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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BARKER

Starke, Anderson and Tadgell JJ

29 July 1982

CRIMINAL LAW – BURGLARY – "LICENCE TO ENTER PREMISES FOR A LIMITED PURPOSE WILL NOT EXEMPT FROM THE CATEGORY OF A TRESPASSER THE LICENSEE WHO ENTERS FOR A PURPOSE ULTERIOR AND ALIEN TO THE TERMS OF THE LICENCE": *CRIMES ACT* 1958 S76(1).

[The following is a condensed version from the report of the judgment of Tadgell J with which Anderson J agreed. The report also contains a lengthy judgment by Starke J which directs itself to further matters.]

TADGELL J: Richard Ernest Barker was convicted in the County Court at Melbourne on 29th March last on one count of burglary, against which conviction he now seeks leave to appeal. The charge was laid under s76(1) of the *Crimes Act* 1958 which, so far as it material, provides that -

> "A person is guilty of burglary if he enters any building ... as a trespasser with intent—
> (a) to steal anything in the building ...".

The essential facts giving rise to the principal point raised by the appeal are at once simple and bizarre. In December 1979 one Curl, a printer and the proprietor of a large Victorian house in Brighton, was minded to go on holiday for two or three weeks. He had not long before had an item of printing equipment stolen from his business premises, also in Brighton. For reasons connected with that incident, on which it is not now necessary to enlarge, Curl feared further depreciation of his property. Before leaving on his holiday he therefore asked the applicant, another Brighton resident whom he had known for some years, to keep an eye on his house while he was away. Curl used to keep a key to his house concealed in some iron lacework on his front verandah, and he told the applicant where it was in case he needed to enter. Curl had also asked his mother and his brother (neither of whom lived with him) to keep an eye on the house. He left for his holiday on about 26th December 1979.

Curl's two teenaged sons, James and Andrew, ordinarily lived with him, but while he was away on holiday they were staying elsewhere with their mother, from whom he was divorced or separated. On the afternoon of 28th December 1979, the two boys had occasion to visit Curl's house. They went there with two other youths, Phillips and Hibbert, who were friends of theirs, and all four intended to go swimming at a house next door. When they arrived all the boys saw a truck parked in the driveway of Curl's house and two men were there – the applicant and his co-accused, McFarlane. The elder of Curl's sons, James, recognised the applicant as a friend of his father's and asked him what he was doing there. According to the boy's evidence the applicant said he was "looking after the house for my father" and also that he was going to fix a broken window or windows. At least one window had in fact been broken for some time. The boys went for their swim at the neighbouring house and afterwards returned to Curl's for towels. The applicant and McFarlane were then inside the let the boys in. Shortly afterwards the two men left in the truck. According to the boys nothing appeared to be missing from the house when they themselves left later on in the afternoon.

The next morning, a Saturday, Curl's sons again visited their father's house and found that a miscellany of household electrical and other goods, some paintings and some furniture, including a lounge suite, were missing. They immediately notified the police. James Curl went with a detective to the applicant's house, which he knew, and identified the applicant and McFarlane who were later detained on the same day. The two were jointly presented on a charge of having entered Curl's house on 28th December 1979 as trespassers with intent to steal therein,

That was the charge which produced the conviction to which I have referred, although

McFarlane was not convicted, the jury being unable to agree about him. According to the Crown evidence the applicant initially denied to the police that he had had any involvement at all in the removal of the goods from Curl's house. That denial, however, was not maintained at the trial, and for good reason. It is here that an already curious set of facts assumes the proportions of a burlesque. Curl returned from his holiday in the first week or two of January 1980. Upon doing so he learned, of course, of the removal of his goods and he learned also that the applicant had been charged in respect of them. On the evening of 16th January, having been out of his house for most of that day, Curl went home to find that all of the missing items of property had been returned save for the lounge suite which the police had already recovered but retained in view of the pending criminal proceedings. The goods had even been replaced in substantially the positions from which they had been removed. That no doubt suggested, although it did not prove, that their removal and return had been effected by the same person or persons. A few days later the applicant telephoned Curl and told him, in effect, according to Curl's evidence, that it had been he who returned the goods.

