IN THE NAUARU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 05 of 2021
Supreme Court Criminal Case No. 13 of 2021

BETWEEN

THE REPUBLIC

AND

APPELLANT

RANDY DOGUAPE

RESPONDENT

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. R. Palmer
Justice C. Makail
Justice M.P. de Silva

DATE OF HEARING: **02 November 2023**

DATE OF JUDGMENT: **03 May 2024**

CITATION:	**The Republic** v **Randy Doguape**
KEYWORDS:	Self-induced intoxication, basic intent, specific intent, enter or remain without lawful authority or excuse, voluntary conduct,
LEGISLATION:	Section 8, 43, 117, 164 of the Crimes Act 2016;
CASES CITED:	DPP v Majewski [1977] AC 443; DPP v Morgan [1975] 2 All ER 347; R v O'Connor (1980) 54 A.L.J.R. 349; Bratty v Attorney General for Northern Ireland, [1961] 3 All ER 523
APPEARANCES:	
COUNSEL FOR the Appellant:	**S. Shah**
COUNSEL FOR the Respondent:	**R. Tagivakatini**

JUDGMENT

1. This is an appeal by the Director of Public Prosecutions (Appellant) on a judgment delivered by the Supreme Court on 27 July 2021. The Respondent was charged for Indecent Acts in Relation to a Child under 16 years contrary to section 117(a)(b)(c) of the Crimes Act 2016 and Being Found in Certain Place without Lawful Authority or Excuse contrary to section 164(a)(ii)(b) of the Crimes Act 2016. After a full hearing the learned trial judge acquitted the Respondent on both counts.

2. The Appellant filed a timely notice of appeal on 25 August 2021 seeking to appeal against the acquittal in respect of count 2 and sought an order to

overturn the acquittal and substitute it with a conviction. The ground of appeal reads as follows:

> "That the learned judge erred in law and in fact when he acquitted the Respondent of count 2".

3. The appeal was taken up for hearing on 02 November 2023. The parties filed their written submissions and made oral submissions briefly. Interestingly, the Respondent conceded the appeal and submitted that a judgment be delivered setting aside the acquittal. We have considered the submissions filed by the parties.

4. The brief facts of the case are as follows: On 21 May 2021, the Respondent began drinking with a group of friends in Anabar District to celebrate passing a course they had completed. The following morning, in the early hours, the Respondent was found inside a house in Anetan District where three children were sleeping. The children's mother had gone out partying, and their father had left home around 5:30 am to visit a friend. After the father left, the Respondent entered the house through a back door, which was left unlocked for the mother's return. The Respondent then climbed onto the back of one child and squeezed her back. The frightened child quickly left the bedroom with her siblings and sought help from her aunt next door. When the children's father returned from his friend's place, he discovered the Respondent asleep in the bedroom. He dragged the Respondent out, slapped him several times to wake him up, and restrained him with a wire rope to prevent escape. The police were subsequently informed and took the Respondent into custody.

5. As mentioned before, the Appellant does not appeal against the acquittal in respect of the first count. We will now consider the second count that the Respondent was acquitted on. As per the information the second count reads as follows:

Count 2

Statement of offence

Being found in certain places without lawful excuse: Contrary to section 164(a)(i)(b) of the Crimes Act 2016

Particulars of offence

Randy Doguape on the 22nd of May 2021 at Anetan District in Nauru, entered the dwelling house of Issac Degia, and that Randy Doguape did not have the consent of Issac Degia to enter in the said place.

6. For convenience of reference, we will reproduce section 164 of the Crimes Act 2016 below:

> **164. Being found in certain places without lawful authority or excuse**
>
> A person commits an offence, if the person:
>
> (a) Enters or remains in any of the following places:
>
> (i) A dwelling-house, shop, office, factory, garage, out-house or other building;
>
> (ii) An enclosed yard, garden or other area;
>
> (iii) A ship or other vessel; or
>
> (iv) An area in which mining operations are being carried on; and
>
> (b) Does not have the consent of the owner to enter or remain in the place.
>
> Penalty: 1 year imprisonment.

