

## 104. Arson: s 461

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### 104.1 Legislation

[Last reviewed: May 2025]

*Criminal Code*

[Section 461](#) – Arson

### 104.2 Commentary

[Last reviewed: May 2025]

The Defendant must have:

- (1) set fire to a thing mentioned in section 461(1);
- (2) done so wilfully; and
- (3) done so unlawfully.

*Set fire to the property*

In *R v Joinbee* [\[2013\] QCA 246](#); [\[2014\] 2 Qd R 69](#); [\(2013\) 234 A Crim R 391](#) each of the members of the Court concluded that the expression ‘sets fire to’ in s 461 of the Code refers to conduct which causes the [thing mentioned in s 461] to be set on fire. It is not limited to conduct involving directly physically igniting the thing.

In *R v Joinbee*, Philippides J explained at [16] that ‘a causative connection between the particular act in question and the requisite outcome is inherent in the expression “sets fire to”’. It follows that a direction on causation may be required (see also [80]-[84]).

To have set fire to property, the Defendant must have caused some actual burning of the property. The slightest degree of burning is sufficient (see *R v Joinbee* at [14]). By contrast, mere scorching, or blackening (for example) - not constituting actual burning - will not be sufficient.

It may be desirable that in any expert evidence adduced at trial utilising terminology such as ‘charring’ to clarify the meaning of the terminology adopted so as to establish whether or not actual burning took place (see further *R v Joinbee* at [14]; *R v Jorgenson* (1954) 111 Can Crim Cas 30 at [43], each citing *R v Parker* (1839) 9 Car & P 45; [173 ER 733](#) and *R v Russell* (1842) Car & M 541; [174 ER 626](#)).

*Done so wilfully*

The element of ‘wilfully’ requires either (1) proof of actual intention, or (2) that the Defendant deliberately does an act, aware at the time it is done, that the particular item catching fire is a likely consequence of that act, and that the Defendant does the act

regardless of the risk: see *R v Lockwood; ex parte A-G* [1981] Qd R 209; *R v T* [1997] 1 Qd R 623; [1996] QCA 258.

Where there is evidence of a Defendant having been intoxicated at the time of setting fire to the thing, a direction on the relevance of intoxication to the Defendant's state of mind may be required (*R v Eustance* [2009] QCA 28, [18]).

See also *R v Cormack* [2013] QCA 342.

### *Unlawfully*

It is immaterial that the person who does the injury is in possession of the property injured, or has a partial interest, or an interest in it as a joint or part owner or owner in common: s 458(3).

Section 459(1) renders otherwise lawful acts unlawful, when done with intent to defraud any person. It is immaterial that the property in question is the property of the offender: s 459(2).

A person is not criminally responsible for an injury caused to property by the use of such force as is reasonably necessary for the purpose of defending/protecting him/herself or any other person, or any property from injury which the person believes, on reasonable grounds, to be imminent: s 458(4).

## **104.3 Suggested Direction**

[Last reviewed: May 2025]

**The prosecution must prove beyond reasonable doubt that:**

- 1. The Defendant set fire to [an item in section 461(1)].**
- 2. The Defendant did so wilfully.**

**That is, the Defendant either:**

- i) had an actual intention to set fire to the [item]; or**
- ii) deliberately did an act, aware at the time [he/she] did the act, that the [item] catching fire was a likely consequence of [his/her] act, and [he/she] did the act regardless of the risk.**

- 3. The Defendant did so unlawfully.**

**[(Where applicable): An act which causes injury to the property of another, and which is done without the owner's consent, is unlawful unless it is authorised or justified or excused by law].**

**[(Where applicable):** An act which causes injury to property, where done with intent to defraud any person, is unlawful. It is immaterial that the property is the property of the defendant].