The applicant made an unsworn statement from the dock in which he admitted that on 28th December, after the occasion on which he had met the four boys at Curl's house, he had returned there with a borrowed truck and had in fact with assistance removed the goods which had been found missing the following morning. By way of explanation the applicant said in his statement that he had removed the goods for their protection. He denied any criminal intent. He said his understanding was that Curl "wanted me to take whatever steps I might think necessary to protect the house and his property. I certainly thought I was entitled to move the goods out of the house for safe keeping if I thought they ought to be, and that's what I eventually did." Curiously, the lounge suite was still on the borrowed truck when the applicant returned the truck to its owner, and that no doubt explains how the police recovered it.

As a Crown witness Curl swore in-chief that, although the applicant had his authority to enter his house, he had no express authority to remove goods. In cross-examination, however, Curl conceded in effect that the applicant's mandate from him would have been sufficiently wide to authorise removal of goods had that been necessary for their preservation.

The jury evidently disbelieved the applicant's explanation of his removal of the goods. In convicting him of burglary the jury must have been satisfied, in accordance with the Crown's submission, that his admitted removal of the goods amounted to a stealing of them, that he was accordingly guilty of theft and that the actual theft was sufficient evidence of his intent to steal when he entered the house. A submission was made at the trial that, whatever the applicant's intention was in removing the goods, he could not have been guilty of burglary because, having had Curl's undoubted authority to enter the house, he could not have entered as a trespasser. The learned trial Judge rejected that submission and directed the jury, so far as is relevant, in these terms:

> " ... it was clear enough, I think, that Barker had authority from Curl ... to enter the building and, if necessary, to handle and, indeed, remove property from therein, if he was legitimately acting in furtherance of the request made of him to keep an eye on the premises. Thus, if Barker entered the building and removed the various items of furniture, which you have been told were taken in furtherance of keeping an eye on the building, to safeguard those items for Curl senior, then, I direct you, as a matter of law, that such an entry was not a trespass nor, indeed, did Barker steal those items. However, if you were satisfied beyond reasonable doubt that Barker entered the building at 16 Byron Street with the intention of stealing items of furniture therein – that is with a purpose which was alien to the authority which had been given to him by Curl senior to enter the building – then I direct you, as a matter of law, that he entered as a trespasser. In other words, the authority or licence given by Curl senior to Barker was one to guard, not to steal from the building."

The evident basis of that direction was that a licence to enter premises for a limited purpose will not exempt from the category of a trespasser the licensee who enters for a purpose ulterior and alien to the terms of the licence. The principal ground of the application for leave to appeal involved an invitation to this Court to treat that as a misdirection. In terms, the ground was:

> "That the learned trial Judge erred in law in ruling that the applicant could be guilty of burglary if he entered the premises with the intent to steal notwithstanding that he had permission from the owner to enter."

The submission in support of that conclusion that had been rejected at the trial was repeated in an elaborated form in this Court. Specifically, it was submitted that a person cannot be a trespasser in terms of s76(1)(a) of the *Crimes Act* unless either he has no actual consent to enter the premises in question or any consent he has is vitiated by fraud on his part. It was submitted that a person who has a licence to enter a building, and does so, cannot be converted from a licensee to a trespasser by a mere ulterior intent on his part to act beyond the terms of the licence: if he is authorised to enter, and does so, he is at the time of such entry doing no more than he is authorised to do; and accordingly he cannot be said to have entered as trespasser; it is only when he does an act beyond the authority of his licence in fulfilment or furtherance of his ulterior intention (e.g. he steals) that he becomes a trespasser, and then only from that time onwards, and not, as it were, retrospectively.

Were it otherwise, the argument ran, no useful effect would be given to the words "as a trespasser" in s76(1), for a mere entry with intent to steal would then constitute the entrant a burglar. In other words, it was argued, the two statutory requirements of burglarious intent and trespassory entry would be wrongly fused into a single requirement of burglarious intent, therefore defeating the evident intention of the statute.