7. The Appellant argued that the Respondent was aware of his conduct and that his conduct was intentional. Upon perusal of the judgment from the lower court, it appears that the learned trial judge noted a distinction between 'entered a dwelling house' and 'was found inside' in paragraph 10 of the judgment. Furthermore, it was noted by the learned trial judge that the prosecution must prove, in addition to the elements of the second count, that the Respondent's entry into the house was a 'voluntary act' and that the entry

was 'intentional'. The learned trial judge went on to state the following in the judgment:

> "11. In the present case in the absence of focused submissions and despite it being common ground that the defendant had consumed a large quantity of alcohol that evening and had "blacked out" before the alleged incident, the prosecution it seems, assumes that the mere presence of the Defendant in DP's bedroom is sufficient to establish an intentional entry.
>
> 12. In my view, given elements of the offence and the prosecution's burden of proof and the defence case based on provisions of section 43(3), the discovery of a drunken stranger sleeping in an unfamiliar house without permission is a neutral fact, which does not raise an irresistible inference that entry into the house was intentional and must have been *"a conscious product of the defendant's will"."*

8. The learned trial judge then considered section 43 of the Crimes Act 2016 and seemingly placed his Honour's reliance on subsection 3, concluding that the Respondent's action was neither intentional nor voluntary. Section 43 of the Crimes Act 2016 addresses criminal liability concerning intoxication as follows:

> "43. **Intoxication**
>
> (1) A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.
>
> (2) Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct.
>
> (3) This section does not prevent evidence of self-induced intoxication being considered in deciding whether conduct is voluntary.
>
> (4) In this section:

'dentist' means a health practitioner registered in the class of dentist;

'intoxication' means intoxication because of the influence of alcohol, a drug or another substance; and

'self-induced' intoxication is 'self-induced' unless it came about:

(a) Involuntarily;

(b) Because of fraud, sudden or extraordinary emergency, accident, reasonable but mistaken belief, duress or force;

(c) From the use of a drug for which a prescription is required and that was used in accordance with the directions of a health practitioner or dentist who prescribed it; or

(d) From the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer."

9. In this case, there is no dispute regarding the identity of the Respondent, the date of the offence, and the fact that the premises entered by the Respondent is a dwelling house. The only issue argued by the Respondent in the lower court was that he had "blacked out" and did not know where he was or what he was doing. Therefore, the argument of the defence was that the "offence requires affirmative proof of actual conduct, rather than an inactive 'state of affairs' such as being found." Accordingly, it appears that the learned trial judge considered intention and voluntariness together when his Honour stated in paragraph 34 of the judgment that the prosecution failed to prove that it was an 'intentional' and 'voluntary' act.

10. We will now consider the offence of entering a dwelling house without lawful excuse or authority, in the context of section 43. Section 43(2) states *that evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct*. In other words,

what section 43(2) clearly states is that self-induced intoxication does not negate the necessary fault element, which is intent, when the conduct itself constitutes the offence. This rationale aligns with the reasoning in the landmark decision on intoxication, DPP v Majewski [1977] AC 443, which asserts that intoxication is not a defence for crimes of basic intent. Therefore, it appears that the legislature has created this provision in the Crimes Act to disregard evidence of self-induced intoxication when assessing the fault element of a defendant committing an offence with basic intent. According to section 164 of the Crimes Act 2016, being found in certain places without lawful authority or excuse, is an offence based solely on the act of unlawfully entering someone else's property. There is no need to prove that the person who entered had the intention to do anything specific, once on the property. The act of entry or remain itself constitutes the entire physical element of the offence.

11. The learned counsel for the Appellant brought to the attention of this court the corresponding provisions in Fiji and other jurisdictions. It should be noted that section 164 of the Crimes Act 2016 differs significantly from the corresponding offence in Fiji. Under section 387 of the Crimes Act 2009 of Fiji, the offence of trespass explicitly requires, beyond the basic conduct, a further intention to commit another offence. Distinctively, the Crimes Act 2016 of Nauru does not qualify the offence of being found in certain places without lawful authority or excuse, with an additional fault element to perform another act. But in any event, although trespass in Fiji is not identical to the offence of being found in certain places without lawful authority or excuse in Nauru, the provisions relating to intoxication in Fiji are quite similar to those in section 43 of the Crimes Act 2016 of Nauru. Section 30 of the Crimes Act 2009 of Fiji, which is titled '*Intoxication (offences involving basic intent)*', reads as follows:

> "30. -(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

(2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(4)..."

12. Furthermore, it appears that sub sections 30(1) and 30(2) of Crimes Act 2009 of Fiji expressly mention 'basic intent' in relation to a physical element that consists only of conduct, as opposed to section 43 of the Crimes Act 2016 of Nauru. In this regard, we do not see much difference in the provisions relating to intoxication in Nauru and Fiji, as these provisions very clearly acknowledge the position taken in the Majewski decision (supra).

