would not fit with the proof.

[50] As to s 267(1)(c), neither of the alternative aggravating features of having intent to obtain a benefit or to cause loss to any other person are suggested of Ms [White], so again substitution of that charge would not be appropriate.

[51] For the same reasons the charges in s 267(2)(a) and (b) are not appropriate candidates for substitution.

[52] The charge in s 267(3) might, on a rather artificial basis, be seen to apply in the sense that it could be said that Ms [White] intentionally damaged the junk mail by fire with reckless disregard for the safety of [the landlord's] property. However I consider it would be wrong to substitute this charge given that I have found Ms [White] intentionally damaged [the landlord's] property. This charge is clearly

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[11] [2008] NZCA 505
[12] At [20]

intended for circumstances where the Crown cannot prove intention to damage the "secondary" property but can prove intentional damaging by fire some other, "primary", property with reckless disregard for the safety of the "secondary" property. It is in any event relevant to any question of possible amendment by substitution that the Crown in full possession of the facts by reason of Ms [White]'s interview has elected to lay the charge under s 267(1)(a) without any alternative. There would be a sense of unfairness in substituting a charge of any kind in these circumstances though I would be required to do it if an alternative charge did fit with the proof whether or not the Crown had raised it (given that I do not consider Ms [White] could be seen as misled or prejudiced in her defence by substitution). I acknowledge that under s 133(2) the court has power to amend of its own motion, but for these reasons I decline to do so here.

[53] The other potential possibility in the Crimes Act is s 269 which provides:

> **269 Intentional damage**
>
> (1) Every one is liable to imprisonment for a term not exceeding 10 years who intentionally or recklessly destroys or damages any property if he or she knows or ought to know that danger to life is likely to result.
>
> (2) Every one is liable to imprisonment for a term not exceeding 7 years who—
>
> (a) intentionally or recklessly, and without claim of right, destroys or damages any property in which that person has no interest; or
>
> (b) intentionally or recklessly, and without claim of right, destroys or damages any property with intent to obtain any benefit, or with intent to cause loss to any other person.
>
> (3) Every one is liable to imprisonment for a term not exceeding 7 years who intentionally destroys or damages any property with reckless disregard for the safety of any other property.

[54] As can be seen the possible charges arising from s 269 largely follow the pattern set out for arson in s 267. For the same reasons why I do not consider substitution of one of the s 267 charges is appropriate, indeed possible, I do not consider substitution of a charge under s 269 is possible or appropriate.

[55] For completeness, I also considered whether the wilful damage charge under s.11 of the Summary Offences Act 1981 might properly be substituted, but s11(3) provides that "it shall not be a defence that the person charged had an interest in the property if he damaged it with intent to defraud or cause loss". The clear inference from that, and indeed this is consistent with the Crimes Act provisions to which I have referred, is that if the defendant *does* have an interest in the property, such as a tenancy, then that will be a defence.

Conclusion

[56] I conclude that I have no jurisdiction under s136 to substitute any other charge for the charge faced by Ms [White] under s 267(1)(a), or, in the case of the possible charge under s267(3) decline to exercise the power to do so if there is jurisdiction.

[57] I find that the second disputed element of the charge under s267(1)(a) has not been proved by the Crown beyond reasonable doubt. Accordingly, the verdict is not guilty and charge will be and is dismissed.

S M Harrop
District Court Judge