The point is a formidable one and of the first importance in the practical application of s76(1). In ruling and directing the jury as he did the learned trial Judge acted in accordance with a decision of the Court of Appeal in England in *R v Jones and Smith* (1976) 3 All ER 54; 63 Cr App R 47; (1976) 1 WLR 672 upon s9(1) of the *Theft Act* 1968, which for present purposes substantially accords with s76(1) of the *Crimes Act* 1958. ... In my respectful opinion the decision in *R v Jones and Smith* is consistent with earlier relevant authority. To the extent that burglary under s76(1) of the *Crimes Act* depends upon entry as a trespasser it is referable to the tort of trespass to land. There are many cases authorising the conclusion that a person licensed to enter premises who acts outside the terms of his licence will, upon so acting, be regarded as a trespasser. *Hillen and Pettigrew v ICI (Alkali) Ltd* (1936) AC 65 is an example; and it was cited with others in *R v Jones and Smith* in support of the conclusion reached in that case. Professor Glanville Williams (*op cit*) objects that these decisions do not necessarily support the conclusion that such a person is constituted a trespasser upon his entry, apart from what he does following his entry. This is a fair criticism. Nevertheless, there are decisions apart from those which were cited in *R v Jones and Smith* which in my opinion do support that conclusion, and I take the relevant civil law to be accurately expressed in *Salmond and Heuston on Torts*, 18th ed, p37, as follows:

> "Even he who has a right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose or under any other claim or title apart from that under which he might lawfully enter. The chief application of this rule is the abuse of a right of way, public or private; but presumably the same principle applies to all rights of entry – for example, one given by contract or licence containing conditions – e.g. that the entrant should not take photographs."

The cases which concern the abuse of a right to use a highway are closely in point. The mere entry on to a highway for the purpose of using it otherwise than as a highway may amount to a trespass thereon. The celebrated decision of *Harrison v Duke of Rutland* (1893) 1 QB 142 well illustrates the point, although the facts seem quaint nearly ninety years on. ... In *Harrison v Duke of Rutland* Kay LJ observed (at p158) that

> "The peculiarity of the decision in *R v Pratt* is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and repass."

It is to be noted that the trespass in *R v Pratt* was not the firing at the pheasant but the defendant's being on the highway for a purpose other than that for which it had been dedicated. In that case and in *Harrison's Case* the user of the highway for a purpose alien to the authorized purpose constituted a trespass, neither the user nor the entry to accomplish it being referable to any other legitimate purpose.

In my opinion, it necessarily follows that if the only purpose of the entry of licensee on to land is to use the land for a purpose alien to the terms of the licence then the entry may constitute a trespass. See also *Taylor v Jackson* (1898) 78 LT 555, another case involving an alleged infringement of 330 of the *Game Act* 1831. Another decision which appears to be directly

in point is *Strang v Russell* (1904) 24 NZLR 916. The defendant was sued for trespass to a lagoon and pleaded that the plaintiff had granted him leave and licence to go upon it. Cooper J (at p922) held that the defence could not prevail for the defendant had entered:

> "not because of any leave or licence which may have been given to him by the plaintiff; but under a claim of right to do so as a riparian proprietor, having found out that the plaintiff claimed to have bought the lagoon, and for the express purpose of contesting the plaintiff's legal right to the ownership of the bed of the lagoon. He, in fact proceeded ... along the lagoon not in pursuance of any implied permission given to him by the plaintiff, but in the exercise of a presumed legal right adverse to the plaintiff's claim as an owner, and with the intention of contesting the plaintiff's right as alleged owner of the lagoon."

The decision of Smith J in *Farrington v Thomson and Bridgland* [1959] VicRp 49; (1959) VR 286, especially at p297; [1959] ALR 695, appears to me, consonantly with the cases to which I have referred, to support the conclusion that the entry of the applicant upon Curl's premises was capable in the circumstances of being regarded as an entry as a trespasser.

It was argued for the applicant that *R v Jones and Smith* cannot stand with the earlier decision of the Court of Appeal in *R v Collins* [1972] EWCA Crim 1; [1973] QB 100; [1972] 2 All ER 1105; [1973] 3 WLR 243; 56 Cr App R 554; 136 JP 605 (1973) QB 100. In that case the defendant, naked but for his socks, scaled a ladder to the outside window ledge of a girl's bedroom, in which she was asleep. He was alleged later to have admitted to the police that he intended to have intercourse with her, by force if necessary. The girl sat up and, mistakenly assuming that the defendant was her boy friend, welcomed him in through the window, and allowed him to have intercourse before realising that he was a stranger. He was convicted of burglary in that he entered the premises as a trespasser and with intent to commit rape, contrary to s9 of the *Theft Act* 1968. The Court of Appeal allowed an appeal on the narrow ground that there had not been left to the jury the question whether the defendant had entered the room knowing that he had no invitation to enter or reckless of whether or not his entry was with permission, proof of one or the other being a prerequisite to the Crown's success.