13. It can be deduced that the rationale behind excluding self-induced intoxication in determining the fault element of intention, in relation to a physical element that consists solely of conduct, is based on public policy aimed at safeguarding community from persons who commit certain offences after self-induced intoxication. The significance of public policy embedded in this principle is better explained by the remarks quoted by Elwyn-Jones LC in the Majewski decision from Lawton LJ in the Court of Appeal:

> "The appeal raises issues of considerable public importance. In giving the judgment of the Court of Appeal Lawton L.J., rightly observed that "The facts are commonplace—indeed so commonplace that their very nature reveals how serious from a social and public standpoint the consequences would be if men could behave as the [appellant] did and then claim that they were not guilty of any offence." Self-induced alcoholic intoxication has been a factor in crimes of violence, like assault, throughout the history of crime in this country. But voluntary drug taking with the potential and actual dangers to others it may cause had

added a new dimension to the old problem with which the Courts have had to deal in their endeavour to maintain order and to keep public and private violence under control. To achieve this is the prime purpose of the criminal law. I have said "the Courts," for most of the relevant law has been made by the judges. A good deal of the argument in the hearing of this appeal turned on that judicial history, for the crux of the case for the Crown was that, illogical as the outcome may be said to be, the judges have evolved for the purpose of protecting the community a substantive rule of law that, in crimes of basic intent as distinct from crimes of specific intent, self-induced intoxication provides no defence and is irrelevant to offences of basic intent, such as assault."

14. There is no gainsaying that the creation of section 43(2) of the Crimes Act 2016 by the legislature was intended to give effect to the same rationale discussed in the Majewski case (supra). This section likely reflects a legislative intent to address the challenges posed by self-induced intoxication in criminal law, emphasizing accountability regardless of the offender's awareness or control at the time of committing the offence. Furthermore, Elwyn-Jones LC elaborated on this principle in Majewski (supra), emphasizing the implications of voluntary intoxication on criminal responsibility. On page 268, he articulated a critical perspective on this issue:

> "If a man consciously and deliberately takes alcohol and drugs not on medical prescription, but in order to escape from reality, to go "on a trip," to become hallucinated, whatever the description may be, and thereby disables himself from taking the care he might otherwise take and as a result by his subsequent actions causes injury to another-does our criminal law enable him to say that because he did not know what he was doing he lacked both intention and recklessness and accordingly is entitled to an acquittal ?"

15. Now, a question arises as to what 'offences of basic intent' mean. Although section 43(2) does not specifically mention the words 'offences of basic intent,' unlike the corresponding provision in section 30 of the Crimes Act 2009 of Fiji, it can be clearly inferred from the wording of the provision that the 'physical element that consists only of conduct' refers to offences with basic intent. In DPP v Morgan [1975] 2 All ER 347, the offences of basic intent were discussed as follows on page 363:

> "I turn to examine, first, the distinction between crimes of basic and of ulterior intent, having taken the latter expression from Smith and Hogan (Criminal Law (3rd Edn, 1973), p 47). I leave aside, as irrelevant, crimes of absolute liability; and I propose to use the terms *actus reus* and *mens rea* in the senses which I indicated in *Lynch v Director of Public Prosecutions for Northern Ireland* ([1975] 1 All ER 913 at 934, [1975] 2 WLR 641 at 664-665). By 'crimes of basic intent' I mean those crimes whose definition expresses (or, more often, implies) a *mens rea* which does not go beyond the *actus reus*. The *actus reus* generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the *mens rea* does not extend beyond the act and its consequence, however remote, as defined in the *actus reus*. I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The *actus reus* of assault is an act which causes another person to apprehend immediate and unlawful violence. The *mens rea* corresponds exactly. The prosecution must prove that the accused foresaw that his act would probably cause another person to have apprehension of immediate and unlawful violence, or would possibly have that consequence, such being the purpose of the act, or that he was reckless whether or not his act caused such apprehension. This foresight (the term of art is 'intention') or recklessness is the *mens rea* in assault. For an example of a crime of basic intent where the consequence of the act involved in the actus reus as defined in the crime

is less immediate, I take the crime of unlawful wounding. The act is, say, the squeezing of a trigger. A number of consequences (mechanical, chemical, ballistic and physiological) intervene before the final consequence involved in the defined actus reus – namely, the wounding of another person in circumstances unjustified by law. But again here the *mens rea* corresponds closely to the actus reus. The prosecution must prove that the accused foresaw that some physical harm would ensue to another person in circumstances unjustified by law as a probable (or possible and desired) consequence of his act, or that he was reckless whether or not such consequence ensued.

