28/84

SUPREME COURT OF QUEENSLAND — FULL COURT

MIGLIO v HIBBERD; ex parte MIGLIO

Andrews SPJ, McPherson and Thomas JJ

5 March 1984 — [1984] 1 Qd R 324

CRIMINAL LAW – UNLAWFULLY ON PREMISES – DEFENDANT ON VERANDAH OF MOTEL UNIT LOOKING THROUGH WINDOW OF UNIT – WHETHER MOTEL BUILDING "ENCLOSED YARD" – WHETHER YARD APPURTENANT TO A DWELLING-HOUSE – WHETHER MOTEL IS A DWELLING-HOUSE – MISDESCRIPTION IN ADDRESS SHOWN IN COMPLAINT – WHETHER AMENDMENT ALLOWABLE.

M. was convicted in that he was found in an enclosed yard without lawful excuse. The yard was part of Motel premises, bounded by a brick wall and a wire fence, and another fence which was not continuous, but interrupted at several points by spaces affording access to the motel. On appeal, it was argued that as the motel boundary fence was not continuous, the yard could not be described as being enclosed, nor that it was appurtenant to a dwelling-house. Further, that the Magistrate should not have amended the complaint in the address shown from "24" to "20".

HELD: Appeal dismissed.
(1) The existence of a gap in the front fence or wall giving access to a pathway or drive, does not ordinarily prevent the premises from being "enclosed" within the section.

(2) The question is whether the barrier, not necessarily continuous, is of such a nature as would convey to a reasonable person, that members of the public as such were intended to be excluded.
***Webb v Epstein* [1955] VicLawRp 74; [1955] VLR 462; [1956] ALR 154, applied.**

(3) Having regard to the length of the boundary, the nature and extent of the premises, and the purposes served by the motel and its driveways, the Magistrate was not in error in holding that the place in question was an enclosed yard.

(4) So long as a motel is regularly used for the purpose of providing accommodation to patrons, it is a dwelling-house.

(5) As the alteration in the address shown was to correct a misdescription, and resulted in no prejudice to the defendant, the Magistrate was not in error in making the amendment.
***Felix v Smerdon* [1944] 18 ALJ 30, distinguished.**

McPHERSON J: (with whom Andrews SPJ and Thomas J concurred): The appellant was convicted in the Magistrates' Court at Mount Isa on complaints charging that he was a vagrant in that on two separate occasions he was without lawful excuse found in the enclosed yard of one Lister situated at 20 Fourth Avenue in that city. The evidence discloses that on each occasion he was seen standing on a chair on the back verandah forming part of a complex of units comprising the Dalpura Motel. He was evidently looking through a window at a woman who was showering in unit 15.

The provision under which the appellant was charged was s4(1)(viii)(a) of the *Vagrants Gaming and Other Offences Act* 1931-1978, which deems to be a vagrant any person who without lawful excuse is found in "any enclosed yard". On appeal the matters advanced in the careful submissions of Mr Dorney on behalf of the appellant were three, namely, that the magistrate erred in holding that the place in question was an enclosed yard; that the yard was not appurtenant to a dwelling house; and that the magistrate had erroneously permitted the complaint to be amended by substituting 24 for 20 in the address of the subject premises. The Motel building is located on three out of four adjoining parcels of land running from north to south. The southern-most parcel is vacant and is bounded on its southern extremity by a brick wall. The eastern and northern boundaries of the four parcels are surrounded by a wire fence which is continuous save for the intrusion at one point of the wall of a building. It was on the eastern side that the appellant was found on the verandah which is itself enclosed by a light railing. The remaining or western boundary which adjoins Fourth Avenue is also bounded by a fence that extends from north to

south. This fence is, however, not continuous but is interrupted at several points by spaces that afford access to the motel complex. One of these is 8 metres and the other 15 metres in width. They provide access for vehicles entering the motel from Fourth Avenue or leaving to re-enter the highway.

The question is whether the discontinuity caused by these spaces in the western boundary fence are such that the yard cannot be described as enclosed. In *Webb v Epstein* [1955] VicLawRp 74; [1955] VLR 462; [1956] ALR 154, Smith J on behalf of the Full Court considered that in the case of an ordinary suburban house the existence of a gap in the front fence or wall giving access to a pathway or drive would not ordinarily prevent the premises from being "enclosed" within the meaning of the section. His Honour said that what was required was some barrier not necessarily continuous, of such a nature as would in all circumstances convey to a reasonable man that members of the public as such were intended to be excluded and the space reserved for the use of the occupier and persons authorized by him to enter or having some other special authority to do so. The Victorian decision was referred to with evident approval by this Court in *Hughes v Pulli; ex parte Hughes* [1972] QWN 23, and it accords with the decision of the Divisional Court in *Goodhew v Morton* [1962] 1 WLR 210; [1962] 2 All ER 771 in relation to a similar enactment.

Here the gaps were more extensive than those in any of the cases referred to but not disproportionately so having regard to the length of the boundary, the nature and extent of the premises, and the purposes served by the motel and its driveways. The question is one of fact and I am not disposed to interfere on this point with the finding of the magistrate who, having had the advantage of an inspection, was better placed than we to understand and appreciate the evidence concerning the nature of the eastern boundary fence and the impression it conveyed to a reasonable man.

The second point may be disposed of summarily. The accepted view of the expression "enclosed yard" in s4(1)(viii)(a) of the Act is that those words are limited to a yard appurtenant to the premises described in that provision: *Veivers v Roberts; ex parte Veivers* [1980] Qd R 226. The collocation in that provision includes "dwelling-house" as well as "coach-house" and "outhouse". In my view there can be no doubting that a motel is a dwelling house, or perhaps a series of dwelling houses, at least so long as it or they are regularly used for the purpose of providing accommodation to patrons. This ground of appeal therefore also fails.

Finally, there is the submission that the amendment should not have been allowed. It was said that the alteration in the address shown in the complaints from 24 to 20 was not a mere variance, and *Felix v Smerdon* [1944] 18 ALJ 30 was relied on in that regard. That was, however, not as here a case of mere misdescription but one where it was sought to alter both the place, from one town to another 100 miles away, and time of the offence alleged. Here there was never any doubt as to the identity of the premises involved, and no prejudice resulted to the appellant from an amendment made in the course of the prosecution case that simply corrected an obvious error in the address of the motel.