The argument before us was that, if *R v Jones and Smith* is right, Collins must have been a trespasser because he entered with intent to have intercourse with the girl without her consent, or so the jury must have found. I do not think that necessarily follows. If the defendant had believed that the girl had invited him into the room, notwithstanding the unusual circumstances and being indifferent to his identity, he was not a trespasser. Save that the case decided that a defendant is not to be convicted of burglary under the statute without proof that he entered in the knowledge that he did so as a trespasser or reckless of whether he was entering lawfully or not, is not in my opinion of present relevance. In particular, it is not authority for the conclusion that a person who has an invitation to enter premises for a lawful purpose, and who knowingly enters for an ulterior unlawful purpose, does not enter as a trespasser.

The Court of Appeal did not consider the question whether any consent to enter that the defendant might have believed he had would have been vitiated by his ulterior intention. That might have become relevant had the Crown contended that the girl's consent depended on the defendant's identity. As it was, according to the judgment (at p106)

> " ... the Crown do not suggest that he should have realized or even suspected that she was so behaving because, despite the moonlight, she thought he was someone else."

The appeal seems to have proceeded upon the footing that it had been incumbent upon the Crown to disprove that the defendant reasonably believed that he an unconditional consent to enter the girl's bedroom. That being so, the question whether any such consent might have been vitiated did not arise. The conclusion that proof of all the circumstances of a licensee's entry into premises might at one stroke demonstrate an entry with an intent specified in s76(1) and show him to enter as a trespasser does not in my opinion ignore the requirement of the section that a trespass, as well as the specified intent, must be proved as at the time of entry in order to prove burglary. A shopper having implied authority to enter a department store who steals when in the store is obviously not on that account alone guilty of burglary, for he must be proved to have entered with intent to steal. Even if he be proved to have entered with intent to steal if he could, he might or might not be proved also to have entered for a purpose alien to his implied authority to enter

which constituted his entry trespass in terms of s76(1) of the *Crimes Act*: he might nevertheless have entered for another purpose for the accomplishment of which his entry was, or was believed by him to be, welcome. Similarly, an invited dinner guest who comes and dines at a private house as asked and enters the house intending to steal an ashtray, is not, in my opinion, necessarily a burglar. The concept of a trespasser *pro tanto* was considered by Kitto J in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* [1968] HCA 60; (1968) 121 CLR 584, at p606; [1969] ALR 533; 42 ALJR 280, but it is not in my opinion an attractive concept in the realms of the criminal law. Even so, it does, with respect, seem right to say, as Kitto J observed (*ibid*) that, "... a person cannot be at the one moment of time both a trespasser and not a trespasser in respect of the same land". The theoretical difficulties envisaged during argument on this appeal which predict the unwarranted assimilation of shoplifting with burglary really involve questions of proof rather than of construction of the statute, and they do not arise here. In my opinion the learned trial Judge was right in this case to conclude and to direct the jury that the applicant might be convicted of burglary notwithstanding that he had Curl's authority to enter the house. For the reasons I have endeavoured to express I consider that it was open to the jury to conclude that the applicant entered Curl's house as a trespasser if they found that he did so "with a purpose which was alien to the authority which had been given to him by Curl senior to enter the building". In this case there was no question that, if he did enter with that purpose, he might also have entered for the authorised purpose, for the two were irreconcilable. I conclude, therefore, that the direction was not in this respect erroneous and that the principal ground of the application should fall.

There were three other grounds of the application for leave to appeal, only one of which was argued. It was that:

> "The learned trial judge erred in law in that he failed to require the Crown to elect whether the count of burglary related to an entry at the time prior to or when the witnesses James Curl, Andrew Curl, Anthony Phillips and Andrew Simon Hibbert were present at or near the premises or to a later onto entry after these witnesses had finally departed."