On the other hand, there are crimes of ulterior intent – 'ulterior' because the *mens rea* goes beyond contemplation of the actus reus. For example, in the crime of wounding with intent to cause grievous bodily harm, the *actus reus* is the wounding. The prosecution must prove a corresponding *mens rea* (as with unlawful wounding), but the prosecution must go further: it must show that the accused foresaw that serious physical injury would probably be a consequence of his act, or would possibly be so, that being a purpose of his act. The crime of wounding with intent to cause grievous bodily harm could be committed without any serious physical injury being caused to the victim. This is because there is no *actus reus* corresponding to the ulterior intent..."

16. The above passages from DPP v Morgan (supra) clearly explain the difference between basic intent and ulterior intent, which is also interchangeably referred to as 'specific intent.' The case law indicates that evidence of self-induced intoxication can be considered to decide on the necessary fault element for specific intent offences. However, we are now dealing with a basic intent offence. Therefore, we do not wish to discuss self-induced intoxication with regard to specific intent offences in this judgment.

17. In view of the above case law, it is clearly discernible that evidence of self-induced intoxication cannot be considered in assessing the existence of fault element in basic intent offences, as stipulated in the legislation under Section 43(2) of the Crimes Act 2016.

18. Nevertheless, the learned trial judge erroneously considered evidence of self-induced intoxication to determine whether intention existed in the present case when deciding the criminal liability of the Respondent. It should be reiterated that, in view of Section 43(2) of the Crimes Act, self-induced intoxication does not negate the element of intention in basic intent offences where the physical element consists only of conduct.

19. At this juncture, it should also be noted that there are jurisdictions that no longer follow Majewski(supra). The majority of the Australian High Court, in the decision of R v O'Connor (1980) 54 A.L.J.R. 349, reconsidered the division of offences into basic intent and specific intent and rejected the principles established by Majewski regarding criminal responsibility in relation to self-induced intoxication. However, we will not delve into the details of that decision, as the legislation in Nauru reflects the principles enshrined in Majewski (supra).

20. We will now consider 'voluntary conduct' as mentioned in section 43(3). The introduction of subsection 3, which states that 'this section does not prevent evidence of self-induced intoxication from being considered in deciding whether conduct is voluntary,' clearly indicates the legislature's intention to allow evidence of self-induced intoxication to be considered for voluntariness but not for intent (in basic intent crimes). This approach aims to strike a balance between holding individuals accountable for choosing to intoxicate themselves and recognizing that extreme levels of intoxication might impair physical control over one's actions to the point where they should not be considered voluntary. For example, this provision allows courts to assess circumstances based on extreme situations of self-induced intoxication, which considerably impairs a person's movements, similar to automatism. In such instances, the

court can consider evidence of self-induced intoxication to decide whether the conduct is voluntary.

21. Section 8 of the Crimes Act 2016 defines that conduct is voluntary if:

    (a) in the case of a conduct that is an act, the act is a product of the will of the person who engages in the act;
    (b) in the case of conduct that is an omission to do an act, the omission is one that the person is capable of performing; and
    (c) in the case of conduct that is a state of affairs, the person is capable of exercising control over the state of affairs.

22. The plain reading of the definition of 'voluntary conduct' indicates that limb (a) applies here, as the conduct related to the offence is an act. In this context, an act is voluntary if it was chosen without external influence or manipulation. This also implies that the person had control over whether or not to engage in such an act. As previously discussed, it was decided in Majewski (supra) that when a person voluntarily consumes alcohol and commits an offence, the level of intoxication does not exculpate them from criminal liability in basic intent crimes. An action stemming from voluntary intoxication is considered voluntary, according to the reasoning in Majewski (supra), where a voluntary act includes both the decision to consume alcohol and the resultant behavior while intoxicated.

23. Simply because a person claims that events which occurred while they were intoxicated cannot be recollected does not necessarily mean that the actions, they engaged in during that time were involuntary. The court must consider this claim in the context of all available evidence to determine whether the defendant's conduct during the period relevant to the commission of the offence was voluntary. In Bratty v Attorney General for Northern Ireland, [1961] 3 All ER 523 Lord Denning discussed about involuntary act at page 532:

"The term "involuntary act" is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence for him to say "I don't know what happened. I cannot remember a thing": see *Hill v Baxter.* Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time; see *Russell v HM Advocate; R v Podola.* Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it. When a man is charged with murder, and it appears that he knew what he was doing, but that he could not resist it, then his assertion "I couldn't help myself" is no defence in itself: see *A-G for South Australia v Brown:* though it may go towards a defence of diminished responsibility, in places where that defence is available, see *R v Byrne:* but it does not render his act involuntary so as to entitle him to an unqualified acquittal. Nor is an act to be regarded as an involuntary act simply because it is unintentional or its consequence are unforeseen. When a man is charged with dangerous driving, it is no defence for him to say, however truly, "I did not mean to drive dangerously". There is said to be an absolute prohibition against that offence, whether he had a guilty mind or not (see *Hill v Baxter* ([1958] 1 All ER at p 195; [1958] 1 QB at p 282) per Lord Goddard CJ), but even though it is absolutely prohibited, nevertheless he has a defence if he can show that it was an involuntary act in the sense that he was unconscious at the time and did not know what he was doing (see *HM Advocate v Ritchie, R v Minor* and *Cooper v McKenna, Ex p Cooper).*

24. In the present case, the learned trial judge considered section 43(3) and came to the conclusion that '*the discovery of a drunken stranger sleeping in an unfamiliar house without permission is a neutral fact, which does not raise an irresistible inference that entry into the house was intentional and must have been "a conscious product of the defendant's will*".' However, the Appellant argued that there was sufficient

evidence submitted by the prosecution to prove that the Respondent's conduct was voluntary.

25. The prosecution's evidence clearly shows that the Respondent walked about 800 meters from where he was drinking alcohol to the dwelling house and even remembered the quantity of alcohol he consumed. Furthermore, evidence indicates that the Respondent entered the house through the back door, which was left unlocked for the mother of the child to enter. He was able to turn the knob or handle to open the door and found his way to the bedroom where the children were sleeping. In light of this evidence, it is unlikely that the Respondent's conduct was due to automatism or an accident but rather a voluntary act. Merely because the Respondent does not remember the incident afterward does not establish that his conduct was involuntary. There is no dispute that the intoxication was voluntary, and the subsequent conduct stems from voluntary self-induced intoxication. Therefore, we are of the view that the learned trial judge erred when his Honour found that the Respondent's conduct of entering the dwelling house was not a voluntary act, given all the evidence available in this case.

26. In light of the circumstances, we believe that the learned trial judge misconstrued the intended application of Section 43 on intoxication, particularly failing to appreciate the purpose of subsections (2) and (3). Additionally, his Honour misconceived the fact that the fault element of the offence under consideration related solely to a physical element of conduct—in other words, he failed to recognize that it is an offence of basic intent. Consequently, the learned trial judge did not correctly contextualize the evidence and erroneously concluded that self-induced intoxication negated the fault element. Furthermore, his Honour erred in law by finding that the conduct of the Respondent was involuntary, having disregarded established legal principles within the appropriate context of the case.

27. As mentioned in paragraph 9, there is no dispute regarding the identity of the Respondent, the date of the offence, the fact that the Respondent was self-

intoxicated, the act of intoxication was voluntary, and that the premises entered by the Respondent is a dwelling house. In view of the above discussion, we are of the view that the prosecution evidence establishes the necessary fault element and that the conduct was voluntary beyond a reasonable doubt, in the context of the principles enunciated in Majewski (supra) and section 43 of the Crimes Act 2016. Accordingly, we conclude that the prosecution has proven the elements of count 2 beyond reasonable doubt and find the Respondent guilty of count 2.

28. The appeal is allowed.

Orders of the Court

1) The judgment of the Supreme Court dated 27 July 2021 acquitting the Respondent on the second count is set aside.

2) The Respondent is convicted on count 2.

3) The case is remitted back to the Supreme Court for sentence.

Dated this 03 May 2024

Justice Rangajeeva Wimalasena

NAURU COURT OF APPEAL

President

Justice Sir Albert Rocky Palmer

I agree.

Justice of Appeal

Justice Colin Makail

I agree.

Justice of Appeal

Justice Mahanil Prasantha de Silva

I agree.

Justice of Appeal