At the end of the Crown case at the trial a submission to which this ground is referable was made on behalf of the accused McFarlane but not on behalf of the applicant. The submission was that a conviction upon the single count of burglary with which the accused men were jointly presented might be founded upon an entry to the house at either of the times referred to in the ground as I have set it out. Indeed, the prosecutor had apparently opened his case to the jury on the footing that the count of burglary might be sustained by reference to an entry to the house on either of those two occasions. Counsel for McFarlane submitted that the Crown should be required to stipulate which of the two possible cases was being alleged. The Crown prosecutor made it clear that, consistently with his opening, he intended to go to the jury (if allowed by the Judge) on the basis that the burglary as charged had been committed by the two accused either at the time they entered when the boys were present (or shortly before) or later upon the accused men's return after the boys had left.

The learned Judge allowed the prosecutor to take that course, overruling the submission. I feel bound to say that His Honour's reasons for doing so do not appear very clearly from the transcript, at least to me. Furthermore, I cannot conclude that the course was a correct one. Counsel for the accused McFarlane complained that the course proposed by the prosecutor would disadvantage his client, and I think it did. McFarlane was entitled to know, before he began his defence, if and insofar as the case against him necessitated the presentation of a defence, the precise facts which were alleged against him in support of the single charge of burglary which was brought against him. Strictly speaking the learned trial Judge could, and in my opinion should, have required the Crown to identify which of the two possible sets of facts he was relying upon in order to support the charge or to seek leave to amend the presentment by alleging two counts of burglary instead of one: see *R v Trotter*, an unreported decision of this Court, delivered 10th May 1982 at p14. Dixon J expressed the same concept in *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at p489; [1938] ALR 104, when, speaking of a prosecutor's position in a criminal case before a magistrate, he said:

> "He clearly should be required to identify the transaction on which he relies and he should be to required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal

> nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge ..."

Had McFarlane been convicted, he would in my opinion have been legitimately entitled to complain of the way in which the trial of the case against him had been conducted: there was no direct evidence against him in respect of the second of the two possible sets of circumstances from which the Crown invited the jury to infer his guilt. The first occasion, of which there was direct evidence from the boys of the presence of both accused at the house, was one in relation to which both McFarlane and the applicant denied any criminal intent. In respect of the second occasion, McFarlane, unlike the applicant, might well have wanted to make another answer and to call evidence. In other words, it appears reasonably clear that McFarlane's possible lines of defence for each occasion might well have differed. He was entitled to know, before embarking on his case, whether he needed to take two lines of defence or only one. These observations are of course by the way in relation to McFarlane because in the event he was not convicted.

But they are partially relevant to the present applicant inasmuch as the ground of his application now under consideration seeks to rely on the same general point, although it was not taken on his behalf at the trial. The specific criticism of the applicant's conviction now made is that it is possible that the jury's verdict was a composite one. That is to say, some of the jury might have been satisfied of his guilt in relation to the first occasion, of which the boys gave evidence, but not in relation to the second, whereas the remainder of the jury might have been satisfied of his guilt in relation to the second occasion but not in relation to the first. If that were so, there could be no verdict common to all twelve jurors, even though all twelve were individually satisfied of the applicant's guilt. That was just the ground upon which this Court in *R v Trotter* regarded the verdict in that case as uncertain and therefore unsustainable.

Although the applicant is entitled to complain that, for the reasons I have mentioned, there was in strictness a miscarriage of justice in relation to his trial, I think different considerations now apply to him than those which might have applied to McFarlane had McFarlane been convicted. The applicant's case was not inhibited by the course which the Crown followed, for his case included a concession that he took the goods from Curl's house. Further, if the Crown, as I think it should have been required to do, had either elected to treat one of the first or the second entries as sufficient to sustain the single count of burglary or amended the presentment to contain two counts, I think the result must have been the same as it was. The applicant's concession that he removed the goods from the house, and the jury's evident rejection of his denial of an intent to steal, made the conviction virtually inevitable.

In the circumstances, although there was a miscarriage of justice, I consider, that this is an appropriate case for the application of the proviso to s568(1) of the *Crimes Act* 1958 because no substantial miscarriage of justice actually occurred. In the result the application for leave to appeal should in my opinion be refused.
